Federal Trade Commission Public Workshop
Possible Anticompetitive Efforts to Restrict Competition on the Internet

Overview: Industry Perspectives Panel
October 8, 2002

Opening Statement

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Good morning, Mr. Chairman, Commissioners, ladies, and gentlemen. My name is Paul Misener. I am Amazon.com's Vice President for Global Public Policy. Thank you very much for inviting me to testify today.

In my view, the state of competition on the Internet is best evaluated by separately considering, on one hand, online activities that are substitutes for (and naturally competitive with) offline activities and, on the other hand, online activities that are truly unique to the Internet. The former category includes the sale of physical goods, *e.g.*, caskets and wine, while the latter includes the provision of consumer Internet access service. In my estimation, the principal threats to competition in these two categories are, respectively, from government and industry.

Substitute Activities. Government policy, particularly that adopted at the state and local government levels, can restrict competition among online activities that are substitutes for offline activities. Competition between Internet-based businesses, and

companies using other modes of commerce, already is (or at least could be) vibrant and, of course, overall competition is greater than what preexisted the Internet. Yet, some policymakers support "online-only" laws and regulations that could intentionally or inadvertently restrict this competition by unfairly regulating online activities that, for all practical purposes, are identical to less regulated or unregulated offline activities.

Why would policymakers restrict competition this way? This workshop likely will reveal several specific efforts to intentionally and unfairly protect offline businesses from competition. But there may be a more benign and generally applicable explanation, too: unfamiliarity with the Internet.

Indeed, even though the Web and email have become essential tools of commerce, information gathering, and communications for most Americans, the Internet and its applications remain for many people, including policymakers, mysterious at best, and downright scary at worst. Among federal policymakers, the gap between perception and reality has narrowed dramatically over the past few years, but many state and local government officials continue to misapprehend the technology and, through ill-conceived legislative proposals, threaten its character and usefulness for all Americans, not just those in the smaller jurisdictions.

The implications of these continuing misapprehensions are vitally important for consumers, industry, academia, and policymakers to recognize and address. For example, it is no longer sufficient for federal policymakers to merely "do no harm"; they

also must be vigilant against the potential anticompetitive harms caused by non-federal government officials.

To give a concrete example, many state legislatures have considered well meaning but ill-conceived laws addressing consumer information privacy that, despite the pervasive nature of the issue, address only "online" activities. To date, there have been dozens of "online privacy" bills introduced, in spite of the facts that (1) consumer information is at least as much at risk offline; (2) only a small percentage of consumer transactions are conducted online; and (3) imposing restrictions only on Internet-based commerce would have the effect of aiding existing bricks-and-mortar businesses at the expense of online competitors.

Moreover, taken together, such state privacy laws could easily create a "crazy-quilt" of rules with which it would be difficult if not impossible for Web-based enterprises to comply, and would impose regulatory requirements outside the borders of enacting states. Although it is likely that many of these rules would fail a legal challenge based on Dormant Commerce Clause jurisprudence, such constitutional fights could take years to resolve, by which time irreparable damage could be done to Internet commerce, information gathering, and communications.

The only sure-fire solution, it appears, is for the federal government to preempt state action either as a matter of education and policy or, as a last resort, as a matter of law. Fortunately, the FTC already has begun to "preempt" the states through education

and policy. With its consumer education campaigns and its policy of renewed focus on the enforcement of existing consumer protection law, the Commission has given non-federal governments less reason to be concerned and active. It may come to a point, however, where education and policy preemption are not sufficient and Congress may need to legislate to preempt state actions that restrict competition among online activities that are substitutes for offline activities.

Unique Activities. As for activities that are truly unique to the Internet, however, commercial interests present more significant anticompetitive threats than governments. Thus, federal officials also must be vigilant against anticompetitive industry activities that, in the worst case, could alter the character and usefulness of the Internet, as American consumers and citizens have come to know it.

For example, although competition is fairly robust in the current Internet access environment (whereby individuals link up through broadband corporate or scholastic connections, or through narrowband phone connections from their homes), the broadband consumer home Internet access environment may not be nearly so competitive. Inter-modal residential broadband competition – that is, competition among platform service providers using, *e.g.*, cable, DSL, satellite, and wireless technologies – has not materialized, and may not be technically feasible in many parts of the country. And, intra-modal competition will obtain only if multiple ISPs are available within each technical platform. It seems to me that federal regulators must primarily be concerned with the ultimate consumer and citizen objective in connecting to the Internet: unfettered

access to the information, services, and products offered by Web sites. If bottleneck broadband Internet platform or service providers in any way degrade or interfere with access to Web sites, the character and usefulness of the Web will be seriously damaged.

An appropriate approach here is federal regulation, which would prevent the rapid disenfranchisement of consumers and provide certainty in this very young business sector. The Federal Communications Commission could adopt rules to proscribe this type of anticompetitive behavior or ensure competition among broadband Internet service providers. And the FTC could informally indicate that such behavior would be considered anticompetitive. Either way, competition authorities should remain vigilant to ensure the continued competitiveness of consumer Internet access and, indeed, of all online activities that are truly unique to the Internet and where inadequate competition (because there is no offline substitute) could harm consumers and citizens.

Conclusion. In sum, consumers, industry, academia, and policymakers should monitor and address threats to competition on the Internet in two principal areas: the online activities that are substitutes for offline activities, and the online activities that are truly unique to the Internet. Because the principal threats in each area come from very different sources – government and industry, respectively – different approaches are needed for each. For the former, some form of federal preemption of non-federal actions, either through education, policy, or law, is necessary. For the latter, some form of federal regulation or competition enforcement is appropriate.

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