



Federal Trade Commission

THE FTC: WORKING FOR CONSUMERS IN THE ON-LINE WORLD

Keynote Address
FTC Chairman Deborah Platt Majoras

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Good afternoon. I am very pleased to be here with the FCBA, as you work to promote sound legal policy in some of the most vibrant, dynamic, and important sectors of the American economy. Your work is becoming ever more essential as new communications and information technologies are integrated into the very fabric of consumers' lives, instantaneously connecting them to other people and organizations the world over.

The Internet, of course, has revolutionized commerce, allowing consumers to receive commercial messages and purchase products from around the nation and the world – vastly expanding competition in a way that improves consumer choices and lowers prices. Information no longer travels down a one-way street, however. Consumers have new tools for communicating with businesses and for reaching independent sources of information, including other consumers. The upshot is that the role of the consumer is changing, as consumers evolve from mere recipients of information to more active participants in a commercial dialog.

Consumers increasingly participate in a marketplace of ideas on the Internet, too, sharing non-commercial content and building diverse virtual communities. User-generated

content is found on blogs, vlogs, podcasts, photo and video sharing sites, social networking sites, wikis, dating sites, tagging sites, video gaming sites and more – any list we draw up is liable to be partial today and obsolete tomorrow.

I. The FTC’s Role in Dynamic Markets

A. Enforcement

The FTC is charged with promoting competition and consumer welfare in U.S. markets and, increasingly, we are called to champion competition around the globe. We enforce our nation’s antitrust and consumer protection laws, which act as complements, both serving the ultimate aim of maximizing consumer welfare:¹ competition law protects consumers’ access to the fruits of vigorous competition by combating efforts to thwart free and open markets; and consumer protection law ensures consumers’ effective participation in competitive markets by prohibiting unfair or deceptive conduct as it may arise in particular markets or transactions. In brief, the FTC protects consumers *through* markets, not from them.

In recent years, some have questioned whether the antitrust laws are nimble enough to remain relevant to the dynamic markets that characterize our economy today. These questions led Congress, in 2003, to create the Antitrust Modernization Commission, charging twelve competition specialists with determining whether “the need exists to modernize the antitrust laws.”² While making some recommendations for change (for example, the repeal of the Robinson-Patman Act), the AMC’s April 2007 Report found that the antitrust laws are

¹ See Prepared Statement of the Federal Trade Commission Before the S. Comm. on Commerce, Sci., & Transp., 110th Cong. 2 (Apr. 10, 2007), *available at* <http://www.ftc.gov/os/testimony/P040101FY2008BudgetandOngoingConsumerProtectionandCompetitionProgramsTestimonySenate04102007.pdf>; *see also* FEDERAL TRADE COMMISSION, THE FTC IN 2007: A CHAMPION FOR CONSUMERS AND COMPETITION (Apr. 2007), *available at* <http://www.ftc.gov/os/2007/04/ChairmansReport2007.pdf>.

² Antitrust Modernization Commission Act of 2002, PUB. L. NO. 107-273, §§ 11051-60, at § 11053, 116 Stat. 1856.

“sufficiently flexible as written . . . to allow for their continued ‘modernization’ as the world continues to change and our understanding of how markets operate continues to evolve through decisions by the courts and enforcement agencies.”³ The AMC went on to say that it “does not believe that new or different rules are needed to address so-called ‘new economy’ issues. Consistent application of the principles and focus [currently used in antitrust enforcement] will ensure that the antitrust laws remain relevant in today’s environment and tomorrow’s as well.”⁴ And, indeed, in our investigations, cases, research and advocacy work, this is what we have found. The fundamental principles of antitrust and consumer protection law and economics that we have applied for years are as relevant to new technology markets as they have been to industrial or agricultural markets in our economy.

The FTC’s case against Rambus, Inc. provides one recent example of how we endeavor to protect competition and consumers in rapidly evolving high-tech industries. Last summer, the Commission found that Rambus had unlawfully acquired monopoly power through deceptive, exclusionary conduct in connection with its participation in a standard-setting organization (“SSO”) that set industry standards for DRAM chips -- commonly used in personal computers, servers, printers, and cameras.⁵ In particular, the Commission found that the SSO’s policies and practices created the expectation that members would disclose patents and patent applications that might be applicable to standards under consideration. Like many SSOs, this one wanted to avoid unknowingly incorporating patented technologies and then being held up for high royalties. Rambus, however, undertook a conscious program combining silence and evasive answers to avoid disclosing its patents and patent

³ ANTITRUST MODERNIZATION COMMISSION, REPORT AND RECOMMENDATIONS ii (April 2007), *available at* http://www.amc.gov/report_recommendation/amc_final_report.pdf.

⁴ *Id.*

⁵ *In the Matter of Rambus Inc.*, Docket No. 9302 (August 2, 2006) (opinion of the Commission on liability), *available at* <http://www.ftc.gov/os/adjpro/d9302/060802commissionopinion.pdf>.

applications. Only after the SSO adopted technologies into its standard did Rambus reveal the patents and then claim that firms were infringing and owed royalties. The Commission barred Rambus from making misrepresentations or omissions to SSOs in the future, required it to license its SDRAM and DDR SDRAM technology, and set maximum allowable royalty rates that it can collect.⁶ Rambus has appealed the decision to the United States Court of Appeals for the District of Columbia Circuit.

On the consumer protection side, new technologies, media, content, and applications represent new opportunities, but they also can generate new problems, such as new forms of fraud or challenges for consumers dealing with unfamiliar technologies and, sometimes, inadequate disclosures. Our job continues to be empowering consumers to participate fully in the global marketplace that presents new opportunities. We ensure that consumers receive adequate market information; that consumers are not buried under an onslaught of unwanted noise masquerading as information; and that consumers' own personal information is protected from unauthorized access in the marketplace. Our primary tool, the FTC Act's prohibition of "deceptive acts or practices in or affecting commerce," remains: technology evolves, but general FTC standards for disclosures remain constant – "clear and conspicuous disclosure of material terms" prior to purchase.

For example, the Commission has brought several spyware enforcement actions, most recently obtaining \$3 million in disgorgement of ill-gotten gains and injunctive relief in a case against Zango, Inc., formerly known as 180solutions. Zango provides advertising software programs, or "adware," that monitor consumers' Internet use in order to display targeted pop-up ads. The FTC's consent order settles allegations that the company installed

⁶ *In the Matter of Rambus Inc.*, Docket No. 9302 (Feb. 5, 2007) (opinion of the Commission on remedy), available at <http://www.ftc.gov/os/adjpro/d9302/070205opinion.pdf>; *In the Matter of Rambus Inc.*, Docket No. 9302 (Feb. 2, 2007) (final order), available at <http://www.ftc.gov/os/adjpro/d9302/070205finalorder.pdf>.

its advertising software programs on consumers' computers without adequate notice or consent.⁷ Zango's distributors frequently offered consumers free programs or software, such as screensavers, peer-to-peer file sharing software, and games, without disclosing that downloading it would also result in installation of Zango's adware. In other instances, Zango's third-party distributors exploited security vulnerabilities in Web browsers to install the adware via "drive-by" downloads. As a result, millions of consumers received pop-up ads without knowing why and had their Internet use monitored without their knowledge.

We also have used Section 5 to attack companies' failure to implement reasonable measures to protect sensitive consumer information. Last year, for example, the Commission brought an action against Nations Title Agency, a privately-held company that provides real-estate related services through 57 subsidiaries and that promised consumers that it maintained "physical, electronic and procedural safeguards." In this case, we alleged that the respondents failed to provide reasonable and appropriate security for consumers' personal information, and that on at least one occasion, a hacker – using a common website attack – was able to obtain access to the subsidiaries' computer network.⁸ In addition, we alleged that one of NTA's subsidiaries disposed of documents containing personal consumer information by simply tossing the documents into a dumpster.⁹ NTA agreed to settle the charges by entering into a Consent Order that requires it to implement a comprehensive security program and obtain a third-party audit showing compliance.¹⁰

⁷ *In the Matter of Zango, Inc., formerly known as 180solutions, Inc., Keith Smith, and Daniel Todd*, File No. 052 3130 (consent order), available at <http://www.ftc.gov/os/caselist/0523130/0523130c4186decisionorder.pdf>.

⁸ *In the Matter of Nations Title Agency, Inc., Nations Holding Company, and Christopher M. Likens*, File No. 052 3117 (complaint), available at http://www.ftc.gov/os/caselist/0523117/0523117NationsTitle_Complaint.pdf.

⁹ *Id.*

¹⁰ *Id.* (consent order), available at <http://www.ftc.gov/os/caselist/0523117/0523117NationsTitleDecisionandOrder.pdf>.

B. Empowering Consumers and Businesses Through Education

Of course, the FTC's mission is not confined to law enforcement. The FTC has long been a leader in educating consumers about markets and empowering them to avoid the risks that markets can pose. With the Internet global marketplace developing so rapidly, education is more critical than ever. Two recent consumer education campaigns are illustrative: our OnGuard Online campaign¹¹

all. Thus, we take seriously our role in helping state and federal lawmakers avoid policies with unintended and harmful effects on consumers. Take, for example, Internet wine sales, an increasingly important alternative to the traditional, tightly-regulated, three-tiered system of producers, licensed wholesalers, and retailers. As part of our program to identify regulatory barriers to competition that harm consumers, our staff took an in-depth look at the effect of online wine sales and concluded that states could significantly enhance consumer welfare by allowing direct shipment to consumers. In doing so, FTC staff closely examined, and then rebutted, claims that state laws advanced legitimate state purposes, such as shielding minors from wine bought online. Our staff Report¹⁴ was cited a dozen times in the Supreme Court's decision in *Granholm v. Heald*,¹⁵ which rejected Michigan and New York state laws that discriminated against out-of-state wine manufacturers.¹⁶ In response, many states now are changing their laws.

D. Policy Development: The FTC's Internet Access Task Force

All of our work – law enforcement, education, consumer advocacy -- requires detailed understanding of the relevant markets. To augment the specific, fact-intensive inquiries common to our enforcement efforts, we conduct broader examinations of many of today's important issues. Just last November, for example, the FTC held three days of public hearings in which more than 100 of the best and brightest in the technology sector discussed anticipated technological advances and their likely impacts on consumers. As one of our follow-up efforts, this November – one year after the Tech-ade Hearings – the FTC will host a series of Town Hall meetings around the country to continue to explore current and

¹⁴ FTC STAFF REPORT, POSSIBLE ANTICOMPETITIVE B

emerging technology, its implementation in consumer products and services, and concerns about new risks consumers may face from such products and services.

Since the Internet's earliest days, computer scientists recognized that network resources are scarce and that traffic congestion can lead to reduced performance. Although these problems – and potential solutions – have been explored for decades, the debate over broadband connectivity policy reach

This February, as many of you know, the Task Force held a public workshop on the second issue it tackled – broadband connectivity competition policy more generally. The Workshop was designed to further public understanding and analysis of the contentious but important issues that have been raised in the so-called “net neutrality” debate. For two days, more than 40 experts from business, government, academia, and the technology sector came together for a lively discussion before an equally lively public audience – at times a very lively public audience – to explore a broad range of competition and consumer protection issues relating to broadband Internet access.¹⁹

Participation was better than anticipated – even globally – as a larger public was able to view the Workshop via our live Web cast. In fact, on the second day my office received a call from an online viewer in Sweden asking why the Workshop had not started on time. (We had to delay the start that day due to snow and ice in Washington, where snow and ice may present bigger, if more occasional, challenges than they do in Sweden.) For those of you who were not able to watch it, the Web cast still is available for viewing on the FTC’s Web site, together with Workshop transcripts and public comments. The Workshop went a long way toward clarifying the different policy concerns and proposals that often are placed under the rubric of “net neutrality” through a very useful – and at times contentious – debate about those concerns and the extent to which there is a need for new policy proposals.

Today, we are releasing an approximately 165-page report summarizing our staff’s learning on broadband Internet connectivity issues.²⁰ The Commission’s vote in favor of the report was a unanimous 5-0, with Commissioner Leibowitz offering a concurring statement.

¹⁹ The agenda, transcript, and other information relating to the Workshop are available on the FTC’s Web site at <http://www.ftc.gov/opp/workshops/broadband/index.shtm>.

²⁰ FTC STAFF, BROADBAND CONNECTIVITY COMPETITION POLICY (June 2007), *available at* <http://www.ftc.gov/reports/broadband/v070000report.pdf>.

II. The FTC's Report On Broadband Connectivity Policy: Key Take-Aways

I cannot imagine that there is anyone in this room who does not know where the lines have been drawn in the net neutrality debate. Content and application providers are concerned about the future development of the Internet in an environment that is not subject to common carriage regulations. Foreseeing price or data differentiation being used, for example, to block competitors' effective access to consumers, some have proposed that the Internet be subject to some type of so-called "net neutrality" rules forbidding or limiting data or price discrimination by network operators. Opponents of net neutrality regulation assert that *ex ante* regulation not only is unnecessary, but also is potentially harmful, and that allowing networks to innovate freely across technical and business dimensions, and to differentiate their networks, will lead to enhanced service offerings for both end users and content and applications providers.

providers, and many new entrants trying to captu

dealing arrangements, refusals to deal, vertical integration, or certain unilateral conduct –

a principal focus of our inquiry. As the Task Force began planning the Workshop, however, the importance of disclosure and data security and privacy issues soon became evident.

Panelists at the Workshop discussed what it means for ISPs to disclose prices when, for example, they offer bundles of Internet access, telephone services, and sometimes video programming, with some even offering wireless telephone service as part of a so-called “quadruple play” package. They also discussed the speed of the Internet access being offered, and consumers’ abilities to understand and verify speed claims. What exactly does a consumer get when speeds “up to,” for example, 6 megabits per second are promised? And how can ISPs factor in conditions that affect advertised speeds, such as network congestion, customer location, and other factors that may be outside the ISP’s control?

In sorting through some of these issues in advertising and disclosures, self-regulation by broadband providers could be an effective complement to FTC enforcement of the consumer protection laws. I have commended self-regulation efforts in many other industries and contexts and would encourage broadband providers to also consider such a model.

Finally, the bottom-line recommendation of the report is caution, caution, caution. Based on what we have learned through our examination of broadband connectivity issues and our experience with antitrust and consumer protection issues more generally, we recommend that policy makers proceed with caution, for four principal reasons.

First, to date we are unaware of any significant market failure or demonstrated consumer harm from conduct by broadband providers. Policy makers should be wary of enacting regulation solely to prevent prospective harm to consumer welfare, particularly given the indeterminate effects on such welfare of potential conduct by broadband providers.

III. Conclusion

I look forward to discussion of our broadband Report, as the Task Force continues to explore various issues in this area, to meet with interested parties, and to conduct research.

The FTC is committed to maintaining competition and to protecting consumers from deceptive or unfair acts or practices in computer communications markets, as in all markets within our jurisdiction. Thank you.