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

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[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]

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[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 campaign[11] provides consumers with an interactive environment that provides tips for coping with risks in the on-line world and does so in an interactive way; and our Deter, Detect, Defend program[12] helps consumers protect themselves against the very serious crime of identity theft.

We also educate businesses about compliance. Having heard from a number of businesses, particularly smaller businesses, that they were not sure what data security measures they should take to protect such sensitive information, the FTC developed a brochure that articulates five key steps that are part of a sound data security plan: "Take Stock," "Scale Down," "Lock It," "Pitch It," and "Plan Ahead."[13] The brochure then provides more specific information about what businesses should consider as they go through each of these steps.

C. Advocacy

Of course, government-imposed restrictions on competition and business practices are at least as harmful to consumers as illegal private restrictions. In fact, we have learned, government-imposed restrictions on competition are among the most effective and durable of

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[11] The comprehensive OnGuardOnline.gov Web site has tips, articles, videos, and interactive activities that addresses topics such as: how to recognize scams on the Internet; how to shop securely online; how to avoid hackers and viruses; and how to deal with spam, spyware, phishing, and peer-to-peer file-sharing.

[12] Information about this program is available on the official Web site: http://www.ftc.gov/bcp/edu/microsites/idtheft//.

[13] This brochure is available at http://www.ftc.gov/infosecurity/.

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 Report[14] 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 BARRIERS TO E-COMMERCE: WINE (July 2003), *available at* http://www.ftc.gov/os/2003/07/winereport2.pdf.

[15] 544 U.S. 460, 468 (2005) ("According to the Federal Trade Commission (FTC), '[s]tate bans on interstate direct shipping represent the single largest regulatory barrier to expanded e-commerce in wine.'").

[16] *Id.* at 466.

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 reached critical mass only recently. Technical, business, and legal and regulatory developments all appear to have accelerated the discussion.

In response to these developments and questions that were increasingly posed, last August I announced the formation of the FTC's Internet Access Task Force ("Task Force") and invited interested parties to meet with us to discuss issues relating to Internet access and, in particular, net neutrality.[17] Last fall, the Task Force issued a report on the Municipal Provision of Wireless Internet Services.[18] The report recognized that improving consumer access to broadband Internet service is an important goal for federal, state, and local governments. At the same time, the risk of competitive harms arising from municipal participation in wireless Internet markets calls for careful analysis by policymakers considering if, and how, a municipality should involve itself. Rather than providing a one-size-fits-all answer for every municipality, the report sets forth a decision-tree framework for various options, recognizing that the potential competitive benefits and costs of municipal wireless may vary with a municipality's circumstances, such as the local availability of broadband and possible improvements in government services with increased broadband access.

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[17] *See* Deborah Platt Majoras, Chairman, Federal Trade Commission, Luncheon Address, The Progress & Freedom Foundation's Aspen Summit, *The Federal Trade Commission in the Online World: Promoting Competition and Protecting Consumers* (Aug. 21, 2006), *available at* http://ftc.gov/speeches/majoras/060821pffaspenfinal.pdf.

[18] FTC STAFF, MUNICIPAL PROVISION OF WIRELESS INTERNET (2006), *available at* http://www.ftc.gov/os/2006/10/V060021municipalprovwirelessinternet.pdf.

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.

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[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.

I want to highlight four key take-aways from today's report. First, there are national trends that appear to show an increasing number of competitive alternatives for broadband Internet access across all markets. There is no question that proponents and opponents of net neutrality regulation have fundamentally different views on the present (and likely future) state of competition in the market. Proponents argue either that the national market for broadband Internet access is, in effect, a cable-telephone duopoly or that there are significant failures of competition in many local markets. Opponents characterize the market as highly competitive.

Our staff did not conduct independent empirical research regarding competition in local broadband Internet access markets for the purposes of its Report. But we do know that broadband Internet access generally is a relatively new market characterized by high levels of demand growth from consumers, high market shares held by incumbent cable and telephone

providers, and many new entrants trying to capture some share of the market. The current market-leading technology – cable modem – has been losing market share to the more recently deregulated major alternative – DSL – and prices for DSL broadband services have fallen rapidly. In addition, a substantial number of consumers now have access to high-speed service from satellite technologies, as well as other wireless technologies, such as Wi-Fi, Wi MAX, and 3G cellular services.[21] Opponents of net neutrality regulation have pointed to evidence on a national scale that access speeds are increasing, prices – particularly speed-adjusted or quality-adjusted prices – are falling, and new entrants, including wireless and other competitors, are poised to challenge the incumbent cable and telephone companies. Statistical research conducted by the FCC has tended to confirm these general trends.[22]

Second, the Report concludes that antitrust law is well-equipped to deal with the competitive issues raised in the net neutrality debate. These competitive issues are not new to antitrust law, which is general, flexible, and able to analyze potential conduct and business arrangements involving broadband Internet access, just as it has been able to deal with such conduct and arrangements across many diverse markets.

Many proponents of net neutrality regulation are concerned that broadband Internet access providers have market power in the last-mile access market and that they will leverage that power into adjacent content and applications markets in a way that will harm competition and, ultimately, consumers. Such leveraging could take the form of exclusive

[21] According to a 2006 GAO Report, three companies have deployed infrastructure to provide satellite broadband service to most of the U.S., a number of municipalities are exploring the deployment of Wi-Fi networks, and Wi MAX technology is also being deployed – over 150 pilot Wi Max projects were under way by May 2006. *See* GOV'T ACCOUNTABILITY OFFICE, GAO-06-426, BROADBAND DEPLOYMENT IS EXTENSIVE THROUGHOUT THE UNITED STATES, BUT IT IS DIFFICULT TO ASSESS THE EXTENT OF DEPLOYMENT GAPS IN RURAL AREAS 15 (2006).

[22] *See, e.g.*, Federal Communications Commission, High Speed Services for Internet Access: Status as of June 30, 2006 (Jan. 2007), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-270128A1.pdf. Although some have questioned whether the methodology used in compiling this data allows the FCC to provide a reliable analysis of competition in particular markets, the FCC data does provide an overall picture of the significant growth in broadband penetration over the past few years.

dealing arrangements, refusals to deal, vertical integration, or certain unilateral conduct – conduct that we review all the time for antitrust enforcement purposes.

The *Madison River* matter may be an interesting example, partly because it seems to be a signal case for both proponents *and* opponents of net neutrality. In *Madison River*, a provider of both Internet access and telephone services allegedly blocked its DSL customers from using a rival's VoIP service. Following an FCC investigation, Madison River entered into a consent decree, paying a fine and agreeing not to engage in such blocking in the future.[23] Proponents – seeing an example of both an incentive and ability to block rivals – cite the matter in support of calls for new legislation. But net neutrality opponents at our Workshop pointed out that this conduct by a small rural provider seems to be an isolated – perhaps unique – case of discrimination in the history of the market, and one easily detected and remedied under existing law. As troublesome as the blocking conduct may have been, I submit that we should be careful before viewing the actions of a single access provider, facing little local competition, as a sufficient basis for across-the-board, national regulation.

All of these types of conduct – integration, prioritization, refusals to deal, and so forth – can be anticompetitive and harmful to consumers under certain conditions. What is often missed in the debate, however, is that they also can be pro-competitive – capable of improving efficiency and consumer welfare, which involves, among other things, the prices that consumers pay, the quality of goods and services offered, and the choices that are available in the marketplace. An antitrust inquiry permits a determination of the net effects on consumer welfare before conduct is summarily condemned.

Third, consumer protection issues – for example, clear and conspicuous disclosure of material terms of ISPs' access-related policies – play an important role in broadband access. When I created the Internet Access Task Force last year, consumer protection issues were not

[23] *In re Madison River Communs., LLC*, 20 FCC Rcd 4295 (2005) (consent decree).

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.

Second, the broadband market is young and dynamic, and there are many open questions regarding fundamental market issues that are yet to be answered: How much demand will there be, from content and applications providers, for data prioritization? Will effective data prioritization, throughout the many networks comprising the Internet, be feasible? Would allowing broadband providers to practice data prioritization necessarily result in the degradation of non-prioritized data delivery? When will the capacity limitations of the networks comprising the Internet result in unmanageable or unacceptable levels of congestion? And if that point is reached, what will be the most efficient response – data prioritization, capacity increases, a combination of these, or some as yet unknown technological innovation?

My third reason for suggesting that policy makers proceed with caution is that regulation can have adverse and unintended consequences. Despite the good intentions of their proponents, industry-wide regulatory schemes – particularly those imposing general, one-size-fits-all restraints on business conduct – may well have adverse effects on consumer welfare, as certain unintended consequences may not be known until far into the future.

My final reason for suggesting that we proceed with caution is that the federal antitrust agencies -- the FTC and the DOJ -- and the FCC have the capacity and authority to address broadband access issues. The agencies have a heightened awareness of the potential consumer harms from certain conduct by, and business arrangements involving, broadband providers. Perhaps equally important, many consumers are now aware of such issues. Consumers – particularly online consumers – have a powerful collective voice; in the area of broadband Internet access, the message from consumers seems to be that the unfettered Internet access to which they have grown accustomed is the only acceptable offering.

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.