

FEDERAL TRADE COMMISSION

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<u>MEETING:</u>	<u>PAGE:</u>
Interpretation of Rules and Guides for Electronic Media	7

FEDERAL TRADE COMMISSION

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In the Matter of: )  
Internet Legal Issues Task )  
Force ) File No. P974102  
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Friday, May 14, 1999

Room 432  
Federal Trade Commission  
600 Pennsylvania Avenue, N.W.  
Washington, D.C. 20580

The above-entitled matter came on for  
meeting pursuant to notice, at 8:40 a.m.

ATTENDANCE LIST

ON BEHALF OF THE FEDERAL TRADE COMMISSION:

Jodie Bernstein                      Director, Bureau of Consumer  
Protection

Elaine Kolish                      Associate Director, Division of  
Enforcement

Dana Rosenfeld                      Assistant Director, Bureau of  
Consumer Protection

Laura DeMartino                      Attorney, Division of  
Enforcement

Mary Engle                      Assistant Director, Division of  
Enforcement

Alice Saker Hrdy                      Legal Advisor, Bureau of  
Consumer Protection

Lee Peeler                      Associate Director, Division of  
Advertising Practices

ON BEHALF OF THE PARTICIPANTS:

Jo Reed                      Senior Coordinator, Consumer  
Issues, AARP

Roy Green                      Legislative Representative, AARP

Kevin E. Duke                      Assistant General Counsel -  
Marketing, America Online, Inc.

Jill A. Lesser                      Executive Director, Domestic  
Public Policy, America Online,  
Inc.

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ATTENDANCE LIST (cont.)

3

Carla Michelotti Executive Vice President and  
Associate General Counsel,  
American Advertising Federation

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David Clauson American Association of  
Advertising Agencies

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8

Daniel L. Jaffe Association of National  
Advertisers, Inc.

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10

Renee Baruch Bell Atlantic

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Robert Goldberg General Counsel, Business  
Technology Association

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Katharina Kopp Senior Policy Analyst, Center  
for Media Education

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Randi M. Albert, Esq. Citizens Communications Center  
Project, Institute for Public  
Representation

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Kaye Caldwell Public Policy Director,  
CommerceNet

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Jean Ann Fox Director of Consumer Protection,  
Consumer Federation of America

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22

John Fruehe Dell Computer Corporation

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Jerry Cerasale Senior Vice President,  
Government Affairs, Direct

24

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Marketing Association

ATTENDANCE LIST (cont.)

1  
2 Teresa L. Jennings Direct Selling Association  
3 Elizabeth Wang General Counsel, DoubleClick,  
4 Inc.  
5 Beth-Ann Eason DoubleClick, Inc.  
6 Elissa Matulis Myers President and CEO, Electronic  
7 Retailing Association  
8 Wendy Schmidt Associate Counsel, Federated  
9 Department Stores, Inc.  
10 Jill A. Phillips Senior Attorney, Office of the  
11 General Counsel, Ford Motor  
12 Company  
13 James H. Skiles Attorney, Grocery Manufacturers  
14 of America  
15 William C. MacLeod Collier, Shannon, Rill & Scott  
16 Mark Uncapher Information Technology  
17 Association of America  
18 Jeff Richards Executive Director, Internet  
19 Alliance  
20 Phillip C. McKee, III National Fraud Information  
21 Center, Internet Fraud Watch  
22 Project Coordinator, National  
23 Consumers League  
24 Mary Tortorice National Retail Federation  
25 Mallory Duncan National Retail Federation

ATTENDANCE LIST (cont.)

1  
2 Ronald Goldbrenner General Counsel, Promotion  
3 Marketing Association  
4 John P. Feldman Chair, PMA Subcommittee on FTC  
5 Interpretation, Promotion  
6 Marketing Association  
7 Kevin Else Associate Counsel, QVC, Inc.  
8 Michael Nelsen QVC, Inc.  
9 Deborah Hagan Chief, Consumer Fraud Bureau,  
10 Office of the Attorney General,  
11 State of Illinois  
12 Craig Jordan Assistant Attorney General,  
13 State of Texas  
14 Eric A. Wenger Assistant Attorney General,  
15 Internet Bureau, State of New  
16 York  
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## P R O C E E D I N G S

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MS. BERNSTEIN: Good morning, everybody. Will the Senate please come to order? That means we can all vote later on. So we'll just consider ourselves that way.

Welcome, everybody. It's just marvelous to see all of you here for what we consider to be a really very exciting event at the FTC. I would note that there are a number of people here, and we particularly welcome them, who have been with the Bureau -- with the Commission in the past.

Bill MacLeod, who is one who was in my wonderful job sometime ago, told me he was very jealous this morning of this wonderful event. And I told him that was why we did it.

**(Laughter.)**

MS. BERNSTEIN: To make sure that he was enormously jealous. But welcome anyway, Bill.

MR. MACLEOD: Thank you, Jodie.

MS. BERNSTEIN: I would also like to note that Commissioner Thompson is with us this morning, Mozelle Thompson, one of our most recent appointees to the Commission, who has been very supportive and helpful of the Bureau's efforts and with the rest of the Commission.

1 He's also, I think, the youngest -- probably the youngest  
2 person in the room, which means he's enormously  
3 competitive technologically. So we welcome him and  
4 welcome his support of this effort.

5 I think you all know what this is about today.  
6 It's our effort to -- oh. Before I move on, there is  
7 another young Commissioner here in the room, Christine  
8 Varney, who just came in.

9 MS. VARNEY: Former.

10 MS. BERNSTEIN: Former. Yes, yes, yes. But you  
11 were so influential, Christine, that sometimes we think  
12 you're still here.

13 **(Laughter.)**

14 MS. BERNSTEIN: And we welcome you,  
15 particularly. I think you know what our goal is today,  
16 and that is to examine really with you and with each  
17 other what the application of the rules and guides --  
18 many of which have been in existence for some time -- are  
19 to electronic commerce, most particularly the Internet.

20 I am really very proud of the effort that's been  
21 made today, because it really demonstrates, I think, the  
22 new way in which the Commission is staying not only  
23 competent, but hopefully ahead of the game in terms of  
24 applying existing law to this new area in a very informed  
25 educated way. We recognize the enormous benefits that

1 are already coming to consumers, and we want to be sure  
2 that what we do encourages that marketplace, makes it  
3 better for consumers and at the same time that we carry  
4 out our law enforcement responsibilities as we have over  
5 the years.

6 So we're continuing to proceed in the same way I  
7 think we have always proceeding, and that is to apply  
8 existing law to new markets, new technologies. I  
9 fortunately was here in the era when television was  
10 pretty new, and in some ways we went through the same  
11 thing then. So I consider myself an experienced hand in  
12 applying the Commission's law to new media and new  
13 markets.

14 I would like to add one organizational note, and  
15 that is that in order to really focus your attention --  
16 our attention -- on what's happening and be sure we know  
17 exactly what we're doing as we apply law to these new  
18 areas, we have established something we call the Internet  
19 Advertising Group. It's within the Division of  
20 Advertising Practices, so it's not really a bureaucratic  
21 structure. Rather, it's an effort to see to it that  
22 experienced lawyers and investigators are focussing  
23 particularly on these areas.

24 We will also, in that context, build a state of  
25 the art Internet lab, which will hopefully put us in a

1 position to be able to monitor in a very systematic way.

2 I do want to make sure that I thank all of the  
3 people here who have been responsible for this marvelous  
4 workshop. And I must say, that when you see the stuff  
5 that has been created here, creation of new products and  
6 new ads, so that you can figure out how to apply the laws  
7 to them, and we can do it together. I don't want any of  
8 you recruiting any of my people.

9 **(Laughter.)**

10 MS. BERNSTEIN: They're fabulous. They're  
11 fabulous and creative. And they're going to stay here  
12 with us so that we can continue to stay ahead of the  
13 game.

14 So let me then close my very brief opening here  
15 and put for the record at least the names of the people  
16 who were so centrally involved in putting this together.  
17 And first and foremost Laura DeMartino, who is right  
18 there in the middle of the room, from the Division of  
19 Enforcement, has played a central role here. She really  
20 was the team leader. I don't intend to pass the hat in  
21 order to reward Laura today, because we have money in the  
22 budget to do that.

23 **(Laughter.)**

24 MS. BERNSTEIN: But she's really done an  
25 extraordinary job of pulling this together. And if you

1 will indulge me for a moment and let me just thank the  
2 others who have been involved. Beverly Thomas and Dean  
3 Forbes and Faith Veenoo of the Division of Enforcement.

4 Several from the regional offices, Seattle,  
5 Boston and others have been involved as well. Orey Lief,  
6 Alice Hardy and Dana Rosenfeld in my office. Liz Grant  
7 in Marketing Practices. Lou Silverson, the Bureau of  
8 Economics. Randy Clark of the Division of Policy and  
9 Information. Bruce Jennings and Barry Hutchins in our  
10 Office of Information and Technology Management deserve  
11 mention for their -- and if they can be helpful today --  
12 for their technical assistance.

13 Particularly acknowledge Elaine Kolish, who you  
14 will hear from for a moment. She did the management of  
15 this project, and I know will do an equally wonderful job  
16 in leading the discussion today.

17 And before I close, a special thanks to the  
18 Direct Marketing Association and the Grocery  
19 Manufacturers for generously providing us with breakfast  
20 this morning. That is a new -- in addition to creating  
21 an advertising unit here, we also had a break through in  
22 receiving permission from the General Counsel's office to  
23 receive this nice breakfast from these associations. And  
24 we thank you.

25 **(Applause.)**

1 MS. BERNSTEIN: So you see, we're all in this  
2 together. And with that, let's get on with the work of  
3 the day, because I know it's going to be very exciting  
4 and challenging.

5 Elaine?

6 MS. KOLISH: Yes. Thank you, Jodie. Good  
7 morning. My name is Elaine Kolish, and with me is Laura  
8 DeMartino, as you know, who has been the project manager,  
9 and Dana Rosenfeld, who is an Assistant Director in  
10 Jodie's shop.

11 Laura, Dana and I are going to moderate today's  
12 discussion about clear and conspicuous disclosures on-  
13 line. Or at least we're going to try to. I think with  
14 this crowd if we can try to get a word in edgewise, we'll  
15 be doing well.

16 Later in the day we're going to have a session  
17 on proposed interpretations for the online world, a term  
18 such as written and printed, as they are used in FTC  
19 rules and guides. And of course the good news is, since  
20 we've had a very, very active regulatory review program  
21 here, we have 50 percent fewer rules and guides than we  
22 did several years ago under Jodie and the Chairman's  
23 direction.

24 Our final session, the one on printed, is going  
25 to be moderated by Mary Engle, over there in the back of

1 the room, Assistant Director in the Enforcement Division,  
2 and Alice Hrdy, one of Director Bernstein's legal  
3 advisors.

4 I want to tell you why we're focussing on rules  
5 and guides in this workshop today. We're doing so,  
6 because for the most part the content of the disclosure  
7 is prescribed. Thus our discussion does not have to  
8 involve to any significant degree broad issues about what  
9 claims in all ads might need qualification, or what the  
10 content of a qualification should be.

11 Although we are not examining the wide array of  
12 matters that might be unfair or deceptive under section  
13 five, in identifying topics for today's discussion, we  
14 have considered how the Commission has evaluated clear  
15 and conspicuousness in all types of law enforcement  
16 actions, as well as the actual language of the rules and  
17 guides themselves.

18 I want to emphasize at the outset that the  
19 purpose of our workshop today, as we've previously noted  
20 in our Federal Register notices, is to have a dialogue.  
21 We are not planning on prescribing specific rules for  
22 making clear and conspicuous disclosures online today or  
23 in the future. Clear and conspicuous is a performance  
24 standard, and it is designed to ensure that the claim  
25 that is being modified has been appropriately modified.

1 That is, that the net impression of the ad is not  
2 misleading.

3 We would like to learn from all of you more  
4 about the circumstances that may affect whether a rule or  
5 guide requires disclosure, is clear and conspicuous, and  
6 about both the challenges and opportunities that the  
7 online world provides for communicating with consumers.

8 We hope that you will come away with a better  
9 understanding of the types of questions that we might ask  
10 when we're analyzing an ad, and any future guidance that  
11 we might provide will be designed along the same lines.

12 Now, as we have our discussion today, many of  
13 the commentors advocated that in evaluating clear and  
14 conspicuousness online that a reasonable online consumer  
15 approach be used. No empirical research was submitted by  
16 the commentors on this point, however, and the research  
17 that we have identified provides no basis for suggesting  
18 that reasonable consumers interpret ads differently in  
19 the online and off-line world.

20 But if there is such research, we would love for  
21 you to provide it. In the absence of reliable research  
22 to the contrary, common sense dictates that we assume  
23 that online and off-line reasonable consumers have common  
24 characteristics. Indeed, some research already suggests  
25 that with respect to advertising, consumer behavior

1 online and off-line is comparable in at least one  
2 material way: consumers don't read every word on every  
3 page, whether it's a web page or a written page. This,  
4 of course, has important ramifications for advertisers,  
5 particularly with regard to disclosures.

6 The Commission has long recognized that in  
7 evaluating disclosures, in many circumstances reasonable  
8 consumers do not read the entirety of an ad, or are  
9 directed away from the importance of a qualifying phrase  
10 by the acts or statements of the seller.

11 What we want to do in our session today is  
12 discuss the factors that are commonly associated with  
13 clear and conspicuous disclosures. For example,  
14 prominence and proximity to the claim as they occur in  
15 the online world. The written comments that we've  
16 received show that some commentators feel strongly that  
17 disclosures be on the same screen, while others believe  
18 scrolling down to a disclosure or using a hyper link  
19 should be acceptable.

20 We recognize that in having this discussion  
21 today that not everyone is going to get to express all of  
22 their views. And, of course, we had to limit the number  
23 of people at the table who could directly participate.  
24 Consequently, as we've usually done in the past, we will  
25 be leaving the record open for post-workshop comments,

1 and you'll be able to submit comments for about 45 days  
2 until July 1st.

3 We will be putting the transcript of today's  
4 proceeding on the public record and on our web page as  
5 soon as it is available, and we know that might assist  
6 you in preparing your comments.

7 Now onto our mock ads. Through these mock ads  
8 we can discuss the factors we've mentioned on a practical  
9 level. But we're not going to do so all at once. For  
10 the purpose of organizing the discussion and developing a  
11 record, we will be discussing factors such as scrolling  
12 and hyper links and asterisks and bannerettes somewhat  
13 separately.

14 We are confident we're going to have a fun and  
15 interesting day. But to keep it from being too, too  
16 chaotic, please allow us to call on you, rather than just  
17 jumping in. And to keep the record clear and to keep our  
18 court reporter from losing her mind, please identify  
19 yourself and speak into the microphone.

20 We are going to move on to the ads, but we  
21 wanted to note that we provided a brief description of  
22 the ads and the guides that are involved with those ads  
23 with the online version. But we thought it might be  
24 useful to just briefly review that to set the stage for  
25 the discussion and because maybe not everyone here has

1 had a chance to review that material.

2 So Laura is going to do a brief introduction for  
3 us.

4 MS. DEMARTINO: Thanks, Elaine. Our first two  
5 sets of ads from the FTC fashion jewelry site involve  
6 pearls and diamonds. The Commission's guides for the  
7 jewelry, precious metal and pewter industries state that  
8 when you're advertising or selling imitation pearls, you  
9 need to disclose that the pearls are imitation or  
10 simulated, so that consumers are not misled about the  
11 type of pearls that they're getting. The guides state  
12 that this disclosure, the word "imitation," immediately  
13 precede the term pearl.

14 For diamonds, many retailers, and FTC fashion  
15 jewelry included, use fractions to make diamond weight  
16 claims, fractions such as three quarter carat. But the  
17 fraction does not necessarily mean the decimal  
18 equivalent, .75. Instead, the fraction is used to  
19 represent a range of weights. In that situation, the  
20 jewelry guides state that the advertiser and seller needs  
21 to disclose that diamond weights are not exact, and  
22 disclose the range of weights that are being used for  
23 that fraction.

24 Our second -- or next two sets of ads involve  
25 our fake product, Quick DDRIP. Quick DDRIP is designed

1 to speed up your Internet access. And in our world,  
2 Quick DDRIP works for everyone. But Quick DDRIP works  
3 better for some consumers than others, depending on your  
4 computer equipment and depending on phone line  
5 conditions.

6 So the testimonials that we have in our ads  
7 represent the best case scenario. According to the  
8 guides concerning the use of endorsements and  
9 testimonials, the advertiser needs to disclose the  
10 limited applicability of the testimonials to what  
11 consumers may generally achieve.

12 Also in the Quick DDRIP ads on the Quick DDRIP  
13 home page, we have an endorsement from D. J. Blackhand.  
14 And assuming that D. J. Blackhand is not known to a  
15 significant portion of the viewing public, the advertiser  
16 needs to disclose that D. J. Blackhand was paid for his  
17 endorsement.

18 MS. KOLISH: Thank you, Laura. Let's put ad one  
19 up. We apologize to people in the overflow room that you  
20 may only be able to see screen one because of technical  
21 difficulties getting screens two and three to display.  
22 But that's not a problem for this ad.

23 This, as Laura mentioned, is an ad for pearl  
24 earrings, and there is a one word disclosure, imitation,  
25 which immediately precedes the word pearl. And that's

1 what the guides say you have to do. You have to have it  
2 immediately preceding it.

3 So we thought we would start with an easy  
4 example, and see if there is any disagreement about the  
5 fact that there is no reason this word -- this disclosure  
6 -- can't appear exactly where it is, or whether we should  
7 treat this ad differently in the online world. We all  
8 agree this is easy? Let's do it? Okay.

9 Let's move on to ad two, diamond weights.

10 MS. DEMARTINO: That was quick.

11 MS. KOLISH: In ad two we have a claim that this  
12 is a three quarter carat diamond earrings. And if you  
13 look down to the bottom of the page, you can see that  
14 there is a disclosure there: diamond weights may not be  
15 exact. So this disclosure is on the same screen as the  
16 claim that it is qualifying. On the other hand, it's  
17 below the claim at the top.

18 Are you having trouble? It's hard to see, I  
19 know. Can we turn down the lights a tiny bit? No? Oh,  
20 it's the camera lights probably. We found our eyes  
21 adjusted during the course of the day when we looked at  
22 these.

23 **(Laughter.)**

24 MS. KOLISH: The question we have for you, is it  
25 important to always have the disclosure on the same

1 screen, or only under certain circumstances to have it on  
2 the same screen? And does it increase its noticeability  
3 and accessibility and effectiveness if it's on the same  
4 screen? And what kinds of considerations may affect  
5 whether it appears on the same screen?

6 Anybody want to -- Jean Ann?

7 MS. FOX: We think it's important for material  
8 disclosures to be as prominent as possible to be on the  
9 same screen with the sales pitch. This would be improved  
10 by moving it above add to cart so that the consumer has  
11 seen the important disclosure before they make the  
12 decision to purchase.

13 MS. KOLISH: What does anybody else think?

14 FEMALE SPEAKER: Elaine, we mirror that. We  
15 were concerned about it being below add to cart. It  
16 seemed to be too close to a purchase decision at that  
17 point and they had not seen a disclosure.

18 MS. KOLISH: So in your view, the fact that it's  
19 on the same screen isn't even sufficient. It needs to be  
20 closer to the claim that's being qualified?

21 FEMALE SPEAKER: And before a purchase decision.

22 MS. KOLISH: Let me ask you whether it makes a  
23 difference in this ad -- if we scroll down a little bit,  
24 you'll see that there are other relatively important  
25 information about this item here. I mean, this is a pair

1 of earrings selling for nearly a thousand dollars, and  
2 all you know is the diamond weight. And although that  
3 might be the only thing of importance to some people, you  
4 might want to know what kind of setting it occurs in.  
5 Whether it has -- you know, what color the diamond is.  
6 Whether it is included or not.

7 So it's possible consumers could choose to do  
8 the add to cart before they read this. But would a  
9 reasonable consumer likely look for additional  
10 information about this product and therefore inevitably  
11 have to see this information?

12 Jerry, was there something you wanted to say?

13 MR. CERASALE: Well, yeah.

14 MS. KOLISH: Jerry Cerasale.

15 MR. CERASALE: Jerry Cerasale from the DMA. The  
16 first thing is talking about what's on the screen that  
17 you see, and that depends on the recipient's computer,  
18 not on what the ad is. Not on what the -- the only thing  
19 you could make sure that is on the screen, I guess, is if  
20 you had the disclosure the first words on the ad before  
21 anything, because you don't know the size of the screen.

22 So I'm not positive. I mean, this happens to  
23 show on the same screen in your ad here, because of the  
24 computer you have. But someone could have the whole  
25 thing on one screen, or someone could have just down to

1 the bottom of the picture on the screen, or even less.  
2 So I think the screen itself is a problem for you to make  
3 that any part of your rule or any part of your real  
4 interpretation because it depends on the recipient. It  
5 doesn't depend on the advertiser.

6 MS. KOLISH: Ron?

7 MR. GOLDBRENNER: Yeah, I would like to expand  
8 on that just a little bit.

9 MS. KOLISH: It's Ron Goldbrenner.

10 MR. GOLDBRENNER: If you look at the range of  
11 regulation that comes now from the FTC and the states in  
12 this respect, where you put the disclosure --

13 MALE SPEAKER: Could you put the mic to your  
14 mouth? We can't hear you. Thank you.

15 MR. GOLDBRENNER: Where you put the disclosure  
16 often demands upon how important that particular  
17 disclosure is. So materiality is relative, and  
18 prominence is relative, and accessibility is relative.  
19 And we need to keep that in mind when we deal with the  
20 technology of the Internet, because the ability to do  
21 different things -- scroll down, clip to, etc. --  
22 increases your ability to give prominence, to give  
23 access, etc.

24 And so if you set very specific rules, if you  
25 say only this is sufficient access, not only are you

1 freezing the technology, but you're freezing creativity.  
2 You're dealing with a whole range of technological  
3 capabilities -- as Jerry said, the different size of the  
4 screen -- that you really can't foretell. And so I think  
5 you're getting into a very difficult area.

6 And I just want to make a comment about  
7 something that was said before about the reasonable  
8 Internet consumer. While it is true that the perceptions  
9 of an individual of an ad and the content of the ad are  
10 the same, what those people who have postulated a  
11 reasonable Internet consumer mean is that because you're  
12 more familiar with the technology of the Internet --  
13 clicking through, scrolling down and doing all of these  
14 things -- that brings an extra dimension to the  
15 consumer's ability to gather information. The ability to  
16 go to another site and look something up immediately adds  
17 to your ability to gain information about the product.

18 And so when you say and we consider here what  
19 are the technological ways we can enhance disclosure or  
20 use these technologies to get better disclosure, or not  
21 hide things through technology, you have to take into  
22 consideration the level of the knowledge of the people  
23 who are using the Internet, who are using these  
24 computers. How much do they know that they can click  
25 through? How much do they know they can scroll down?

1                   And so the reasonable Internet consumer is a  
2                   concept that you need to consider with respect to  
3                   technology and how one perceives that. Thank you.

4                   MS. KOLISH: Would you please remember to  
5                   identify yourselves for the court reporter?

6                   MR. UNCAPHER: Mark Uncapher for the ITAA. Let  
7                   me expand on that particular point. I think beyond what  
8                   the reasonable consumer expects, or rather would  
9                   anticipate, I think there is an expectation on the  
10                  Internet that information doesn't necessarily have to be  
11                  on one particular page, that there can be hyper links.  
12                  And there is this expectation that additional valuable  
13                  information that the consumer can exercise the choice to  
14                  move on to will be available on one page.

15                  In that format, quite a part from just  
16                  e-commerce is something that is available across the  
17                  board on the Internet. And trying to cram additional  
18                  information on a particular page really runs counter to  
19                  that particular expectation of the consumers. And I  
20                  think actually has the effect of defeating the purpose of  
21                  disclosure, because, you know, dense text is something  
22                  that consumers will click through and won't bother  
23                  reading.

24                  MS. KOLISH: Is there any empirical evidence  
25                  about how consumers are going to act? Oh. Did a plug

1 just get pulled?

2 MALE SPEAKER: Yeah.

3 MS. BERNSTEIN: Either that or we blew a fuse.

4 **(Laughter.)**

5 MS. KOLISH: One of the things we're interested  
6 in is consumer research on consumer behavior online, and  
7 if people have that, we would like to see it and, of  
8 course, take that into account.

9 In terms of materiality, let me just comment  
10 that because we're talking here about rules and guides,  
11 for the most part the disclosures we're talking about are  
12 ones that the Commission has already made a decision are  
13 necessary to prevent a consumer from being misled. So  
14 we're not just talking about any information that might  
15 be of interest to a consumer that an advertiser might  
16 like to provide -- and certainly hyper links are a  
17 fabulous way of doing that.

18 But we're talking about important information  
19 that should qualify the claim so that a consumer isn't  
20 misled. And would you be confident if at the end of the  
21 day you did a copy test on your web ad, whether the net  
22 impression would be appropriately qualified.

23 So that's one of the reasons we think it's  
24 important to focus on how noticeable and prominent these  
25 disclosures are and make certain they're not overlooked.

1           Because as we can take for granted, consumers typically  
2           aren't going to read every word, whether it's a web page  
3           or a written page.

4                        But I'll stop editorializing. I think Dan had a  
5           comment next?

6                        MR. JAFFE: Dan Jaffe with the Association of  
7           National Advertisers. What you're talking about is a  
8           very significant moving target. I carry one of these.  
9           I'm sure lots of people have palm pilots. People are  
10          getting information in smaller and smaller equipment, and  
11          therefore you can talk about unavoidability, as was  
12          discussed in the FTC's notice, but that may be  
13          impossible.

14                       Also, the other thing that I think makes this  
15          medium different than all the other medium that we've  
16          ever dealt with before, or at least significantly more  
17          pronounced, is that the receiver of the information has  
18          more control over what he sees. I can -- even with this  
19          very, very small screen, I can split that screen so that  
20          I can be taking notes, or sending information back, or  
21          taking an e-mail while I'm seeing something else.

22                       And so I can configure it. However you may say  
23          the advertiser should put the information out to the  
24          consumer, the consumer now can say no, I'm not going to  
25          get that that way. I'm going to make the screen very

1 smaller or very large.

2 I saw something in the paper just the other day,  
3 which was a telephone -- a hand held telephone that you  
4 flipped out and had a little screen, and the screen was  
5 no bigger than that. And so I think it's going to be  
6 very, very important that we not start asking advertisers  
7 to do the impossible.

8 And the other aspect of this is that maybe when  
9 you put something with, you know, color and a click  
10 screen, it's more likely that someone is going to look at  
11 it, particularly if it's tagged to particular key  
12 information than having just a lot of words. Because  
13 you're saying this is important, and people are being  
14 trained in this area to say, this is important  
15 information in a particular area.

16 MS. KOLISH: Thank you. We would like to get to  
17 more about the technology issues, but does anyone else  
18 wonder about why as we get older, everything is getting  
19 smaller and harder to read?

20 **(Laughter.)**

21 MS. KOLISH: I think Phillip was next.

22 MR. MCKEE: Thank you. Phillip McKee from the  
23 National Consumers League. Many of the previous  
24 commentators have been quite correct in stating that we do  
25 have a large amount of control as to the way the

1 information is presented to us. Our screens can be made  
2 much smaller.

3 And so the statement -- as many of the industry  
4 representatives have said, insisting that the statement  
5 is on the screen can be very difficult to monitor. I can  
6 force the statement off the screen if I so desire. What  
7 I cannot do if the statement is properly placed, is force  
8 myself not to see it prior to placing my order.

9 So in this case, to look at example number two,  
10 I can very easily re-size the screen, so that just  
11 because of my personal viewing preferences, I may not see  
12 that disclosure prior to placing my order. But if the  
13 disclosure statement concerning the weight of the diamond  
14 is moved upwards, above the add to cart button, it  
15 becomes impossible for me not to see the disclosure  
16 statement prior to making my order.

17 So it becomes incredibly important to consider  
18 the placement of these disclosures, not simply in a vague  
19 position on a screen, but in relation to the other  
20 components of the web site. Be it the hyper link,  
21 whether you are considering scrolling, or whether you're  
22 considering the ordering information, it has to be  
23 considered relative to the rest of the web site.

24 MS. KOLISH: A good point. I know that people  
25 have their hands up. I want to put up a couple more ads

1 so you can see some additional descriptions. We'll take  
2 down ad one, and we're going to put up ads 19 and 20.

3 MALE SPEAKER: Well, there's a jump.

4 MS. KOLISH: And then I'll try to call on people  
5 in order. Our little surfers over there are coming up to  
6 -- we could leave up ad one if you -- yeah. I mean leave  
7 up ad two, that's right, and put up 19 and 20.

8 In ad 19, which is over here on the right, you  
9 can see there is a disclosure at the top about speed  
10 improvement. And this is the disclosure meant to explain  
11 that the endorser's experiences that follow are not  
12 necessarily the same experience that everyone will  
13 receive.

14 On ad 20, however, you see the same disclosure,  
15 and you can see an obvious difference between the two.  
16 In ad 19 it is in blue type. It contrasts well against  
17 its background. And in ad 20 it's in light gray type,  
18 which does not contrast well. And I think -- I doubt  
19 there's any argument that, you know, ad 19 is superior to  
20 ad 20.

21 However, I think that people have raised some  
22 good questions about the technology, that there are  
23 differences in browsers and hardware and software that  
24 can make a difference in terms of what consumers see.

25 So as sort of a preparatory note, because I

1 think this all relates to the prior question in ads you  
2 saw, how do advertisers design their web sites so that  
3 most consumers are going to see their ad in an optimal  
4 fashion? Obviously you are aware that there are  
5 different browsers, and you may have some concern and  
6 consideration. Are there defaults and, you know, can you  
7 plan for your ad to consider the impact of a different  
8 browser, or could you evaluate and plan for the  
9 prominence of the disclosure relationship to other  
10 elements of the ad?

11 For example, if most of your ad copy was in 12  
12 point type and you had your disclosure in 15 point type,  
13 and then the recipient changes their browsers so they  
14 don't ever see it in 12 point type, can you still ensure  
15 that that disclosure will be in larger type and thus may  
16 be more prominent in relationship to the rest of the  
17 language on the ad?

18 So I'll go in order -- unless people want to  
19 have different views and don't want to raise hands any  
20 more, I'll go with the ones who were up before. Did you,  
21 Phillip? Right. You already talked, so --

22 MR. MCKEE: Yeah. I just had a comment with  
23 regards to your statement on point size. As a web master  
24 myself, point size is not really a very good way of  
25 discussing size on a screen. If you are using a what you

1 see is what you get web editor, you can sometimes have a  
2 statement that it's going to be in a particular point  
3 type, but that's not actually the case.

4 When you look at the HGMO code, what you're  
5 saying is size one, two, three, four, five or six, and  
6 it's a relative size statement. On your browser you can  
7 set what is a standard font size that you're at.  
8 Anything of a number higher than that will appear larger.  
9 Anything of a number lower than that will appear smaller.

10 And so to make any kind of statement of point  
11 type as a guiding principle loses its ability to apply  
12 in the realm of the Internet. So we need to consider it  
13 in terms of relative type size to other sections of the  
14 screen.

15 MS. KOLISH: Well, that was part of my question.  
16 Before we move on to other commentators, let me note for  
17 people who are standing that there is an overflow room in  
18 room 332 if you would like to sit. Although maybe if the  
19 cameras aren't here all day, we'll be able to put in a  
20 few more chairs.

21 Okay. Katharina I think was first.

22 MS. KOPP: Yes, thanks. I just wanted to  
23 reiterate what Phillip was saying earlier, that we are  
24 dealing with a problem that we have different sizes --  
25 computer screen sizes -- and therefore I think that what

1 we should learn from that is that we have to move up the  
2 disclosures high up on the web page as possible. And at  
3 the very least it should be before the purchasing  
4 decision is made. It should be disclosed there.

5 And then there was another point that  
6 advertisers should take advantage of the ability to hyper  
7 link and therefore that the disclosures -- you know, the  
8 hyper links then can disclose more information. And I  
9 think the second ad is a good example of that. In fact,  
10 it's not that important to have that much information in  
11 the disclosure. Like this one sentence here is  
12 sufficient to provide a lot of information that can be  
13 put in the initial ad and there is no need to hyper link.

14 And also if the hyper link is very, you know,  
15 down and hidden in the page, the consumer might never  
16 find out that there is all this information and will  
17 never click on that to obtain all the additional  
18 information.

19 MS. KOLISH: Well, we're going to get to some  
20 examples involving hyper links in a minute, so we will be  
21 able to pursue that point. And I think Jean Ann was --  
22 you don't want to. Okay. Melissa?

23 MS. MYERS: Elissa.

24 MS. KOLISH: Elissa. Elissa Myers. Remember to  
25 say your name for the court reporter.

1 MS. MYERS: Sorry. Elissa Myers, President of  
2 the Electronic Retailing Association. You know, we read  
3 different -- in different languages in different products  
4 in different ways. Russian is read right to left.  
5 English is read left to right. And so the whole question  
6 of prominence and how an Internet page is read is a  
7 complex and interesting one.

8 It occurred to me -- in looking at the example,  
9 which is your ad number 19, and the comments that have  
10 been made relative to positioning the disclaimer at the  
11 very beginning of the page, it occurred to me that if I  
12 -- as a consumer looking at that, I'm not ready to absorb  
13 that information until I've begun to address the sales  
14 message. So the disclaimer has no relevance to me if I'm  
15 reading it linearly on the page. I'm not interested yet,  
16 because I don't know what it is that I'm interested in  
17 buying.

18 And going back to the earlier ads and the  
19 placement above the button that adds the item to the  
20 cart, as a passionate shopper both in brick and mortar,  
21 from catalogs and online, it's one of my great passions  
22 in life, and I wish it was so easy to push a button and  
23 consummate the order online. Perhaps it will be one day.

24 But right now all that button does is to take me  
25 beyond to another page where I have copious -- additional

1 information and blanks. So the Internet is a contextual  
2 environment, and it perhaps becomes more relevant once I  
3 get to the order decision. You don't know -- we don't  
4 know looking at these ads what is on the order page.  
5 There may be a very prominent statement that says any  
6 time you're purchasing jewelry, you want to be very  
7 careful about the conditions and here are some of the  
8 things you should be aware of.

9 We don't know that, looking at the ads you have  
10 provided.

11 MS. KOLISH: Right. But we will have an example  
12 of that that we can talk about later. I think David  
13 Clauson from four A's is next.

14 MR. CLAUSON: Thanks. Dave Clauson representing  
15 the four A's today. In some of the discussion -- first  
16 of all, I think I'm one of the few people in the room who  
17 actually design this work for many different kinds of  
18 clients. I've heard some assumptions today that I would  
19 like to challenge.

20 First of all, we're speaking in very generic,  
21 general terms about who the consumer is, how they behave  
22 and where things need to be. From our experience with  
23 our clients, that is a very, very misleading assumption.  
24 The first lesson you learn about marketing on the  
25 Internet is that the minute you start to assume that all

1 consumers behave one way, or that all consumers desire  
2 things in a certain way, you're in deep trouble.

3 What we consider first in marketing online is  
4 where is the consumer in the purchase process, and you  
5 have many different variables here. In this instance  
6 we're talking about diamonds. If we were talking about  
7 cars, if we were talking about credit cards, or if were  
8 talking about food, you would find that the consumers  
9 behave and react to information very differently.

10 Probably the most generic thing you can say is  
11 that the more information you can give earlier on in the  
12 sale cycle, in the consideration phase, that is where the  
13 Internet has its most value. We have done research with  
14 a lot of consumers in various different product  
15 categories, and from that research I can at least argue  
16 the point that consumers behave very, very differently.

17 So when it comes to disclosure, what most  
18 marketers are discovering, is that the more information  
19 about the product that can be put in the consideration  
20 cycle, rather than saving disclosures and things like  
21 that for just before you buy, actually empowers the  
22 consumer and makes the consumer an expert.

23 If you consider the fact that what the Internet  
24 really represents is a lowering of the cost of  
25 information, consumers are getting smarter out there

1 about the information they can get and are empowering  
2 themselves. And that's a very important dynamic that  
3 marketers need to recognize, that the choice to control  
4 the convenience is now in the hands of the consumer. And  
5 that is the way the Internet behaves.

6 So we advise a lot of our clients that the best  
7 marketing we know of is to provide as much information  
8 early on in the sales cycle as you possibly can. And if  
9 you can make that consumer smarter, you actually  
10 empowered the consumer to deal with brands who are making  
11 you smarter and in that way more effectively.

12 So many of the considerations about technology  
13 and browsers are important issues, but they are not as  
14 relevant to the discussion. Most consumers are not out  
15 there configuring their browsers in different ways every  
16 day. They usually plug it in out of the box and go. The  
17 expert techs may want to -- the web masters of the world  
18 may want to adjust their browsers and things like that,  
19 but most consumers just want to be informed as best they  
20 can. But they want the information on their terms, not  
21 on someone else's terms, not on the government's terms  
22 and not on the marketer's terms.

23 So as representing marketers, what we need to do  
24 is recognize that dynamic and step into the consumer's  
25 shoes for a moment and give them as much information to

1           rely on as we can.

2                       MS. KOLISH: Thank you, David. Carla  
3 Michelotti?

4                       MS. MICHELOTTI: Carla Michelotti representing  
5 the American Advertising Federation. I want to follow up  
6 on what David just said, because it really is a key  
7 principle for what we're all going to talk about all day,  
8 which is this reapplication of -- I don't know -- 70 some  
9 years of consumer protection law.

10                      So for 70 some years, we've had consumer  
11 protection law that's been written to protect consumers  
12 against media which was out of their control and forced  
13 upon them. And so as a result, there were a lot -- there  
14 is a lot of information that is commanded and demanded,  
15 because the consumer was not empowered. The consumer was  
16 not in control.

17                      So in this new media, we've now reinvented the  
18 power base between the consumer and the media. And in  
19 this empowerment of the consumer, the reapplication of  
20 consumer protection, I think we have to look at the goals  
21 of consumer protection to provide key information to the  
22 consumer before the purchasing point, which it depends on  
23 the behavior, as David said, where the purchasing point  
24 is. But the consumer must be provided with all the key  
25 information before the point that they spend the dollar.

1           So if you look at consumer protection law and  
2           reapply it, with the understanding of the empowerment of  
3           the consumer, you don't have to have the demands of  
4           placement and location, and you look much closer to what  
5           Ron Goldbrenner was talking about with the ordinary,  
6           reasonable Internet user, and the education of the  
7           Internet user, and the experience of the Internet user.

8           You know, one of the clues here that would tell  
9           the ordinary, reasonable Internet user that there was  
10          other stuff to read about, is just that little bar on the  
11          side. You know, if you put an eight year old on this web  
12          page, the eight year old would go to the bar and go down  
13          and see what else is there. It tells the consumer  
14          something else is there.

15          So I think as we move forward, it's the  
16          empowerment of the consumer and reapplication of consumer  
17          protection law in this empowered society where we can  
18          control the media as an overriding concept.

19          MS. KOLISH: Let me follow up on that for a  
20          minute, because a lot of people have talked a lot about  
21          that.

22          MS. MICHELOTTI: The new medium is so  
23          interactive and consumers are in control. But when we  
24          look to the media consumers have now, they get many --  
25          often get multi page solicitations. They have the power

1 to read every single word, to turn every single page if  
2 they choose. But what we know is that they don't.

3 And that the Commission has long decided that  
4 the advertiser has the responsibility of making certain  
5 that the information is placed prominently so that they  
6 see it. That burying it in the middle of a multi page  
7 document, or in fine print at the bottom of an ad, simply  
8 isn't good enough. But you have to assume they're not  
9 responsible for reading every word, that advertisers  
10 spend a lot of effort to draw consumers' attentions to  
11 certain points, and they can be equally responsible for  
12 drawing consumers' attention to a disclosure.

13 So in terms of empowerment, I think there has  
14 been empowerment in other media, too. We probably don't  
15 think of it. You have the power not to open the  
16 envelope, to open it and read every page, read the little  
17 sub-pieces within it. And, you know, in terms of new  
18 media, as Jodie was saying, she was, you know, here when  
19 television was in its infancy.

20 (Laughter.)

21 MS. BERNSTEIN: That's not quite right.

22 (Laughter.)

23 MS. MICHELOTTI: Advertising. When advertising  
24 was really developing, is what I meant to say.

25 MS. BERNSTEIN: I think I just heard Carla refer

1 back to my origin -- 70 years?

2 (Laughter.)

3 MS. BERNSTEIN: And I would add a more serious  
4 comment other than, Carla. In regard to your very good  
5 point, doesn't the new medium also empower, if you will,  
6 the marketer or the advertiser as well, in the sense that  
7 the advertiser or marketer also has more flexibility than  
8 in the conventional media, where the limitations are the  
9 30 second spot, etc., etc.

10 So from that point of view, which I think is  
11 valuable to both, it does provide more flexibility to  
12 provide more information in a less restrictive media. So  
13 in a sense, the power is more balanced between the two.

14 MS. KOLISH: We have some other people who  
15 already put their hands up, so we'll try to call them.  
16 Debbie?

17 MS. HAGAN: Deborah Hagan from the Illinois  
18 Attorney General's Office, and the New York and Texas  
19 Attorney General's Office, too. In terms of the bigger  
20 picture that Carla was talking about, I think we would be  
21 very concerned if the standard moves towards material  
22 disclosures before a payment purchase decision. To us,  
23 that moves the whole information situation from the  
24 trigger term to a purchase, which could be many screens  
25 and far down the process.

1                   We think that it is still important --  
2 particularly we're talking about rules here in which the  
3 Commission has already determined that certain qualifiers  
4 are material and that they should be in close proximity  
5 to the trigger term. And in particular, we think that  
6 based on what's been said here, because of consumers'  
7 differing levels of understanding and maybe ability to  
8 vary technology, it becomes even more important for a  
9 material disclaimer to be in close proximity to the  
10 trigger term.

11                   MS. KOLISH: Thank you. I think Phil had his  
12 hand up and then we'll go to you, Kevin.

13                   MR. MCKEE: Okay. Just a couple of issues here.  
14 One, earlier I had stated the necessity of placing the  
15 disclosure prior to the add to cart button on number two.  
16 I wanted to make sure that it was very clear that we did  
17 also intend that the disclosure should be close to the  
18 trigger term, that it not be on a separate screen.

19                   In regards to Ms. Myers' statement about some of  
20 the places that she has purchased online, I, too,  
21 purchase a lot of things online, and several of my  
22 favorite online sites actually have complete profiles of  
23 my information located on their servers. And so for me,  
24 it is actually as simple as one click of a button and a  
25 password and that item is mine and my credit card has

1           been billed.

2                       So it isn't as simple as all of a sudden you  
3           have a screen with a large amount of information that you  
4           have to put in. On many stores it has gotten to the  
5           point where online purchasing is as simple as a single  
6           click.

7                       Also, to get back to one of the earlier  
8           questions that you had asked, in regards to ad number 19  
9           and ad number 20, the coloration and the points and the  
10          font size is incredibly important. And something that we  
11          had noticed in looking over the ads is the necessity of  
12          stating that it be clear, that it be concise, and that it  
13          be easy to notice.

14                      That can be difficult when creating a web site  
15          because of the large amount of control that the  
16          advertiser has and the consumer has. If you mandate a  
17          certain color, or a certain exact size, it may turn out  
18          that that size is smaller than the type the advertiser  
19          has chosen to use for the site, or a color that would  
20          react quite negatively with the color scheme that the  
21          advertiser has chosen.

22                      Instead, an unfortunate need is created to use  
23          guidelines that are slightly vaguer, but that more  
24          accurately describe the clearness and the ability to  
25          perceive it based upon the surrounding background. It

1 does become a completely contextual concept.

2 And finally, in regards to Mrs. Michelotti's  
3 statement about scrolling, yes. When an experienced  
4 Internet user goes to a web site and sees a scroll bar --  
5 for example, the scroll bar on ad number two is not very  
6 large -- they're quite likely to scroll down and read  
7 what the rest is. However, that same user shows up at ad  
8 number 19 or ad number 20 and sees that based on the size  
9 of the moving section of the scroll bar, there is a very  
10 large amount of information on that page. They are far  
11 more likely to avoid the scroll bar.

12 That's why when you look at advertising sites  
13 and you look at online sites, the most successful sites,  
14 the ones that are having the largest amount of hits, the  
15 gateway sites that are becoming the most popular, they  
16 tend to be single screen or simple, small scrolling  
17 screens. People don't want to have to wait for a huge  
18 amount of information to download. They're going to  
19 click away.

20 People don't want to have to scroll down through  
21 everything to get to what they want. They want it right  
22 there. They want it now. If that means they have to  
23 hyper link to it, that's what they're going to do. But  
24 they don't want to have to scroll.

25 So if you embed that disclosure at the very

1 bottom of a page such as 19, the vast majority of people  
2 are never going to see it, because they are going to  
3 exercise their choice to control the media and not scroll  
4 through everything.

5 MS. KOLISH: Well, Phillip, hold that thought,  
6 because maybe we'll show an example of that later. Next  
7 is going to be Kevin.

8 MR. DUKE: Kevin Duke with America Online. Just  
9 a few points on the discussion so far. I think it points  
10 up the need to proceed with care and caution here. Even  
11 though we've got ads up on the screen, we're all talking  
12 about the same things.

13 You know, defining our terms is so important  
14 here, and that's why I think it's a good idea, the  
15 approach the Commission is taking. You know, I know when  
16 I read the materials and they were talking about should  
17 the disclosure be on the same screen, I took that to mean  
18 the same page, and didn't realize they were talking about  
19 the display. There is a difference there.

20 People have been throwing around the idea that,  
21 you know, disclosures need to be made before the purchase  
22 decision. You know, again, the way people click through  
23 web pages and cruise the Internet, it's hard to say what  
24 that before means.

25 And again, there's been discussion about other

1 media. I know a mail package comes to my house with a  
2 catalog. There is information materials. There is an  
3 order form. The advertiser there is not required to make  
4 sure the order form is the last thing I see and, you  
5 know, that it's stapled to the back or whatever. It's in  
6 the envelope. All the information is there and is  
7 available to the consumer.

8 And while I think it's important to recognize  
9 and to take advantage of the flexibility of this medium,  
10 we also need to approach in such a way as not to  
11 discriminate against a media and impose rules here that  
12 aren't imposed for other media.

13 MS. KOLISH: No, we agree. Our goal is not to  
14 discrimination, but merely to see what the applicable  
15 type of clear and conspicuous would be in this medium.  
16 You know, what's the equivalent of saying, you don't have  
17 fine print at the bottom of a written page. Is it buried  
18 fine print if it's at the bottom of a web page.

19 And to go back to define terms just for a  
20 minute, we use screen to mean what you're seeing on your  
21 computer now, and that a page -- a web page -- could  
22 consist of multiple screens. Is that how everybody else  
23 is understanding it? Carla, you're looking puzzled?

24 MS. MICHELOTTI: Because I've never -- AOL, I've  
25 never thought about a web page, because of the web page

1 variation. I can't tell you --

2 MS. KOLISH: Well, I know it's going to vary.  
3 But that's how we were using it here for the purpose of  
4 these ads, to say that this is what's on the screen -- is  
5 the screen -- and then the page is when you stop -- you  
6 get to the end of it however screens later, that's the  
7 end of the web page.

8 Okay. We had some other people who had had  
9 their hands up. Jo, you did?

10 MS. REED: Thank you. Jo Reed from AARP. I  
11 wanted to speak in support of the importance of having  
12 disclosures up high on the screen very near the claim.  
13 And specifically I wanted to respond to Dave Clauson's  
14 remarks, which I appreciated with respect to diversity of  
15 the audience we're talking about, the group of people who  
16 actually use the Internet.

17 There has been some tendency in the discussions  
18 today to talk about the Internet users, the fairly  
19 sophisticated person who is quite experienced. Actually,  
20 one of the fastest growing group of users of the Internet  
21 is older people. And I think we have to realize that we  
22 have a very broad diversity of people, some of whom are  
23 not at all sophisticated.

24 And I think that disclosure, like all consumer  
25 protection principles, should be geared to the most

1 vulnerable. So having that in mind, we should apply it  
2 very carefully.

3 MS. KOLISH: Okay. Renee, you were next, I  
4 think.

5 MS. BARUCH: Renee Baruch, Bell Atlantic. We  
6 have a concern as a newly soon to be deregulated  
7 industry --

8 **(Laughter.)**

9 MS. BARUCH: -- that as such we are going to  
10 have to make huge amounts of disclosures to consumers,  
11 all of which will be mandated, all of which will be  
12 required to be displayed with prominence and  
13 conspicuously.

14 Accordingly, we're very concerned about any  
15 standard which would require a display on a single  
16 screen. We would like to be able to have as much  
17 flexibility as possible to hyper link, to do anything  
18 that is appropriate, to bring information to the  
19 consumer.

20 I do think that there are other considerations  
21 when designing hyper links and your pages that make  
22 required disclosures more easily available to the  
23 Internet consumer. Specifically, I think if you create a  
24 page with huge amounts of graphics which require a great  
25 deal of time to download, you will discourage consumers

1 from viewing your disclosure.

2 I think there are different considerations that  
3 you have to take into account as we move into this new  
4 media.

5 MS. KOLISH: And I think that's what we would  
6 like to do. I think Jean Ann was next, then Bill and  
7 then Elissa. And then Jeff.

8 MS. FOX: I think it was Katharina.

9 MS. KOLISH: Okay.

10 MS. KOPP: Katharina Kopp, Center for Media  
11 Education. I just wanted to follow up with what Kevin  
12 Duke was saying. I think actually that the Internet is a  
13 different medium and that there should be different  
14 standards that apply to the Internet.

15 Obviously on the Internet you can order directly  
16 immediately, and that puts it in a different category. I  
17 mean, it's different from television. It's different  
18 from the print that you get in the mail. So I think we  
19 need to take that into consideration and have stricter  
20 standards here.

21 MS. KOLISH: Okay. There's a voice for a  
22 stricter standard. Bill? What a nice lead in to Bill.

23 **(Laughter.)**

24 MR. MACLEOD: Thanks, Elaine.

25 MS. KOLISH: If I can anticipate what you might

1 say.

2 (Laughter.)

3 MR. MACLEOD: This is Bill MacLeod from Grocery  
4 Manufacturers of America. We are mixing some standards  
5 here as we're talking about them, and I think that can  
6 get very dangerous, especially in the Internet context.  
7 We are talking about design standards, and we're talking  
8 about performance standards, almost as if they are the  
9 same thing.

10 The ultimate performance standard, of course, is  
11 that the advertisement or the message on the web site not  
12 deceive. Clear and conspicuous is kind of a performance  
13 standard, but it starts to mix elements of design.  
14 Proximity is almost entirely a design standard. It is a  
15 prophylactic that is designed to make sure that people  
16 get information.

17 I have heard a number of suggestions here as to  
18 why the standard -- or why the disclosure, ought to be  
19 high in the screen or ought to be near the particular  
20 representative to which it applies. And there are other  
21 ads that you have coming up pretty soon which I think may  
22 even be better under some Internet circumstances of  
23 getting this information to consumers.

24 When we are talking about design standards on  
25 the Internet, that is when we are at the most danger of

1 designing out of the Internet the effectiveness that this  
2 medium can offer. And I think it will be useful to look  
3 at these other ads as they come up, and we can ask the  
4 question, is something actually better for consumers when  
5 it is not proximate in the old paper or TV sense, but it  
6 is much easier to stumble across when you are winding  
7 your way toward the purchase decision.

8 MS. KOLISH: Well, let me just note that in  
9 terms of design versus performance standards, you know,  
10 we're mindful that you can lapse into design. And that's  
11 not the intent. We think when you're using the word  
12 proximity, it really is performance. It's not saying it  
13 has to be immediately next to, or within three words of.  
14 It isn't very specific. There are still leeway about how  
15 close is close, and how close does it need to be.

16 Anyway, sorry for the editorializing. Elissa, I  
17 think you were next?

18 MS. MYERS: I know we're talking about  
19 commercial applications for the Internet now, but as I  
20 was sitting and listening, I was thinking about  
21 statistics. I'm a statistics junkie. I love research.  
22 And I was thinking that when I am surfing around --  
23 searching around -- different statistical sources, if I  
24 find a set of statistics that is relevant to my purposes,  
25 then I want to find out all of the disclaimers and the

1 facts and the information about how -- where those  
2 numbers came from and how they were created. But until I  
3 find the numbers, again, the background is irrelevant.

4 Second, just -- I'm not sure what the  
5 implication is, but adding a layer of complexity to the  
6 discussion, we've so far been talking about the Internet  
7 as a computer experience. And we believe that the  
8 Internet is rapidly going to become not a one-on-one  
9 consumer computer relationship, but a multi person  
10 relationship via the television. And I think that adds a  
11 layer of complexity.

12 And then finally, Phillip, I know what you mean  
13 about storing data on your credit card and so forth. But  
14 it would scare me -- scare the bejesus out of me, if  
15 you'll excuse the expression, if I had no other  
16 alternative than to click, because my hand so often  
17 slips.

18 So again, I hope that we can keep thinking about  
19 not only the consumer protected in terms of the offer,  
20 but in terms of the whole transaction. What is the final  
21 outcome of the consumer relationship to the purchase.

22 MS. KOLISH: Okay. Jeffrey is going to be next.  
23 But I was just going to add, in terms of you mentioning  
24 television, that when the Commission was first dealing  
25 with television ads long ago in the 1970's, it actually

1 issued a policy statement on clear and conspicuous for  
2 television ads.

3 And one of the requirements there, one of the  
4 pieces of advice, is that no matter what the size of the  
5 picture tube, the lettering of the disclosure has to be  
6 in a size large enough to view it. So in a way, you  
7 know, 20 or 30 years ago the Commission already dealt  
8 with a new technology in advertising medium and said,  
9 okay, advertisers, you've got to figure it out.

10 So keep that in mind as we're talking. You can  
11 go on, Jeff.

12 MR. RICHARDS: Thank you. Jeff Richards,  
13 Internet Alliance. You know, so far in our discussions  
14 here, and this is an important dialogue, we're still  
15 assuming -- we all have our old media hats on. It's so  
16 hard to break through. Each of us here in this room is  
17 not only a potential consumer or an actual consumer via  
18 the Internet, we're also all potential advertisers  
19 individually as well.

20 And we all know the explosion of advertising and  
21 sales that are occurring between individuals. We all  
22 know the impact on traditional and even classified  
23 advertising that may occur. All kinds of issues are at  
24 stake here. But our guiding principle here needs to be  
25 simplicity such that each of us can be appropriate

1           advertisers as well as consumers, because that's what's  
2           going to happen worldwide.

3                     MS. KOLISH: Thank you. Ron?

4                     MR. GOLDBRENNER: On behalf of the advertisers  
5           who I represent, I think we have to keep in mind that the  
6           advertiser is engaging in Internet advertising or selling  
7           to accomplish a specific purpose. And I think it's fair  
8           to say that we should preserve to the advertiser and/or  
9           the seller the fundamental benefit of what he does  
10          primarily.

11                    So a lot of what I've heard, unfortunately,  
12          seems to me to require disclosure over the advertiser's  
13          desire to use this media properly. The most important  
14          thing to people advertising on the Internet now, and it  
15          is statistically supportable, is to get the visitor to  
16          come to the site. The second most important thing is to  
17          hold him at the site, to make him go through the site.

18                    I think the Commission and everybody who  
19          criticizes or comments upon what we must do on the  
20          Internet has to keep that in mind. And you have to  
21          measure what you finally do against that and say, am I  
22          destroying those values. Am I going to destroy the  
23          ability of the advertiser to capture and hold people by  
24          the manner in which I require these disclosures, by the  
25          size and all of the rest.

1                   How can we accomplish a full and fair ad? A  
2 full and fair ad is not one that immediately says don't  
3 buy this product because, or be leery of buying this  
4 product because. We all would agree that a fair context  
5 is that the advertiser should be permitted to get his  
6 message across to some degree initially.

7                   And so, again, measure what you're going to do  
8 against some kind of ability for the advertiser to do  
9 that.

10                   MS. KOLISH: Of course. I mean, we all agree  
11 that the advertiser, you know, has the right and should  
12 make advertising claims. In fact, if there is not claim,  
13 there is no need for a disclosure.

14                   **(Laughter.)**

15                   MR. GOLDBRENNER: That's where we don't want to  
16 wind up.

17                   MS. KOLISH: Right. We're not talking about --

18                   MR. GOLDBRENNER: And with respect to what you  
19 said before the proximity of disclosures and print and  
20 all of the rest, that's true. But we have a variety of  
21 disclosures in print. Some of it appears in the bottom  
22 in small type or on later pages, and that is permissible.

23                   So again, you have to measure the requirement  
24 for a particular disclosure. How important is it that it  
25 be up front. Can it be later on. Can it be just before

1 the order. Why must it be right after the trigger. You  
2 can do any of those things. You have to have a good  
3 reason for them.

4 MS. KOLISH: That's right. We agree and that's  
5 what we want to talk about. You know, do all disclosures  
6 need to be in the same place. But remember that the  
7 purpose here is so that your ad isn't misleading, which  
8 would be bad for you as a business if consumers were  
9 misled.

10 MR. GOLDBRENNER: Absolutely.

11 MS. KOLISH: I mean, Bill probably knows from  
12 having represented jewelry people before that consumers  
13 who bought a three quarter carat diamond and later had it  
14 appraised and found out there was only 70 points and not  
15 75 points, are real mad. So that's why if they don't see  
16 the fact that oops, there is a range here. It's not  
17 necessarily going to be -- guaranteed to be 75 points on  
18 the dot, that's going to help ensure that you don't have  
19 really angry consumers.

20 MR. GOLDBRENNER: We're all talking about  
21 achieving the balance.

22 MS. KOLISH: Right.

23 MR. GOLDBRENNER: And all I'm asking is that --  
24 I think the primary element of the balance ought to be  
25 that first and foremost the advertiser be guaranteed a

1 shot at the consumer first and a shot at holding him.

2 MS. KOLISH: We agree. We have some other  
3 people who had their hands up first. Dave Clauson, did  
4 you still want to speak?

5 MR. CLAUSON: Just a quick comment on comparing  
6 media. It's a very fuzzy arena. In considering design  
7 of a web page or a screen, the first thing you have to  
8 think about is that there is an information architecture  
9 that we consider. There is a flow of information that  
10 the consumer wants and goes through before they come to  
11 even consideration of whether to purchase or not, and  
12 that is critical.

13 And even though we mentioned that this is not  
14 about art direction, when you talk about where disclosure  
15 buttons need to be, that very much is our direction. So  
16 I just want to be careful that we're not misleading  
17 anybody here.

18 The second thing is that -- well, it is a new  
19 medium and to take Katharina's point, you can buy -- you  
20 can also buy on 800 numbers on a screen. The Home  
21 Shopping Network is very adept at doing that. There are  
22 many other mediums where immediacy of buying is very  
23 real.

24 I think what is different here is that because  
25 it is information based, the Internet actually is a

1 better opportunity to have more informed buyers. The  
2 points that were just made a moment ago about where  
3 information needs to be in disclosure is important. It  
4 does need -- the advertiser needs flexibility to respond  
5 appropriately to the individual consumer of his or her  
6 product.

7 So if I'm buying a car, where I need to  
8 disclosure information is very different than if I'm  
9 buying jewelry. And I would not want to see us mandated  
10 to saying this is the one and only place to have  
11 disclosure and have it be uniform.

12 MS. KOLISH: Well, Dave, let me draw on your  
13 advertising expertise for a minute, since you mentioned  
14 information flow. Do you think an add to the information  
15 flow isn't good, that you have, you know, the weight of  
16 the diamond or its size, then a price, a shipping weight,  
17 add to cart and then disclosure, and then if you scroll  
18 down more information?

19 I mean, is this just bad information flow?

20 MR. CLAUSON: That's bad information flow. It  
21 is.

22 MS. KOLISH: So how would you have done it  
23 differently, you know, having the information flow work  
24 well and having the disclosure work well?

25 MR. CLAUSON: You would want at the top more

1 information about diamonds, something that the consumer  
2 language -- is in the language of the consumer that they  
3 understand, or if you click there you would have all of  
4 the information about diamonds and then back to the page.

5 MS. KOLISH: Do you mean like information that  
6 these are classic diamond earrings, their sparkling  
7 design, round, six prong, you would have moved it up some  
8 place in here?

9 MR. CLAUSON: Yeah. I would have -- what you  
10 would want on the page -- and the point was made earlier  
11 -- is that simplicity of information delivery is the key.  
12 That on this page where we are talking about price and  
13 those kinds of things, you're assuming that a transaction  
14 is going to happen here. We find that that is usually  
15 not the case.

16 The consumer will come to a page like this in  
17 consideration mode. So what you would also want to have  
18 on here is maybe a bar at the top that says more about  
19 diamonds, how to evaluate a diamond, diamonds come from  
20 different places and have different capabilities, so the  
21 consumer has the ability to go back and drill down into  
22 the information as he or she feels they need to.

23 So in terms of selling, again, this is providing  
24 information. I wouldn't use the term disclosure. It's  
25 empowering the consumer when they are at this point in

1 the consideration cycle to either drill down more, be  
2 informed more, and then come back. And then if there is  
3 a formal disclosure that needs to be there, that would  
4 probably, you know, be a matter of debate about where  
5 that needs to be.

6 But I think again, assuming that everybody  
7 responds the same way to a page is a big mistake.

8 MS. KOLISH: Okay. I think Teresa was next.

9 MS. JENNINGS: I would also agree with David.  
10 With your ad right here, it kind of builds on the point  
11 that I wanted to make, that the consumers are going onto  
12 the web sites -- I'm Teresa Jennings with the Direct  
13 Selling Association, by the way.

14 The consumers are going on the web site not  
15 necessarily just to buy something. They're going on  
16 there to be entertained, to do research, to find out  
17 information that they want to share with their friends,  
18 and maybe they'll come back next time or the next time  
19 after that. We have a responsibility to give them what  
20 they want, or they won't come back.

21 And we want to hold them there, but we also want  
22 to give them the appropriate information at the time that  
23 they're ready for it, and not just pretend that it is a  
24 newspaper ad where there is the picture, there is the  
25 price, there is the information. It truly isn't like

1           that here.

2                       And I think we need to use this medium in the  
3 way to get the consumers the information that they want  
4 at the time they want to have that activity  
5 appropriately, but also, again, make it easy for them to  
6 do research and to get the entertainment they want.

7                       MS. KOLISH: Thank you, Teresa. We're going to  
8 go to Elizabeth Wang, then to Phillip, then Carla, then  
9 John, and then I would like --

10                      **(Laughter.)**

11                      MS. KOLISH: Remember your order. Try to keep  
12 it short, because then we're going to move on to  
13 scrolling after that. So we will have opportunity to  
14 have more debate as we look at some different ads in  
15 different contexts.

16                      Okay. So Elizabeth -- no, you don't want to  
17 talk? Oh, I'm sorry. Then Phillip?

18                      MR. MCKEE: Okay. What I want to do is to go  
19 back to Mr. Goldbrenner's point about allowing the  
20 advertiser to make his or her point concerning the  
21 product, to make the sales pitch prior to being forced to  
22 make a disclaimer that might make the consumer leery of  
23 purchasing.

24                      If we use ad number 19 as an example, you look  
25 at the top and you have the menu bar, which shows the

1 layout of the site structure essentially. The home page  
2 for this single product web site is going to be where the  
3 initial product pitch has been located. You're going to  
4 have something similar to, say, ad number 16B, for  
5 example, or any of the 16 series of ads.

6 You're going to have this home page. It's going  
7 to give you a quick blurb about it. It's going to tell  
8 you what has been happening. Then the consumer will look  
9 at the menu bar and say, oh, let me see what other people  
10 have purchased -- have experienced. Click on that and go  
11 to this other page. They already know something about  
12 the product. They've already read the initial sales  
13 pitch. And now they've decided they want to go read some  
14 testimonials.

15 At that point, having a disclosure prior to  
16 reading the testimonials does not deprive the advertiser  
17 of making their sales pitch. They have made the sales  
18 pitch. There is nothing at all wrong with insisting that  
19 prior to testimonials, they be told that these  
20 testimonials may not represent what their experience is  
21 going to be in this case.

22 And the same situation applies to anything else.  
23 If you have links that take you deeper into the  
24 information, the consumer knows where they're going.  
25 They don't need to be not told the disclosure concerning

1           that information until well afterwards.

2                       MS. KOLISH: Thank you, Phillip. Then Carla, I  
3 think you're next, and then John.

4                       MS. MICHELOTTI: Carla Michelotti with the  
5 American Advertising Federation. I think that we --  
6 someone down here was talking about how hard it is to  
7 take off the hat of the old medium. We continually are  
8 talking about geography here, folks, because we're  
9 talking about the geography in a two dimensional world of  
10 paper, or even the flat world of a television screen, and  
11 in the digital world, where there isn't any paper, there  
12 isn't any two dimensions.

13                      We're into a cyber space world. It's like the  
14 movie Matrix, you know, and there's a depth to it. And  
15 you go deeper and deeper and deeper, and it's very hard  
16 to be talking about geography. And when I say geography,  
17 I mean the placement, the location, the before and the  
18 after.

19                      And I'm here representing AAF today, but I'm  
20 going to quote from the DMA comments, which I pulled off  
21 the web, because they -- I thought it was really good  
22 what they had said here, which is --

23                      MS. BERNSTEIN: That's an endorsement, Carla?

24                      MS. MICHELOTTI: Well, we're a member of DMA,  
25 too, Jodie.

1                   **(Laughter.)**

2                   MALE SPEAKER: So it's a paid endorsement.

3                   MS. MICHELOTTI: Yeah.

4                   **(Laughter.)**

5                   FEMALE SPEAKER: Paid by moi.

6                   MALE SPEAKER: There's disclosure for you.

7                   MS. MICHELOTTI: But the standard -- they were  
8 talking about that DMA believes that a disclosure should  
9 be easy to find, easy to read and easy to understand.  
10 Easy to find, easy to read and easy to understand, with  
11 just the value of the disclosure going to a value based  
12 standard, going to the goal of consumer protection and  
13 not the geography of where it appears on an individual  
14 screen.

15                   MS. KOLISH: Well, we think those are great  
16 goals. And the question is, what does easy to find mean  
17 to different people. And, you know, some people -- well,  
18 I think we'll have disagreement about that.

19                   MS. MICHELOTTI: You know what, I had one more  
20 sentence which I forgot.

21                   MS. KOLISH: I'm sorry.

22                   MS. MICHELOTTI: Which you reminded me of,  
23 Elaine. And it's also very premature to allow -- you  
24 know, the technology is developing. The creativity --  
25 the people -- I don't know how many people here have ever

1 developed a web page. I never developed a web page. The  
2 creativity is spanning geometrically with the technology,  
3 and it would be very hard to tie down specific rules,  
4 regulations and guidelines that are going to become  
5 outmoded or outdated very quickly.

6 MS. KOLISH: All right. Just remember, we're  
7 not talking about prescribing specific things. If  
8 anything, we're talking about types of questions that  
9 might be asked, like we are doing today.

10 Anyway, I keep editorializing. John, you were  
11 next?

12 MR. FRUEHE: John Fruehe from Dell Computer.  
13 One of the dangers that we have here is that we're  
14 evaluating web pages in a vacuum. I'm looking at one  
15 page and I'm making a judgment about some type of  
16 disclosure, but I don't know what's happened prior to  
17 that.

18 We do a lot of research at Dell, and one of the  
19 things we found that's typically is that someone comes  
20 back to the site five or six times before they make the  
21 purchase. The average visit is somewhere between eight  
22 and 15 pages. So if you start to do the math on that,  
23 people are looking at, you know, 50 to 75 web pages  
24 before they make the decision to make the purchase.

25 And I think this is something that is extremely

1 important that we understand, and that we don't go down a  
2 path of saying, we have to, you know, prescribe to these  
3 particular specifications. Or we're going to take this  
4 one path for the consumer and, you know, this is the path  
5 that they have to follow in order to make the purchase,  
6 but we have to be flexible in the way that the customers  
7 want to buy.

8 We find that they come back. They comparison  
9 shop. They go around and check out different  
10 manufacturers. They probably do more research as the  
11 price goes up. You're probably less likely to find  
12 someone making an impulse buy on a thousand dollar pair  
13 of earrings than on a book. I've got a one click buy  
14 with an organization that sells books on the Internet. I  
15 would never do one click buy with jewelry.

16 So we have to look at things in context of the  
17 selling process also.

18 MS. KOLISH: That's a good point. Is that  
19 research that you mentioned something that you could  
20 submit for the record?

21 MR. FRUEHE: Pardon me?

22 MS. KOLISH: Is that research that you mentioned  
23 something that you could submit for the record that we  
24 could all look at?

25 MR. FRUEHE: Most of it would be confidential

1 Dell information, but we would be more than happy to  
2 share what we can with you.

3 MS. KOLISH: Thank you. We would appreciate  
4 that. Okay. Let's go to some -- Elissa, did you want  
5 the last comment on this and then we'll move on. Because  
6 I'm sure people's comments are going to be relevant to  
7 lots of other ads, too.

8 **(Laughter.)**

9 MS. MYERS: Again, just tagging onto a couple of  
10 things that were said. Just a reminder that in this new  
11 media you're talking about -- when you're looking at the  
12 Internet on television, you're talking about multiple  
13 people in the audience potentially with only one driver.  
14 Typically.

15 MS. KOLISH: Good point.

16 MS. FOX: Elaine, could I add one point?

17 MS. KOLISH: Sure. Jean Ann Fox.

18 MS. FOX: Jean Ann Fox, Consumer Federation of  
19 America. As I recall your rules, an awful lot of the  
20 information that you want to be sure consumers get is  
21 cautionary. It is not the information they're  
22 necessarily searching for. If they knew they needed to  
23 be cautioned, you wouldn't have required the advertisers  
24 to tell them.

25 So it's not as if you're looking for how big the

1 engine is the car you want to buy. It's that you need to  
2 be told some cautionary word about the claim the  
3 advertiser is making. So there is a tension here between  
4 what they want to tell you and what you think they ought  
5 to tell us.

6 I also think we need to bear in mind on the  
7 question of how sophisticated consumers are, that as a  
8 new medium is being launched that is supposed to appeal  
9 to a mass market, we need to write the protection in  
10 early rather than allow problems to develop and have  
11 great consumer disenchantment later. We should have  
12 learned something from the 900 number debacle, from the  
13 alternate operator service problem with telephones, and  
14 with all of the other new sales methods that have taken  
15 place.

16 We believe it's in everyone's interest for  
17 consumers to feel confident when they shop in cyber  
18 space, and that it's in the advertisers' and the  
19 marketers' best interest to find every way possible to  
20 fit what they are doing with the Commission's  
21 requirements.

22 MS. KOLISH: Thank you. Let's move on and put  
23 ad three on the screen. We're going to look at some  
24 issues that involve scrolling, which we've already talked  
25 about a little bit. But some of these ads will bring it

1 to a point more closely.

2 A lot of people have talked about scrolling and  
3 how it is part of the Internet culture, and therefore  
4 scrolling down to reach a disclosure should be  
5 permissible. What we would like to do is explore what  
6 circumstances where scrolling might be acceptable, and  
7 ones where maybe it's less desirable, and see if we can  
8 come up with some principles for distinguishing the two,  
9 if possible.

10 So in ad three you'll see that here we are with  
11 our three quarter carat diamond earrings. And if you  
12 would scroll through this ad, please? Keep going. Keep  
13 going. Oh, look. There's a disclosure at the end. Here  
14 you have to scroll, as you can see, beyond a fair bit of  
15 white space.

16 Are consumers likely to keep going when they hit  
17 white blank space? And, you know, in general what  
18 factors are going to affect whether a consumer will  
19 continue to scroll. Now, some of you may think, oh, we  
20 just made this up. But we saw this on our surfing of the  
21 web, and so we thought well, it happens, so let's talk  
22 about it.

23 People have comments there? John?

24 MR. FRUEHE: Yes. Contextually what you want to  
25 do on a web page, is you want to have something that

1 breaks the visual plain. If you look at all the pages on  
2 our site, we've got -- the left hand column is a dark  
3 blue column that will break the plain. So if somebody  
4 looks at the screen, they see that this column goes down  
5 to the bottom and it does theoretically continue on.

6 Or having the text at the bottom on some of the  
7 others that you had up, where it's actually at what we  
8 call the fold, which is the bottom of the screen, you  
9 actually see the text, a partial line of text. It's a  
10 visual indication that there is something below.

11 So having some type of visual, either broken  
12 text or some type of line or something that helps show,  
13 are all ways that you can help encourage people to  
14 scroll.

15 MS. KOLISH: What do you mean by plain when  
16 you're talking about that. Do you mean what they're  
17 actually just seeing at the moment?

18 MR. FRUEHE: What they're actually seeing. When  
19 you had the page up, you couldn't see that there was text  
20 below. Because of the visual plain, it was a very clean  
21 line across the bottom. But if there was something to  
22 cut it, that may give an indication to the consumer that  
23 there is something further down and to continue  
24 scrolling.

25 MS. KOLISH: Okay. Carla had said earlier that

1 because there is a scroll bar here that consumers would  
2 know that they could keep scrolling. Is that really  
3 reasonable to, you know, assume here?

4 MR. FRUEHE: I think that you probably couldn't  
5 get to this site if you weren't familiar with the concept  
6 of clicking on hyper text or the concept of scrolling.  
7 It's probably fairly difficult to get this far into a  
8 site on the Internet.

9 MS. KOLISH: Phillip and then Dave and then --

10 MR. MCKEE: One, I do think it is -- it is  
11 fairly reasonable to assume they understand how to  
12 scroll. As I said earlier, however, that has negative  
13 consequences. They can see a scroll bar that's very  
14 large and decide oh, there's nothing there.

15 They are also used to the concept that if you  
16 scroll down just a little ways after you've gotten the  
17 hint, as Mr. Fruehe has said, that there is something  
18 else down there, that you've found something that has  
19 broken the plain, be it a color bar or just the top of  
20 the line of text, then you know that there is something  
21 else down there.

22 If you begin to scroll down the page, and you  
23 just get white space after white space after white space  
24 -- something that I've seen on several sites is, all  
25 you've got is a bunch of empty space until you get down

1 on the bottom. And oh, great. I really wanted to waste  
2 my time scrolling down so I can read the copyright  
3 information. That's exactly what I wanted to do with my  
4 time today.

5 Some people after they see that white space will  
6 assume it's lazy coding. Poor site design. Just a  
7 really stupid advertiser. Something along those lines.  
8 They're not going to assume that there is something of  
9 use down there. The clues that are normally provided by  
10 a good e-commerce site are the ones that the  
11 representative from Dell Computer has mentioned. There  
12 is something to lead you down.

13 Something else that was just brought up to my  
14 attention regarding these sites, unless we're to assume  
15 that where it says FTC Fashion Jewelry Number 3 there's  
16 going to be a menu bar with scroll -- with buttons to  
17 take you to other sections of the site, frequently what's  
18 going to happen on a site of this nature is that the  
19 consumer will have scrolled down just a little to get rid  
20 of the logo up there to try to get a nicer fit on the  
21 screen of what they're looking at.

22 And so what we might be seeing here is not quite  
23 what a consumer might be looking at. It would just be --  
24 just a little bit enough down. So in this case you might  
25 see that.

1 MS. KOLISH: But you still down see it, because  
2 I have disclosures.

3 MR. MCKEE: You don't see everything.

4 MS. KOLISH: Yeah.

5 MR. MCKEE: You don't see the disclosure, but  
6 you see a little -- you would see something slightly  
7 different. And we do have to take into account the  
8 scrolling behaviors out there. But like I said, there  
9 are negative consequences to scrolling.

10 MS. KOLISH: That's right. Well, the FTC  
11 fashion jewelry is a one product retailer.

12 **(Laughter.)**

13 MR. MCKEE: All right.

14 MS. KOLISH: Dave, you're going to be next and  
15 then Kevin.

16 MR. CLAUSON: Could I ask the people controlling  
17 the screen on the left -- could you move it all the way  
18 to the top, please, because I think this illustrates a  
19 perfect point.

20 First of all, no disrespect to the people who  
21 designed the screens, but you won't make it as an  
22 information architect in our firm today.

23 **(Laughter.)**

24 MS. KOLISH: We'll keep our day jobs.

25 **(Laughter.)**

1                   MR. CLAUSON: Can you take the screen on the  
2 left and just bring it down just a little bit? Right  
3 there. Perfect. If you look between the left and the  
4 right, this is a classic case of what you might get on  
5 the same screen with different information designs or  
6 different technology issues.

7                   If the consumer on the left is reading that  
8 screen, chances are when they get to the end of the  
9 paragraph, they will not necessarily be inclined to  
10 scroll, because the information architecture of that page  
11 suggests that that is the conclusion. And if you look on  
12 the right, there is information even in more bullet form,  
13 but just the essential price of the diamond earrings  
14 there. On the other hand, in this case because there is  
15 no copy, you actually might be more inclined to scroll on  
16 the page on the right.

17                   So again, information architecture is science  
18 and design and creativity, and it has to have enough  
19 flexibility to be adaptable to the needs of the audience  
20 who this is being designed for. So in terms of whether  
21 someone is scrolling or not, I think the gentleman from  
22 Dell hit it right on the nose. If you want to convey  
23 more information, you need to suggest to the consumer in  
24 the easiest way possible that there is more here and it's  
25 your choice to go down more, if you would like to.

1                   But in design here, this would be just a very  
2 straightforward design. And on the left in particular,  
3 and on the right, I would want you to buy right now. So  
4 again, scrolling is a very nebulous science, and to  
5 assume that people scroll the same way or for the same  
6 reasons is a huge mistake.

7                   MS. KOLISH: Thank you, David. We accept your  
8 criticism about our design.

9                   **(Laughter.)**

10                  MS. KOLISH: All I can say in our own defense is  
11 that we borrowed liberally from sites that we visited.

12                  MR. CLAUSON: I would comment that I thought you  
13 did a very good job in showing the breadth of creativity  
14 on the web.

15                  **(Laughter.)**

16                  MS. KOLISH: Kevin?

17                  MR. DUKE: Kevin Duke from America Online. Some  
18 people have been talking about, you know, the reasonable  
19 Internet consumer or reasonable consumer. There is sort  
20 of one in between, and that's a reasonable computer user.  
21 And anybody that has used a computer or, you know, typed  
22 half a page in a word document, has seen a scroll bar.  
23 And we've seen that the appearance of a scroll bar is a  
24 good indication that there is more.

25                  And again, there's been discussion about, you

1 know, do people really go and reset their defaults and  
2 their browser or change their fonts. One thing people do  
3 do is they use -- they work in different size windows,  
4 and whether a scroll bar is even going to appear, depends  
5 on how big their window is. Whether you have, you know,  
6 expanded the window to take up the whole desk top, or if  
7 you, you know, are using the Jargon Multi Tasking and  
8 have two windows open, the windows are going to be much  
9 smaller and you're probably going to have to scroll  
10 through everything.

11 MS. KOLISH: Right. I know, Ron, you have a  
12 comment. I want to put up this other ad, ad 12. You can  
13 leave ad three up, if you want. Oh, no, just put ad 12  
14 up. This is the Quick DDRIP ad. And you'll see if you  
15 scroll down through this, I think as you would, because  
16 you want to see more about it, you'll see on the right  
17 hand side this endorsement from D. J. Blackhand, who is  
18 just a great guy and has won lots of games.

19 Somebody had mentioned earlier that other stuff  
20 -- well, John, you had. That if there is other  
21 information on the page -- scroll back up and let's go  
22 through it more slowly. If you're looking at stuff that  
23 is of interest to you, and all of a sudden you're in the  
24 middle of this endorsement, you might keep going if  
25 you're interested. If you stop before you read very much

1 of it, who cares. You don't have to know he's a paid  
2 endorsement.

3 But you're likely to get through the whole  
4 thing. Is this the difference -- an importance  
5 difference between this and ad three, the jewelry ad,  
6 where there is tons of white space?

7 MR. FRUEHE: Absolutely. Yes.

8 MS. KOLISH: Okay, good. Let's just put up ads  
9 19 versus 21 now. And this is, again, the Quick DDRIP ad  
10 with the pages of endorsement. As you saw from ad 12,  
11 that was the home page where there is a menu. You can go  
12 -- you can click to see what satisfied customers have to  
13 say about Quick DDRIP.

14 And we have in ad 19 that the disclosure is at  
15 the top. You've seen this one before. And on ad 21,  
16 just scroll, scroll, scroll. Keep going. Keep going.  
17 Keep going. You see there is a disclosure at the end.

18 And some people -- I think Phillip mentioned how  
19 if you had clicked into this page because you had said  
20 oh, I want to see what satisfied customers have to say,  
21 maybe you would notice this. But does everyone agree  
22 that at the top of the page, you know, it's good enough  
23 here?

24 I see a lot of heads being shaken yes. Okay.  
25 So we'll not talk about that. But -- no, you're not

1           agreeing, Bob?

2                   MR. GOLDBERG:  No, I was agreeing.

3                   MS. KOLISH:  Oh, you are agreeing.

4                   MR. GOLDBERG:  Absolutely.

5                   MS. KOLISH:  Okay.  Great.  What about in ad 21,  
6           where you have to go to the bottom.  Other people have  
7           said well, you know, at the top I'm not really ready for  
8           that information.  I'm not interested enough yet.  It's  
9           only going to be relevant to me later on in the process.

10                   Is this good enough where consumers have to  
11           scroll down, in this instance seven screens of  
12           information, the equivalent of four written pages?  I  
13           don't know whether you guys read these endorsements, but  
14           they're hysterical, I think.  So maybe you would read all  
15           four pages of them, but maybe you wouldn't.

16                   Is it good enough when it's at the end under  
17           these circumstances?  All right.  We'll let Ron, and then  
18           Elissa and then Phillip.

19                   MR. GOLDBRENNER:  There is a very old joke,  
20           older than my --

21                   MS. KOLISH:  Okay.  Identify yourself first.

22                   MR. GOLDBRENNER:  This is Ron Goldbrenner and  
23           I'm with the Promotion Marketing Association.  There is a  
24           very old joke about a boy scout who helps an old lady  
25           across the street, and she's beating him with the

1 umbrella all the way. But there's traffic and he  
2 perseveres and gets her to the other side. And he says,  
3 you know, I was just trying to help you. Why are you  
4 beating me with your umbrella? I was just trying to help  
5 you get across the street. And she said, because I don't  
6 want to go across the street.

7 So we have to keep in mind the consumers'  
8 preferences -- the consumers' choices. We're talking  
9 about a spectrum of making information available. Do we  
10 just make it available somewhere. Do we make it  
11 available at the right place, at the trigger point of the  
12 order point. Do we make it unavoidable so that he  
13 absolutely can't miss it no matter what. Do we make it  
14 that he has to assimilate it. He has to sign a statement  
15 saying I read this, and I agree, and I understand.

16 So there is a spectrum. And where you put a  
17 particular disclosure on that spectrum depends on how  
18 material it is and how important it is. You have to  
19 analyze what the particular disclosure is.

20 We seem to be ignoring that issue, and we seem  
21 to be talking about disclosures with the same weight.  
22 And that's not true, because you just said you have to  
23 scroll down seven pages. Well, we permit a lot of  
24 disclosures to be made at the end of very long ads, or at  
25 the end of very long direct mail presentations, or at the

1 end of commercials on television, or at the end of a  
2 radio commercial.

3 So it's not such an easy decision to say that  
4 just because it's at the bottom of a page it's wrong.  
5 And I'm not making a judgment on this particular ad. But  
6 again, I think when the Commission decides how to do  
7 this, you have to keep that spectrum of availability.  
8 Really it's a spectrum of information delivery. How  
9 important is this piece of information to be delivered,  
10 because that's going to determine whether it can go on  
11 the bottom, or right next to, or on the top.

12 MS. KOLISH: Okay. We're not trying to make a  
13 judgment about the bottom of an ad in all circumstances.  
14 We're trying to say, if this is something that consumers  
15 might typically encounter, does this work here, and to  
16 get people's reactions to that.

17 Elissa, I think you were next.

18 MS. MYERS: This doesn't work for me, because it  
19 is not readily noticeable, legible or audible and  
20 understandable, which I think is the value standard that  
21 was expressed earlier similar to the statement quoted  
22 from DMA. That statement comes from the ERA marketing  
23 guidelines for online marketers.

24 But right above that, we also have the statement  
25 -- and I want to come back to this, because I don't want

1 this to be lost in the discussion -- that another  
2 requirement that we make of our members, we require them  
3 to agree to respond to complaints, inquiries or refund  
4 requests promptly and courteously. So no matter how  
5 smart and prominent, if the consumer makes an error, it's  
6 the whole transaction that is at issue. What is the  
7 consumer experience in its totality.

8 MS. KOLISH: Elissa, you said that you didn't  
9 think that this was, you know, very noticeable. Is it  
10 because it's of the type -- if it were this same blue  
11 type appearing at the bottom, would you feel differently?

12 MS. MYERS: I actually don't think either one of  
13 these would prompt the average consumer to stop and read.  
14 I don't think it's the type. I don't think it's the  
15 placement. I think it's the graphic treatment. I think  
16 it's the architecture of the way the message is conveyed,  
17 to quote -- not to speak for in this instance, but to  
18 quote from what David said.

19 MS. KOLISH: Well, I think that's a good point.  
20 I mean, I've commented as we've been looking at these  
21 ads, that below the disclosure this, you know, AWESOME in  
22 capital letters and all those exclamation points always  
23 grabs my eye first and I always go to that. So I always  
24 had questions about whether people would notice that  
25 language, even in blue.

1                   But putting that aside for a moment, I'll let  
2 other people comment. I think Phillip, Dan and then  
3 Jerry.

4                   MR. MCKEE: Thank you very much. Phillip McKee  
5 from the National Consumers League. Ms. Myers, thank you  
6 for being very concise in stating why ad number 21 is  
7 bad. It's very difficult to read. You do have to scroll  
8 down. And I agree, of the two number 19 is the better  
9 one. Both of them, however, desperately need jazzing up.  
10 They need something that grabs the consumer's attention.

11                   In the case of ad number 19, the endorsement  
12 directly below it does grab your attention to a greater  
13 degree, but it is also a matter of context. The specific  
14 reason why ad 21, though, is difficult is the format of  
15 the page. A specific reason is simply that if you have  
16 to scroll down that many sections, you're unlikely to do  
17 it.

18                   If you're actually reading every last one of  
19 these endorsements of this huge list of testimonials, and  
20 you're believing every last one of them, you're going to  
21 get to the bottom of the page. And at that point it may  
22 not even be material to your decision. It truthfully may  
23 not. You've gotten incredibly excited at this point.  
24 Now you've got this thing. It's in slightly smaller  
25 type. It's a little bit -- it's less difficult to read.

1           Oh. Let me just go back up here. I want to get  
2 back to this one that said Awesome. I want to reread  
3 this section. The first one grabs your attention at  
4 least a little bit. It comes in at a point where you  
5 have the ability to make a decision. You know before you  
6 got to this page, like I said before, it's going to be  
7 testimonials. So you don't need to wait until after the  
8 testimonials to find out that this testimonials may not  
9 apply to your experience.

10           MS. KOLISH: Okay. So, all right, we take your  
11 criticism. We have to make it jazzier. All right. Then  
12 Dan?

13           MR. JAFFE: Dan Jaffe, Association of National  
14 Advertisers. I think we get back to something that Bill  
15 MacLeod said earlier, which was we are again going back  
16 into a design approach. It's one thing to say that this  
17 would be a nicer way to make something even more clearer  
18 and conspicuous, and jumping from that to saying that's  
19 how you have to do it.

20           As I have understood how the FTC has been doing  
21 its business in all media, it's not to say there is only  
22 one way to do this, but you have to have a reasonable  
23 consumer. And there's been some discussion that we  
24 should now have the most vulnerable consumer become the  
25 test for the reasonable consumer. And I hope we're not

1 going to suddenly change that, because that would be a  
2 major backtracking for the FTC. We went through those  
3 battles, as I'm sure some of you remember.

4 MS. KOLISH: That was expressed by somebody  
5 else.

6 MR. JAFFE: That's right. I understand. I'm  
7 just saying that there have been some suggestions to move  
8 from the reasonable consumer to the most vulnerable  
9 consumer. And I think that would not be a good idea.

10 But also I think that all of these examples  
11 actually understate the problem, because you can have --  
12 you're having a single trigger term and a single product.  
13 And it's not at all clear that that's how it would have  
14 to be. You could have a pearl, a diamond and a third  
15 type of jewel on there, all of them having a trigger term  
16 involved with them.

17 If you're going to demand that they all have it  
18 on the top, you're suddenly going to have three  
19 disclosures on the top. Now, the question is, are some  
20 of those disclosures going to get lost, or is the  
21 consumer going to say, no, I'm not going to look at that  
22 because there are too many. I'm only interested in one  
23 and I can't find it right away.

24 So I think we've got to be very careful about  
25 not confusing design standards with performance. And I

1 think it's useful to talk about some of the kinds of  
2 things that you would think about. I think we're then  
3 drifting to say, well, you had better jazz it up, because  
4 if you don't jazz it up, it's not clear and conspicuous.  
5 And I'm not sure that that -- at least we would not  
6 believe that that is necessarily accurate.

7 I think we could find some that I would at least  
8 say I don't think are clear and conspicuous that the  
9 reasonable consumer would find. But I certainly would  
10 like to have some data that would show whether in fact my  
11 instinct -- my gut -- is actually accurate as to how  
12 consumers operate in the real environment. And I think  
13 we will all start working to try to give you some of  
14 that.

15 But I don't think it's so easy, even with this  
16 one, to be sure that people wouldn't find it and get the  
17 information you need.

18 MS. KOLISH: Okay. Just to make sure everybody  
19 is on the same page, Dan, when you're using trigger  
20 terms, you're meaning here like when there is an  
21 endorsement, it triggers the need to have a disclosure?

22 MR. JAFFE: Or three quarters, you know.

23 MS. KOLISH: Yes. Have a disclosure of a  
24 typicality --

25 MR. JAFFE: Or imitation.

1 MS. KOLISH: -- or a disclosure of the fake --

2 MR. JAFFE: Imitation pearl.

3 MS. KOLISH: Okay. I just wanted to make sure  
4 everyone is on the same page.

5 MR. JAFFE: Or you can have an ad where you  
6 would have five or six of these things, and of course you  
7 have the privacy terms, and you might have warranty  
8 terms. If you get into a car -- I mean, just the one  
9 product alone may have a whole series of things that you  
10 might demand about, you know, a very short little  
11 disclosure. But each one of them may have some trigger  
12 term that you have to go look to, and then you certainly  
13 are going to probably want to jump site, you know, by  
14 going to somewhere else to get the information.

15 If you try to put it all on one page, that's  
16 going to be a very long page. You're going to be  
17 scrolling for hours.

18 MS. KOLISH: Yes. We recognize and we're trying  
19 -- we're basically doing single products here. It's not  
20 a real web site. We thought it would be impossible to  
21 have a discussion that was not chaotic if we did that.  
22 So we understand.

23 MR. JAFFE: Well, I'm saying, what you're driven  
24 to, is if you look at the simple things and you say oh,  
25 we put it up on the top, isn't that nice. But if you had

1 multiple trigger terms and they all had to be on the top,  
2 you would be in a very different situation.

3 MS. KOLISH: Right. We understand that.

4 MR. JAFFE: So you may be led into a simple  
5 situation and come to a conclusion that it doesn't work  
6 in the world that advertisers deal with, because they  
7 have very, very different products.

8 MS. KOLISH: That's right. I think we're just  
9 trying to talk about does being at the top help it make  
10 it more conspicuous, and then you would still have other  
11 things that you would have to look at.

12 MR. JAFFE: Right.

13 MS. KOLISH: But, Dan, would you -- is your view  
14 that you wouldn't conclude that in ad 21, that this  
15 disclosure at the bottom is ineffective without a copy  
16 test?

17 MR. JAFFE: Well, I might conclude it, but I  
18 would certainly like to have much more information about  
19 how people read. I think that this is an ad that  
20 certainly would raise questions and you would have to --  
21 you know, I think someone would then maybe have to say,  
22 well, yes, they will find it and here's some data to show  
23 it.

24 But all of us are, I think, suffering a little  
25 bit, except for some of the companies here who may have

1 proprietary information, as to exactly how the average  
2 consumer works. And that's not so surprising, as we've  
3 only been selling on the net for what, four years?

4 MS. KOLISH: Exactly. Thank you. Jerry?

5 MR. CERASALE: Jerry Cerasale of the DMA. I  
6 wanted to -- Dan took some of the points I was going to  
7 make, one being that I think his idea of taking a look at  
8 multiple triggers on the same page I was going to raise.  
9 And I think it raises the issue that we all know that  
10 these rules and these disclosures are going to apply to  
11 the net, and that you're stuck, because we're so young  
12 here in e-commerce on the net, to looking more and more  
13 at a case by case basis for the FTC to take a look at  
14 things.

15 And one of the things, if you put everything at  
16 the top, then it becomes that every disclosure is always  
17 the first thing. It becomes -- as Phillip said, I have  
18 time. It becomes automatic that I don't look at the top.  
19 Your attempt to try to make something obvious and  
20 unavoidable makes it easy for me to avoid. I will  
21 clearly click down past it.

22 If every disclosure is always at the top, the  
23 consumer who doesn't read it all -- and you're trying to  
24 protect them to make it so they will read these things or  
25 have the opportunity to read it -- will automatically go

1 elsewhere on it because of time.

2 So I think that sitting right now, trying to  
3 look and think about how you want to dictate copy and  
4 where it's going to go and dictate design, we're way too  
5 soon and the consumer is going to find -- is going to  
6 react exactly in the opposite that you want the consumer  
7 to react potentially.

8 MS. KOLISH: Thank you. Jeff, you're next.

9 MR. RICHARDS: Jeff Richards, Internet Alliance.  
10 I just want to quickly echo this, because it is so  
11 important. The first time I used a scroll bar was on a  
12 Macintosh in 1984. It was not in the Internet  
13 convention. I mean, a scroll bar -- all the navigation  
14 tools we're seeing up here and that we're talking about  
15 as if they are here forever, in fact are a product of the  
16 moment.

17 Scroll bars have been around for a long time,  
18 because they work pretty well for a whole lot of people  
19 in a lot of computing environments. But there are lots  
20 and lots of things on the horizon to replace navigation  
21 tools like scroll bars.

22 So I think this is really valuable to have the  
23 discussion. I do get concerned that we're talking about  
24 things which are destined to go away or radically change,  
25 and not very long from now.

1 MS. KOLISH: And that's a good point. I mean,  
2 one of the issues that we talked about among ourselves  
3 was the fact that on different platforms, such as web TV,  
4 you won't have a scroll bar and you might use Tab. And  
5 in that platform, would it be even more difficult or less  
6 likely that someone would get to the bottom of the web  
7 page? Or on your pager, yes.

8 Okay. And then Mark, you're next.

9 MR. UNCAPHER: Yeah. I wanted to drill down a  
10 little bit on this particular example, and of course  
11 we're dwelling on placement with one particular page. I  
12 would think that the sort of average Internet consumer  
13 might expect that at some point with the variations and  
14 sort of specifications of what would work, that there  
15 would be a hyper link that would allow a consumer to get  
16 additional information to find out whether their  
17 equipment or their particular configuration would work  
18 well. And this, you know, would be part of the selling  
19 process to be able to get that additional information.  
20 And that a consumer that wasn't able to do that would be  
21 less likely to buy.

22 So again, we shouldn't just be looking at one  
23 page and where it is on the page, but understand the  
24 broader context of the availability of information to  
25 provide additional information, which is both in the

1 advertiser's and in the consumer's best interest.

2 MS. KOLISH: Right. Bob and then Elizabeth.

3 MR. GOLDBERG: Bob Goldberg with the Business  
4 Technology Association. I'm concerned when I hear that  
5 if you're using multiple triggers, it might be an  
6 opportunity to delay or diminish the disclosures that are  
7 necessary. I would hate to get on a ride at an amusement  
8 park, which says if you're pregnant or have a heart  
9 condition you shouldn't ride, and then get to the end and  
10 find out four other conditions that you shouldn't have  
11 gotten on, either.

12 **(Laughter.)**

13 MR. GOLDBERG: I am not as concerned with those  
14 people here who suggest that it becomes boilerplate at  
15 the beginning and consumers avoid it. That's a  
16 consumer's choice not to read it and avoid it. I'm more  
17 concerned with those consumers that never get to it and  
18 never see it, and as Mr. MacLeod said earlier, don't  
19 stumble upon it.

20 I am concerned about any site that might start  
21 off on the top that says, fire and you have to scroll  
22 down to find out where the fire is, and then hyper link  
23 to find out where the fire extinguisher is. So I think  
24 once we have these triggers, we should make these  
25 disclosures.

1                   And I think the colleagues on either side of me  
2                   are about to hit me.

3                   **(Laughter.)**

4                   MS. KOLISH: Thank you, Bob. Well, I think  
5                   we're going to --

6                   MR. GOLDBERG: But not in a room full of  
7                   lawyers.

8                   MS. KOLISH: Oh.

9                   **(Laughter.)**

10                  MS. KOLISH: Elizabeth, you're next. And she  
11                  needs a microphone so she can speak into it and identify  
12                  herself.

13                  MS. WANG: Elizabeth Wang from DoubleClick.  
14                  Expanding on a few of the comments that have been raised  
15                  so far, one thing that is clear is that in the two case  
16                  studies we're looking at, it's very straightforward in  
17                  that you see the product. You get the pitch. You can  
18                  buy it right away.

19                  Standing back a moment looking at the entire  
20                  context of how web -- how the web has helped marketers  
21                  market, the fact is that there is more than one source of  
22                  information. So one thing that in, say, the Dell context  
23                  that Mark raised, in this case it may be that -- well,  
24                  this is actually perhaps not the perfect case. But you  
25                  could have a toll free number and we can call up and find

1 out for your particular computer configuration what the  
2 speed might be. And so it's not really just relitigated  
3 to the hyper links or the scrolling and all that.

4 And also, in a much bigger situation where you  
5 couldn't click and buy online, at least not easily, is in  
6 the car situation where you are getting a lot of  
7 information from a lot of difference sources, not just  
8 what is on the web. You also probably have brochures,  
9 and you talk to friends and all that.

10 So I think that in terms of what the disclosure  
11 is in getting information to the consumer, it's not a  
12 uni-dimensional experience for any consumer, even the  
13 most vulnerable. I think people really do look to people  
14 they know and all that. And so in terms of getting the  
15 disclosure up front, I think we should make it -- we  
16 should view it in terms of what the consumer receives  
17 from other media as well.

18 MS. KOLISH: Okay. We're going to go to Bill  
19 and then Phillip, and then we're going to go to Jodie,  
20 and then we're going to go to a break.

21 MR. MACLEOD: Elaine, you said two words which I  
22 think might be the most important words that were said in  
23 the last several minutes, and that was copy test. And I  
24 think that in the situations that we're looking at here,  
25 it is very hard for us to tell whether or not the

1 disclosure on the top is any better than the disclosure  
2 on the bottom, or how much better it is if it is better.

3 And the question in the end is going to be, what  
4 did consumers think after they went away from this web  
5 site. If the FTC is going to haul some advertiser into  
6 court, the question is not likely to be, was this a  
7 conspicuous disclosure. The question is going to be, did  
8 consumers take away the proposition that their  
9 experiences may vary.

10 And I would be very surprised, no matter how  
11 much your eyes are attracted to the word awesome in the  
12 first one, that you will ever have any advertiser in  
13 front of a judge with that disclosure on top of the  
14 awesomeness. Would you be a little more intrigued, and  
15 would we have a little more of a fight, if we had  
16 disclosure number two there? Maybe so.

17 But I don't know what people are going to take  
18 away from reading these endorsements themselves. They  
19 might find after reading the first three that none of  
20 these apply to me. They may scroll to the bottom, and  
21 they may not scroll to the bottom. But they may have  
22 taken away the very message that that disclosure is  
23 intended to impart.

24 So it is very hard sitting here, without the  
25 benefit of the research that you mentioned, really to

1 give a clear answer to whether number 21 does the job.

2 MS. KOLISH: Now, that's a good point, and of  
3 course copy tests are always valuable. But in our  
4 experience we find that advertisers would like some clues  
5 or suggestions about what things are likely to enhance  
6 the effectiveness of a disclosure, because they don't  
7 always want to do copy tests. They like to have a little  
8 bit of knowledge that these things have a better chance  
9 of working than other things. Otherwise, you do have to  
10 go to a copy test.

11 And of course, if an advertiser wants to copy  
12 test their ads all the time, we think that's great and we  
13 would encourage that. But we doubt that's what they  
14 always want to do.

15 Phillip?

16 MR. MCKEE: Once again, something that keeps  
17 coming up and that many people have brought up, we're  
18 dealing with a different situation here. We're not -- we  
19 do not have a simple printed page, so top and bottom can  
20 sometimes be confusing. And in regards to the particular  
21 ad number 19 and those that are similar to it, it becomes  
22 very confusing.

23 Mr. Goldberg brought up a very good point. It's  
24 the trigger word that really makes a difference. If the  
25 disclosure is nowhere near the trigger word but very

1 prominently displayed, it's not going to modify the  
2 trigger word. People aren't going to understand, for  
3 example, if they see a disclosure and they haven't yet  
4 gotten to something that explains why.

5 In the case of number 19, one of the reasons why  
6 the disclosure at the very top of the page works better  
7 than the disclosure at the bottom is the trigger for the  
8 disclosure was when they clicked on what customers say.  
9 So the instant after they had clicked on the desire to  
10 read an endorsement, they are given the disclosure  
11 concerning endorsements.

12 That's why in regards to this particular page,  
13 the disclosure at that absolute top most part is  
14 important. If there is a very long page of legalese, for  
15 example, such as an acceptance agreement which many of us  
16 are familiar with from installing software, and you need  
17 to make some kind of explanation of a term that appears  
18 in the last paragraph, placing it at the first page of a  
19 31 page document is not necessarily going to be the best  
20 place for someone not trained to be looking for these  
21 items.

22 So it does need to be near the trigger word, and  
23 that does need to be taken into account, and it's not  
24 simply a matter of saying top, bottom, middle. Where is  
25 the trigger word? What is the context and how is the

1 consumer going to be navigating?

2 MS. KOLISH: And when you mean trigger here,  
3 you're talking about the claim that requires that a  
4 disclosure be made?

5 MR. MCKEE: Yes. And in this case it's not just  
6 the claim, but the fact that you're moving to the claim.  
7 We also have to consider that in the realm of the  
8 Internet, you are navigating around. You're moving.  
9 It's not simply a matter of flipping pages. You're  
10 jumping back and forth between lots of different  
11 sections.

12 It requires an almost a four dimensional map of  
13 a site. You have to consider not just placement in  
14 relation within a page, but also relationship between  
15 pages and the way in which people move through time  
16 looking at pages. It's a very difficult process to  
17 design a good web site. It's why it's such a major  
18 headache. And in this case, it's the clicking on what  
19 customers say. You're looking for an endorsement. Let's  
20 get the disclaimer on endorsements.

21 MS. KOLISH: Okay. Ron, I know you want to  
22 speak. We're going to go to Jodie first and then we're  
23 actually going to go to a break to try at least to stay  
24 on schedule a bit.

25 MS. BERNSTEIN: Thanks, Elaine. I just thought

1 that I might close this section with a couple of remarks.  
2 First of all, I myself have found this a very informative  
3 and helpful discussion.

4 And just to go back to what we on the staff were  
5 trying to achieve here, I think most of you know that for  
6 the most part the Commission has already applied the law  
7 to Internet in its law enforcement effort. We brought a  
8 number of cases. They have not raised questions or  
9 issues about whether there is a significant difference  
10 between the new technology and the way the laws have been  
11 applied.

12 In these particular areas in rules and guides,  
13 and especially where there is a clear and conspicuous  
14 disclosure requirement where it says written or some  
15 other kind of application, those to us were perhaps once  
16 where it did raise issues.

17 So we were not talking about revising the law.  
18 And I want to make that point, because we're not talking  
19 about revising the definition of the reasonable consumer.  
20 That's not before us at all. Nor are we talking about  
21 changing the basic direction of law enforcement that the  
22 Commission has taken over the years and its flexible  
23 approach.

24 But we are trying to learn together whether in  
25 these particular -- and they're fairly narrow instances

1 in the greater sense of things. Whether we can inform  
2 each other so that the Commission and the staff  
3 particularly will be better able to continue, I think,  
4 the Commission's longstanding ability to understand that  
5 advertising is critical to the market and informative  
6 advertising, and always recognizing the ability of the  
7 advertizer to creatively engage the consumer who wants to  
8 make a purchasing decision, to continue that.

9 So I think the rest of the day will be very  
10 informative and helpful to us, if we can try to really  
11 focus on how we can best continue the kind of flexible  
12 approach to application of existing laws to the new  
13 technology. We really are not -- and probably a lot of  
14 people here would like to think, well, we could throw out  
15 a lot of the consumer protection laws. But we're really  
16 not going to do that today, and we're really not talking  
17 about being hauled into court either, although, of  
18 course, if an opportunity arises.

19 **(Laughter.)**

20 MS. BERNSTEIN: So feel comfortable, feel free,  
21 and continue to work with us as you have in the past, to  
22 keep us as informed as we can be so that we don't make  
23 mistakes in applying longstanding Commission law to these  
24 new areas. We think it will be a great success, the day,  
25 and the Internet as well, if we do that.

1                   Okay. You get to have a break now.

2                   MS. KOLISH: The voice of wisdom. Yes. Please  
3 come back at 10:45.

4                   **(Whereupon, a brief recess was taken.)**

5                   MS. KOLISH: Okay. While you're still taking  
6 your seats, let me just say that the downstairs room  
7 reports they can hear well, but that they would like it  
8 if people would refer more often to the ad that they're  
9 looking at by number in the upper right hand corner.  
10 Because they can't see them all, but they all have black  
11 and white copies so they can refer to them.

12                   So I try to do that at the outset, but a lot of  
13 times the commentators might want to be a little bit more  
14 specific about which ad they're commenting on at the  
15 time. A few more seats have opened up up here if people  
16 want to move. Not very many, but a few.

17                   As we begin the next part, I just want to repeat  
18 something that Jodie was talking about, or draw some  
19 greater emphasis to it. Which is that although we're not  
20 trying to judge ads here saying this is good, this is bad  
21 per se. You have to do it this way. You can't do it  
22 that way.

23                   What we would think would be helpful is if  
24 people can do some comparing and contrasting of what  
25 works better, or is likely to work better, understanding,

1 of course, we're not doing this in isolation when we  
2 would actually investigate an ad that we would consider  
3 lots of factors. But I think it may be possible to say  
4 well, gee, I think people can pretty much agree that this  
5 is less good than something else. Maybe not. But if  
6 possible, I would like to get some kind of specific  
7 comments out on those points.

8 So let's go to hyper links. We're going to be  
9 looking at ad four. But the reason we want to talk about  
10 hyper links is because you all want to talk about hyper  
11 links and what a great way it can be used to present  
12 information in a positive way. And we think that there  
13 is lots to discuss about that.

14 So we have prepared some ads using hyper links  
15 that we think will provoke some discussion about whether  
16 they can be an effective tool, and if so, under what  
17 circumstances. So let me put a few questions out on the  
18 table to sort of frame the rest of the discussion. You  
19 don't have to answer each of these, but just sort of keep  
20 them in mind.

21 And one question is, are disclosures that appear  
22 on another that is the link to page close enough to the  
23 claim to be effective and qualifying it to make certain  
24 that the net impression changes appropriately? And  
25 another question is, what factors affect whether

1 consumers will actually click on a hyper link? There may  
2 be lots of different issues to explore there.

3 So let's start with ad number four, which is,  
4 again, an ad for the three quarter carat diamond  
5 earrings. And in this instance you'll notice that three  
6 quarter carat is underlined and represents a hyper link.

7 And sort of a preliminary opening question I  
8 have for you all is, is a hyper link through a simple  
9 underlined word something that most consumers know to  
10 click on, and if so, would this hyper link technique be  
11 sufficient to put consumers on notice that important  
12 information that qualifies the claim is on the link to  
13 page? Or could it reasonably be construed as general  
14 information that an advertiser wants to provide about --  
15 as Dave said -- what diamonds are, and what mine they  
16 came from? Something that could be interesting, but not  
17 important.

18 Does anybody want to start with some views? A  
19 whole bunch of people. No, one. Jean Ann and then  
20 Phillip and then Jeffrey and then Don.

21 MS. FOX: Jean Ann Fox, Consumer Federation of  
22 America. I'm here representing all the unsophisticated  
23 Internet browsers in the world. And I will tell you,  
24 that when I looked at this ad, I didn't even know that  
25 was a hyper link. It wasn't obvious to me. And I don't

1 think that having the key disclosure on a separate page  
2 is sufficient notice to customers. And there is no  
3 incentive there for a consumer to go to the link, even if  
4 they recognize that an underlined blue word meant there  
5 is more information here. There is nothing to lead you  
6 there.

7 MS. KOLISH: Thank you. Phillip?

8 MR. MCKEE: I would like to echo some of what  
9 Jean said, but specifically I was wondering if the people  
10 controlling the screens could also bring up on the third  
11 unused screen ad number 13? I would like to reference  
12 that real quick as well.

13 MS. KOLISH: Now, aren't we interactive here?

14 **(Laughter.)**

15 MS. KOLISH: Go ahead. Put up ad 13.

16 MR. MCKEE: Okay. If you will scroll down to  
17 where the disclaimer is concerning this ad? Thank you.  
18 When you have the disclosure and you're having it as a  
19 hyper link, as you said, the key issue is, does the  
20 individual know that this is going to lead to a  
21 disclosure of some sort.

22 In this particular instance, frequently a link  
23 links traditional information. And there are many  
24 occasions when an entity, be it an individual or a  
25 company, is mentioned and there is a link, that link does

1 not lead to a disclosure concerning that individual or  
2 company. The link leads to that individual's or  
3 company's web site.

4 I have to admit that the first time I saw this  
5 ad, I saw a link there --

6 MS. KOLISH: Which ad?

7 MR. MCKEE: On number 13. I actually thought  
8 that the link was going to lead not to a disclosure  
9 statement, but to something concerning D. J. Blackhand.  
10 I didn't know whether that was a company that D. J.  
11 Blackhand runs, whether it's his personal home page, or  
12 whether it's further additional information concerning  
13 his endorsement. Is it a longer endorsement? Is it the  
14 full text of his letter? It may even be a link over to  
15 the wrath of Thor. It's not necessary -- it doesn't  
16 necessarily state that because he's got a link there that  
17 it's a disclaimer.

18 If you're going to use that kind of method,  
19 there has to be something that definitively states to the  
20 consumer that this link leads to a disclaimer. And if  
21 you're going to have this additional information sitting  
22 right there saying this link leads to a disclaimer, you  
23 might as well have the disclaimer right there the way  
24 it's done in ad number --

25 MS. KOLISH: Phillip, I think you're preceding

1           our script here.

2                   MR. MCKEE:   The way it's done on ad number 12.

3                   MS. KOLISH:   Okay.  We'll take some other  
4           comments.  We can take down -- shall we take down -- oh,  
5           leave 13 up for a minute, although we actually were going  
6           to use that ad for that purpose at a later time.  But  
7           sorry.  That's okay.  That's okay.  We won't have to do  
8           it then.

9                   All right.  The order was Jeffrey, John, Eric  
10          and then Renee.

11                  MR. RICHARDS:  Jeff Richards, Internet Alliance.  
12          I just want to back up for one second.  We're focussing  
13          already on hyper links as in this case purple underscored  
14          objects on a screen we're looking at.

15                  MS. KOLISH:   Okay.  That is intended to be blue,  
16          except it has already been clicked on.

17                  MR. RICHARDS:  And because I'm somewhat  
18          colorblind, it looks different to me.  And so what I  
19          would just like to say here is that hyper links are not  
20          only ways of getting to disclosures.  Hyper links are the  
21          fundamental basis of the worldwide web.  It's the break  
22          through in thinking that Tim Bruners Lee had and that  
23          we're all utilizing today.

24                  It was preceded by the whole notion of hyper  
25          text, which is -- the inventors of that we're not even

1 remembering today. But the whole idea is that we can be  
2 linked worldwide to each other and to information and  
3 make use of this.

4 And what we've seen in the consumer explosion on  
5 the Internet is exactly that. It's everyone's use and  
6 excitement about that. So I just wanted to frame -- just  
7 remind us for a moment here that we're talking about that  
8 which differentiates this medium from the paper I'm  
9 holding in my hand. And as we talk about hyper links,  
10 let's see that as a fundamental part of the architecture.  
11 Thanks.

12 MS. KOLISH: Good point. John?

13 MR. FRUEHE: This --

14 MS. KOLISH: Say who you are.

15 MR. FRUEHE: John Fruehe, Dell Computer. This  
16 particular example is very clear in what it's trying to  
17 indicate, which is that there is more information about  
18 three quarter carat diamond earrings behind that. Now,  
19 what I would assume a general consumer looking at that --  
20 if the word diamond were the one that was hyper linked as  
21 opposed to the three quarter carat, it generally would  
22 indicate that here is some information about diamonds.

23 The fact that three quarters carat is  
24 highlighted, or even if you just had just the word carat,  
25 these would all be ways to help identify that there is

1 something very particular about that piece of the  
2 information. Again, if earrings were the one that was  
3 hyper linked, you wouldn't necessarily assume that you  
4 were going to find some information about the weight of  
5 the diamonds.

6 But because that particular one -- and as  
7 Phillip pointed out, looking at the name of a person  
8 there is already an indication that is building in  
9 consumers' minds that this is information about the  
10 person or a mail to for that person. So what you're  
11 seeing is, you're actually categorizing it and  
12 highlighting one particular piece of information that  
13 you're telling the consumer there is more behind this.  
14 This is an area to go look.

15 And another point about hyper links is that the  
16 most important piece is consistency. So throughout the  
17 site, one of the most helpful things you can do for  
18 consumers is to be consistent with your links, always  
19 using the same types of visual indicators, such as a blue  
20 underline or in our case, a small yellow arrow that we  
21 use to indicate a hyper link.

22 These are things that when we test with  
23 consumers, it becomes very easy for them to identify and  
24 say, yes, this is clickable. That is not. And quite  
25 often we'll have a page. We'll give them a piece of

1 paper that is not a web site, and we'll ask them to  
2 circle the things that are clickable on the page. So  
3 from a hyper link standpoint, if you are consistent,  
4 consumers generally would pick out all of the things that  
5 are clickable on the page.

6 MS. KOLISH: Well, John, let me ask you this.  
7 You said because the three quarter carats is underlined  
8 rather than diamonds or earrings that, you know, it's  
9 more likely to draw attention. But what if consumers  
10 would think, oh, that's going to tell me there is a  
11 hundred points in a carat or, you know, it's a fifth of a  
12 gram, blah, blah, blah. I already know that. You know,  
13 I already know what a carat is.

14 And so they're not going to click on it, because  
15 they're going to think it's just sort of generalized  
16 information about carats that they already know, as  
17 opposed to saying, this diamond earring isn't necessarily  
18 75 points. It could be, you know, as few as 70 points.

19 MR. FRUEHE: Well, how in the real world then  
20 does somebody who already has that predisposition to say  
21 that I understand all about carats. How are we informing  
22 them, then?

23 MS. KOLISH: Well, in print ads and stuff people  
24 have to say on the page that it's not exact, and they're  
25 allowed to reference charts about the diamond weight

1 ranges to another place. But the question is, they have  
2 to do it so that it's, you know, clear and conspicuous.

3 And we're saying this is hyper linked as clear  
4 and as conspicuous as having it on the same page or not.  
5 But I take your point, and we will take on some other  
6 questions and then we'll move to some other ads where we  
7 can explore different types of links.

8 Eric is next.

9 MR. WENGER: Hi. Eric Wenger from the New York  
10 Attorney General's Office. And I'm sure that this is  
11 clear, but I have to make it very clear that these are  
12 just my views that I'll be giving here and I don't  
13 necessarily represent the opinions of my office.

14 I think there are a number of questions that are  
15 raised by this particular ad, and even though it's a  
16 simple ad, there are a number of things that are quite  
17 complicated here that we need to address. One of them is  
18 the point that was raised by Jean Ann Fox. Is it clear  
19 at all that this is a hyper link. And I think that many  
20 consumers might not recognize that this is a hyper link.  
21 So that's the first threshold issue that needs to be  
22 addressed.

23 Let's assume that people do know that this is a  
24 hyper link. The next question I would ask, since there  
25 is a specific guide on point here, does this hyper link

1 -- or does this disclaimer appear in a way that is clear  
2 and conspicuous. And I don't think that it does.

3 If you read the guide, it specifically requires  
4 that the language weights may vary must be within the  
5 bounds of the ad itself, and then there can be a  
6 reference to the actual ranges. And I think that that  
7 seems to be an appropriate use of a hyper link, if there  
8 was some sort of disclaimer that said that weights may  
9 vary. Click here for more -- and we see this in later  
10 examples, so I don't want to jump ahead.

11 And let's assume, again, that there is no guide  
12 on point. Then you have a question about whether or not  
13 a hyper link can be a clear and conspicuous disclosure  
14 under section five itself. And I think in this case it  
15 seems to me that it would not, because it does not  
16 provide any hint about what the type of information that  
17 will be disclosed if you click on the link is.

18 And so in that case, you're going to have to  
19 look at what claims would be required to be made. And  
20 again, we're assuming the absence of guides here. And  
21 that's a facts and circumstances based analysis, I think.  
22 If the disclaimer is long, then probably to give some  
23 hint about what you'll see if you click on it and then  
24 jumping you to the details may be appropriate.

25 But in another circumstance where the

1 information that needs to be disclaimed is rather short,  
2 then as Phillip pointed out, maybe there is no real need  
3 for a hyper link. And in that case, the only purpose  
4 that a hyper link can serve is to make the disclaimer  
5 less prominent and more avoidable. And if you look at  
6 those standards that the Commission has laid out as being  
7 factors that it would analyze in determining whether or  
8 not a claim is clear and conspicuous, that might lead you  
9 to determine that a particular disclaimer is not clear  
10 and conspicuous.

11 MS. KOLISH: Thank you, Eric. Renee, you're  
12 next.

13 MS. BARUCH: I think the thing that we're all  
14 speaking of here is the concept of accurate labelling of  
15 hyper links. If you have an accurate label for the hyper  
16 link, then that should suffice to advise consumers of  
17 what they might find.

18 For example, in -- I guess it's ad four where  
19 the three quarter is the hyper link. If instead of  
20 underlining three quarter, you had under it a small  
21 button that said "about our weights," or something like  
22 that, that would be a much more accurate label for this  
23 particular hyper link.

24 There is another issue as well, and that is the  
25 issue of a mandated hyper link. If you really, really

1 want to have a safe harbor and want to be assured that  
2 your consumer has seen the information there, you could  
3 actually create an unavoidable hyper link that the  
4 consumer would have to go to.

5 I don't think that that's what most people would  
6 want to do, but nevertheless it's there as an option.

7 MS. KOLISH: Okay. Wendy, and then we'll move  
8 to show some other examples.

9 MS. SCHMIDT: I wanted to respond to the --

10 MS. KOLISH: Oh, state your name.

11 MS. SCHMIDT: Oh, I'm sorry. Wendy Schmidt from  
12 Federated Department Stores. I wanted to respond to the  
13 point that links might be used to obscure or sort of hide  
14 information. And actually I think they can be used --  
15 actually to highlight information, it will allow you to  
16 give it in one place.

17 I know on our web site if you had a disclosure  
18 on diamonds, there might be multiple places where you  
19 wanted to make that disclosure. If you have it in one  
20 place, number one, it can provide more information in a  
21 more user friendly format; number two, you'll have  
22 consistency throughout the web site, and number three,  
23 having a button or something like the three quarter carat  
24 underlined, if you've trained your consumers to know what  
25 that means, it can actually be a easier or more prominent

1 way to give the disclosure.

2 And if you think about print media when you're  
3 doing the jewelry guides, oftentimes you would have an  
4 asterisks. And the customer can always decide whether  
5 they're going to look further down the page to find the  
6 disclaimer that carat weights may vary, and two, whether  
7 they are actually going to look at the chart. We can't  
8 necessarily control what a consumer does, and I think we  
9 need to make sure we're maintaining comparability between  
10 the print.

11 MS. KOLISH: Thank you, Wendy. Let's pull up  
12 ads five, six and seven. Here we have the same jewelry  
13 ad, the three quarter carat diamond earrings, but we have  
14 three different ways of presenting the hyper link. This  
15 one I think says jewelry disclaimer, and this one says  
16 click here for more details on the jewelry you are  
17 purchasing -- and that's in ad six. And ad seven says,  
18 diamond weights are not exact. Click here for weight  
19 ranges.

20 And Renee raised the point that accurate  
21 labelling of a link might make a difference and came up  
22 with her own example. And, you know, here are three  
23 examples of different kinds of labelling of a link.

24 Does anyone have any views? Are these more  
25 effective than ad four, which just had three quarter

1       carat underlined, to put people on notice? Do any of  
2       these links -- do they vary in their effectiveness? What  
3       do people think the word disclaimer means? Is it just  
4       legalese? Does click here for more details mean oh, it's  
5       information about sales tax and delivery, blah, blah,  
6       blah?

7                So, you know, here are some questions I'll put  
8       out. And we already have hands up. Jo, Eric and then  
9       Phillip.

10               MS. REED: Jo Reed, AARP, with allergies. You  
11       actually raised the question earlier what people might  
12       interpret from the hyper link in terms of whether it was  
13       just going to be general information about jewelry or  
14       actually a disclosure about something they needed to know  
15       in terms of the claim being made.

16               And I think that being in Jean Ann's  
17       constituency of unsophisticated types, I would definitely  
18       require that diamond weights are not exact in number  
19       seven line of disclosure. I want to go there to learn  
20       more about it.

21               And that goes back to my earlier comment about  
22       vulnerability. I was not suggesting that FTC's approach  
23       to the reasonable consumer was wrong, but rather that in  
24       looking at who a reasonable consumer is, we have to  
25       recognize that there are people new to cyber space. And

1           they can be quite reasonable, but need more information  
2           in order to be well protected.

3                     MS. KOLISH: All right. Thank you, Jo. And  
4           then Phillip, I think.

5                     MR. MCKEE: I think Eric was next.

6                     MS. KOLISH: Oh, I'm sorry. I was out of order.  
7           Eric and then Phillip and then Mark.

8                     MR. WENGER: Eric Wenger, again, from the New  
9           York Attorney General's Office. I think that if you  
10          compare five, six and seven, I would like to go back to  
11          the framework that I used before. Five does a better job  
12          of explaining that something is a hyper link, because the  
13          idea that it's a disclaimer probably would put somebody  
14          on notice that there might be some information that  
15          they're going to click to that relates to the jewelry  
16          claims in the ad.

17                    But it does not, I don't think, comply with the  
18          jewelry guide, because it doesn't provide the information  
19          regarding weights may vary. And again, under a section  
20          five analysis, I think you would have a similar  
21          conclusion.

22                    Six pretty clearly puts you on notice that you  
23          can be clicking on something and that it is a hyper link,  
24          because it has that language, click here. And it depends  
25          -- under the 17D, I think again it doesn't make the

1 weights may vary disclaimer. And if that rule did not  
2 exist, then you have a question about whether or not the  
3 claim about weights may vary would be important enough to  
4 be required to be made in the hyper link itself.

5 But when you look at six and seven, I think it  
6 highlights something that I raised before. I didn't mean  
7 to suggest that hyper links are necessarily bad. But  
8 they can be used in ways that either convey information  
9 to consumers, or make information more avoidable and less  
10 prominent for consumers.

11 And it's approximately the same number of words  
12 in six and seven, and if you're going to say that six is  
13 okay and it's not overly burdensome from a design  
14 perspective -- and I'm not trying to dictate what is a  
15 good design. If as an ad designer you think that that's  
16 not overly burdensome, then I don't see what is -- what  
17 makes it harder for you to do seven than six, because it  
18 actually conveys the information that would be required  
19 under the jewelry guides.

20 In addition, assuming that the jewelry guides  
21 did not exist, it probably conveys the most important  
22 disclaimer -- sorry. Important information that the  
23 consumer needs to know about what they're going to be  
24 clicking to.

25 MS. KOLISH: Thank you, Eric. Dave, you wanted

1 to comment?

2 MR. CLAUSON: Yes.

3 MS. KOLISH: And then we'll do Mark, and then  
4 we'll do Carla.

5 MR. CLAUSON: Dave Clauson.

6 MS. KOLISH: Oh, I thought you had already --

7 MR. MCKEE: You have gotten out of order.

8 MR. CLAUSON: Sorry.

9 MS. KOLISH: I'm sorry. I lost my place. Well,  
10 Dave is talking and then we'll go to you, okay? And then  
11 we'll go to Mark, and then we'll go to Carla. And then  
12 who else has their hand raised? Kevin.

13 MR. CLAUSON: Dave Clauson. Just to comment on  
14 a couple of questions that were raised. First of all on  
15 this issue of experience, it's okay to be a novice.  
16 Everybody has a first time on the web.

17 **(Laughter.)**

18 MR. CLAUSON: So you can all lower the anxiety  
19 about your first time. It's okay. I don't think you  
20 will ever use the Internet without being able to master  
21 the point and click metaphor. It is the way the basic  
22 navigation functions. You will never get past the home  
23 page of your browser unless you can move a mouse and  
24 click a button. It just doesn't work without that. So  
25 to assume that people would not be capable of doing that

1 I think is a mistake.

2 Secondly, just a quick point on some of the  
3 technologies. I could have very easily used ad four, and  
4 with the basic browser technology of rollover made any  
5 statement on five, six or seven in a rollover on the  
6 hyper link on ad number four.

7 MS. KOLISH: What do you mean. I don't get  
8 that.

9 MR. CLAUSON: If we go back to ad number four,  
10 please, but leave six and seven up, please? If you would  
11 move the arrow curser over the three quarter carat just  
12 for a moment? In many browsers, do you see the way the  
13 arrow changed to a hand? In rollover technology that  
14 could very easily be a text bubble containing the text in  
15 six and seven.

16 So in other words, a simple hyper link on ad  
17 number four could very easily, if it's designed properly,  
18 contain the information in six and seven. Without  
19 necessarily having the full disclosure on the page, it  
20 can very clearly signal what that hyper link is about if  
21 it is designed carefully.

22 So, again, design does matter here and  
23 experience in information architecture matters and use of  
24 technology matters. You can't leave these things as  
25 separate issues. They have to be considered as a

1 collective whole. And in general information  
2 architecture, the simplest, most effective way of  
3 conveying the basic information is always best.

4 So in terms of these three, if I would simply  
5 use the rollover technology of most browsers today -- you  
6 cannot buy a personal computer with an Internet browser  
7 without rollover capability -- that you would have that  
8 -- I would have designed that hyper link in that way.

9 So a couple of questions. One, where is the  
10 disclosure close enough to the link? I could argue that  
11 ad number four would actually do a better job, because it  
12 would say very clearly not only the three quarter carat,  
13 but that it's disclosing information about that if I  
14 click there if I designed it properly.

15 Two, what factors affect click through?  
16 Signaling the information soon rather than later affects  
17 click through. But how you signal does matter, and you  
18 have to pay careful attention to that. So users will  
19 very quickly tell you that if you're not giving them the  
20 information they want, they'll go away.

21 So I click through on that three quarter carat  
22 and found that it was disclosure. I'm not interested in  
23 disclosure. And you would notice the click through rate  
24 drop to less than two seconds, because I would hit the  
25 back button in about that time.

1           So again, this is an inexact science and it has  
2 to be considered from all those dimensions.

3           MS. DEMARTINO: Can I just jump in for a second.  
4 The rollover technique that you're talking about is  
5 unique and it sounds great, except would there be any  
6 concern of a consumer missing that information, because  
7 in the scenario you're presenting a consumer would have  
8 to roll their mouse over the three quarter carat claim.

9           You know, are there concerns that a consumer  
10 might not roll their mouse over that? I mean, they see  
11 it as a link and they might continue scrolling down the  
12 page or click some place else. And then I guess there is  
13 a twofold of will the information stay up on the screen  
14 long enough once you've put your mouse there for a  
15 consumer to read it.

16           MR. CLAUSON: I'll break both of those questions  
17 down.

18           MS. DEMARTINO: Thanks.

19           MR. CLAUSON: And those were good questions. We  
20 wrestle those issues every day. The first point is that  
21 you just brought up the issue that no two consumers  
22 operate the same way, okay. And the fact that -- again,  
23 this is what I was trying to get at in terms of my  
24 decision cycle. My decision cycle on when to buy this  
25 product may be very different than yours.

1           In fact, in some cases -- and I'll go back to  
2 the gentleman from Dell who was referencing the math of  
3 75 pages potentially before a product is purchased. I'm  
4 likely to come to that three quarter carat at my first  
5 time, and if I don't know anything about carats, I'm very  
6 likely to click on it, because I might like to know more.  
7 But I might not, okay. I mean, that's the individual  
8 nature of it.

9           In terms of the rollover technique, if the mouse  
10 or the curser is left on the hyper link, it will stay  
11 there as long as the curser is on it. So it will stay  
12 there as long as I want it to. So if that rollover comes  
13 up and it's long enough for me to read it, fine. If it  
14 comes up and I want to roll away from it, that's up to  
15 me.

16           **(Staff speaking, not picked up by the**  
17 **microphone.)**

18           MR. CLAUSON: Can you point out -- she's  
19 referring to ad six in the middle screen? If you watch  
20 her --

21           MS. KOLISH: Are you talking about this bar  
22 here?

23           **(Staff speaking, not picked up by the**  
24 **microphone.)**

25           MS. KOLISH: What yellow one that pops up?

1 MR. CLAUSON: Right there?

2 (Staff speaking, not picked up by the  
3 microphone.)

4 MS. KOLISH: Yes.

5 (Staff speaking, not picked up by the  
6 microphone.)

7 MS. KOLISH: Yes.

8 (Staff speaking, not picked up by the  
9 microphone.)

10 MS. KOLISH: Oh, okay.

11 MS. DEMARTINO: So for the people downstairs,  
12 we're demonstrating through the use of the tool bar the  
13 rollover technique so the information will stay up.

14 But I guess, you know, just to follow up on what  
15 you were saying. Is there still a concern that a  
16 consumer might miss an important disclosure if they  
17 choose not to, or don't know that they need to, roll  
18 their mouse over the link?

19 MR. CLAUSON: I'm not attorney, but I play one  
20 on T.V.

21 (Laughter.)

22 MR. CLAUSON: I think there is -- regardless of  
23 whether it's disclosure information or any information,  
24 again, the nature of the information architecture  
25 dictates such that a consumer may miss it or they may

1 not, depending on -- you cannot sit there and ask them to  
2 point the button here and say press this. That just  
3 doesn't work.

4 So will some consumers rollover a hyper link,  
5 not read it and not click through it? Yes.

6 MS. KOLISH: Okay. Let's put five back up, so  
7 we have five, six and seven for our general discussion.  
8 And we'll go to Phillip now.

9 MR. MCKEE: Thank you, Elaine. Phillip McKee,  
10 National Consumers League. The mouse over technique,  
11 another name for rollover, can be used very effectively  
12 on web sites. Another convention that is already  
13 displayed on all of the ads on the screen, five, six and  
14 seven, and something that online shoppers are very used  
15 to, is the idea that the button add to cart and buttons  
16 of similar design, if you have a consistent site design,  
17 mean that it's a link.

18 You click on it and it does something. You  
19 click on a submit button, it submits your form. You  
20 click on add to cart, it's going to add to cart. You  
21 have buttons that are of similar design. They're also  
22 going to have a similar function.

23 Another way to provide a disclaimer that has  
24 obvious functionality and is also eye catching on the  
25 screen -- yes, I realize I'm edging to the realm of

1 design, again; please indulge me, everyone else -- is to  
2 have a button of similar design that says something along  
3 the lines of the language Mr. Wenger from the New York  
4 Attorney General's Office mentioned, that weights may  
5 vary.

6 You can place that very near the statement,  
7 three quarter carat diamond earrings. It becomes an  
8 obvious sign that this is something that you can click  
9 on, because it's of the same design. It has the same  
10 functionality. And at the same time it has a little bit  
11 more obvious positioning.

12 So a problem that I have with all of the ads,  
13 five, six and seven -- even though I like the language of  
14 number seven the best. The problem that I have with all  
15 of them is the actual placement of the link and its  
16 relationship. Everything is syntax to the three quarter  
17 carat diamond earrings statement.

18 I am most likely -- I've gone to this page  
19 because I want -- personally I wanted to look at three  
20 quarter carat diamond earrings. My eye, therefore, is  
21 automatically drawn to the statement, three quarter carat  
22 diamond earrings, something in about half the size up at  
23 the top. Yeah, it's a link, but I'm looking down at what  
24 I wanted to look at, the bullet point of the three  
25 quarter carat diamond earrings.

1           The language is the best on seven, but I'm  
2           dissatisfied with all three.

3           MS. KOLISH: Well, Phillip, you're always ahead  
4           of us. We're going to talk about placement of those  
5           links, too. But we'll get through some more stuff about  
6           language. So we're going to go to Mark next, then Carla,  
7           then Kevin, then Ron, then Eric. Did someone else just  
8           have their hand up? Okay.

9           So Mark is next.

10          MR. UNCAPHER: Sure. I was going to, I guess,  
11          make the point --

12          MS. KOLISH: Say who you are.

13          MR. UNCAPHER; Mark Uncapher for ITAA. I think  
14          a similar point to the one that David made is that, you  
15          know, we have some data which would be able to track in  
16          terms of whether or not each of these would be used by  
17          consumers to click through. You know, the more legal it  
18          may well be, and I realize this is more in the realm of  
19          conjecture.

20                 It may well be that the more legalese or the  
21          more specific the link is, say a disclaimer or something  
22          that suggests that it's a more narrowly focused piece of  
23          information, may well be information. Although on one  
24          hand providing more information than text in the main  
25          document may be less likely to attract a consumer to go

1 forward than sort of a more general one that says click  
2 here for more details, because they may have a number of  
3 questions that need to be answered. And I'm more likely  
4 to choose that and get the additional information.

5 So in some respects, the more specific -- the  
6 more sort of text of a disclaimer nature that ends up on  
7 the hyper link itself, if that's not the information the  
8 consumer is interested in, it may in fact discourage them  
9 to go forward and look for additional information.

10 I guess this goes to the point that sort of  
11 reasonable people could look at the exact same thing and  
12 draw very different conclusions.

13 MS. KOLISH: So, Mark, are you saying that you  
14 think the ad six disclosure is better than seven?

15 MR. UNCAPHER: Not necessarily better. And I  
16 guess that's what I'm trying to say. Just the data  
17 again. It's purely in the area conjecture. The data may  
18 show that more consumers are likely to -- and again, this  
19 is not an issue of the quality of the disclosure. But an  
20 issue that that information may encourage consumers to  
21 hit that hyper link, because they have a variety of  
22 questions that they want information, and they want that  
23 information. It may not necessarily be about the size of  
24 the carat. They'll hit that and obviously come across  
25 the disclosure information.

1                   Again, reasonable people -- different consumers  
2                   -- will respond differently and in different points in  
3                   the context. But all of this is really kind of a game of  
4                   percentages in terms of whether or not somebody is going  
5                   to go forward.

6                   MS. KOLISH: Well, let me ask you this as a  
7                   follow up. Is there anything that would, you know,  
8                   prohibit or interfere with an advertiser using something  
9                   more specific, like diamond weights are not exact, so  
10                  that consumers see that there is something important  
11                  about the carat weight in ad seven that's being  
12                  qualified, and also having a disclosure down here -- or a  
13                  link down there that says, you know, click here for more  
14                  information?

15                  MR. UNCAPHER: I mean, the dilemma with that,  
16                  though, is that at some point if you're requiring a high  
17                  level of sort of substantive information to be contained  
18                  in the hyper link itself, then in many respects you're  
19                  losing the advantage of the technology, the ability to  
20                  hyper link, because you're kind of forcing the hyper link  
21                  to be the disclosure as opposed to the content of the  
22                  subsequent hyper link.

23                  And from a copy perspective, that could be very  
24                  difficult to get the right -- I mean, in this example you  
25                  can do it. To be able to get the right -- the right

1 breadth of the information contained in such a small  
2 piece of information.

3 I guess the appeal here is for sort of  
4 reasonableness and flexibility and recognition that the  
5 consumers will respond differently, and that the link  
6 itself can contain meaningful information.

7 MS. KOLISH: Okay. Carla, you were next. Do  
8 you still want to talk?

9 MS. MICHELOTTI: Yeah. A lot of what I was  
10 going to say has been covered, so --

11 MS. KOLISH: Uh, uh, uh.

12 MS. MICHELOTTI: I'm Carla Michelotti from Leo  
13 Burnett, representing --

14 **(Laughter.)**

15 MS. MICHELOTTI: Representing the American  
16 Advertising Federation. The legal test has never been  
17 avoidable versus unavoidable. And that's something  
18 important as we talk about this, because I think we're  
19 imposing that standard of unavoidability, and that isn't  
20 the standard.

21 And then the other point that I was going to  
22 make is a point that has been probably well made, which  
23 is consumer behavior. When they're spending a thousand  
24 dollars on the web, consumer behavior would be an  
25 exploration of the web site. Once they're interested in

1 a page and interested in an item -- how deep they go --  
2 they're going to be spending a thousand dollars. And it  
3 would be a very rare consumer that would not start  
4 clicking around and examining all four corners of that  
5 web site.

6 MS. KOLISH: Even a man who was in a mad rush to  
7 get his wife the anniversary present?

8 MS. MICHELOTTI: Especially.

9 **(Laughter.)**

10 MS. MICHELOTTI: Especially a man.

11 MALE SPEAKER: I resent the sexist comment by  
12 the Commission.

13 **(Laughter.)**

14 MS. KOLISH: All right. Strike that from the  
15 record. All right. Kevin, we'll get to you then.

16 MR. DUKE: Kevin Duke from America Online. I  
17 think it's important to stress, you know, that these  
18 hyper links are very powerful tools and a great way to  
19 provide information. And as others have said, you know,  
20 the whole idea of clicking and using these is inherent to  
21 the nature of this medium.

22 And in this context, you have to remember our  
23 consumer probably came to this page by, you know,  
24 clicking on a fancy ad while they were cruising Ftc.gov.

25 **(Laughter.)**

1           MR. DUKE: So, I mean, they came here in the  
2 first place because they knew to click on something. And  
3 then again, in context is the whole question of what is  
4 the ad. Is it sort of the four corners of what is  
5 displayed currently on the screen and that's where you  
6 have to comply with the jewelry advising guides?

7           I would submit that it's not. This is sort of a  
8 multi page advertisement, if you will, that started, you  
9 know, when they clicked on your splashy advertisement.  
10 And it is, you know, the electronic equivalent of a multi  
11 page ad. And, you know, one of the great things about  
12 the use of links is that they -- you know, they can  
13 provide more information than an advertiser might  
14 otherwise provide.

15           If the advertisers are restricted, you know, to  
16 get it all on this page at the top of the page, you know,  
17 they may try to cut back on some of the information.  
18 Whereas if I can click and go to all the information  
19 about the carat weight and other jewelry disclosures, you  
20 know, an advertiser might be encouraged to put more  
21 information there.

22           And similarly, you know, we could assume that  
23 this isn't the only item in the FTC jewelry store.

24           MS. KOLISH: It is.

25           MR. DUKE: And that -- it is. Well, you've got

1 other problems also.

2 (Laughter.)

3 MR. DUKE: Well, you have imitation pearl  
4 earrings.

5 MS. KOLISH: Oh, yes, you're right.

6 MR. DUKE: So you have two items, although only  
7 one set of diamonds. But typically an advertiser or a  
8 merchant will have a lot of items and may make the same  
9 warranty, for example, on all of them, and it's more  
10 efficient for the advertiser to have all of the warranty  
11 information in a single place.

12 And again, sort of the benefits of this medium  
13 are rather than try to figure out how to make, you know,  
14 the pre-sale availability disclosures of a warranty, in  
15 the interactive medium we can say, you know, click here  
16 to read our warranty. And if they want to read the whole  
17 warranty, they can or not.

18 MS. KOLISH: Kevin from QVC, I think we  
19 overlooked you inadvertently.

20 MR. ELSE: That's okay.

21 MS. KOLISH: Do you want to speak? Okay.  
22 Because I think I left him out, and then we'll go back to  
23 the order. Plus QVC sells jewelry. Maybe you have great  
24 insight.

25 MR. ELSE: We sell an incredible amount of

1 jewelry.

2 (Laughter.)

3 MR. ELSE: Exceptionally high quality jewelry.

4 (Laughter.)

5 MR. ELSE: Sorry, I had to do that.

6 (Laughter.)

7 MR. ELSE: I think one thing that has come up,  
8 and it's a recurring theme with all the comments, is that  
9 no particular disclosure mechanism will necessarily be  
10 better than other disclosures, depending on the  
11 particular advertisement that's being presented.

12 In this situation of the last disclosure -- the  
13 number seven disclosure -- it obviously offers a lot more  
14 information. But if, for instance, I was selling a  
15 guaranteed three quarter carat, fur and leather lined  
16 diamond earrings, I may have a lot of disclosures that  
17 have to go up in the front.

18 (Laughter.)

19 MR. ELSE: And that's a scary thought.

20 MS. KOLISH: Yeah. That would be the least of  
21 your problems thinking about disclosure.

22 (Laughter.)

23 MS. BERNSTEIN: Kevin, don't leave out the care  
24 labelling rule.

25 (Laughter.)

1           MR. ELSE: So even with a hyper text link that  
2 has that kind of -- or that amount of information for  
3 each link, you still may have nothing but links before  
4 you get to the product if it's up in front. And then  
5 when you get to the situation, which I'm sure is not that  
6 far away, where you have a television program and you're  
7 showing a product, you can instantly bring up on your  
8 television screen a page from your Internet site in order  
9 to purchase the product immediately.

10           That little picture may be a tiny picture on  
11 your screen and the best disclosure may be that each  
12 individual word, if you were to hit it, gives you the  
13 information. And if your -- we found that our customers  
14 become very sophisticated about our sites very quickly.

15           I think that has to do with the amount of time  
16 they spend on the site. Some people will watch 24 hours  
17 a day, or be on our Internet continuously, and if they  
18 know that individual words will immediately hyper text  
19 them to information about that, that may be the best sort  
20 of disclosure.

21           MS. KOLISH: All right. Thank you, Kevin. Now  
22 Ron, Eric, Jean Ann and Teresa.

23           MR. GOLDBRENNER: I think that all of the things  
24 we've --

25           MS. KOLISH: Uh, uh.

1 MALE SPEAKER: You had better tell who you are.

2 MR. GOLDBRENNER: Oh, I'm sorry.

3 **(Laughter.)**

4 MR. GOLDBRENNER: I'm Ron Goldbrenner with PMA.  
5 We've been talking about two different things. Whether  
6 or not consumers understand and can use scroll bars,  
7 hyper links, pop ups and all the rest. It goes to the  
8 question of the reasonable Internet consumer. You've got  
9 to define first who your consumer is. Who your audience  
10 is. And only then can you measure whether these things  
11 are adequate.

12 The second thing we've been talking about is  
13 which one of these is the best disclosure. Well, even if  
14 you accept that seven is the best, six next and five the  
15 least disclosure, what that has to be measured against --  
16 in the abstract that doesn't mean anything, because you  
17 have to know the standard for choosing a disclosure.

18 Do you have to make the best kind of disclosure  
19 possible, one that is definitely assimilated by the  
20 consumer, or do you have to make one that's a little bit  
21 less than that, unavoidable? Although he doesn't have to  
22 go through it, he's definitely going to see it. Or is it  
23 possible to make a disclosure a level prior to that?  
24 It's a good disclosure. It's an adequate disclosure.  
25 It's possible for him to see, but it's not going to be

1           unavoidable. Or perhaps the least adequate on the scale  
2           is one that is available in the context of this ad,  
3           period. However it's available, it's there. It's  
4           available.

5                     You've got to decide where on that spectrum you  
6           want to be before you can decide whether these are good.  
7           If you are looking for somebody to say that number seven  
8           is the best disclosure, then presumptively you are  
9           setting up the proposition that one must make in all  
10          circumstances the best possible disclosure.

11                    I'm not sure that's the law. I'm not sure it's  
12          a good idea for the law to be that. And I think we need  
13          to think about those issues and discuss them as well.

14                    MS. KOLISH: The standard for judging the  
15          consumer's net impression. Are they going to come away  
16          from your ad knowing that it is not exactly 75 points?  
17          That's the standard. And these are techniques that can  
18          help you get there.

19                    MR. GOLDBRENNER: Well, does clear and  
20          conspicuous mean a disclosure which is the best possible  
21          disclosure?

22                    MS. KOLISH: It means an effective one. One  
23          that succeeds in changing the net impression. I mean,  
24          there could be better ways of doing it.

25                    MR. GOLDBRENNER: One that succeeds in changing

1 the net impression, or one that is capable of succeeding  
2 in changing the net impression?

3 MS. KOLISH: Well, usually if you're going to do  
4 a copy test, you're going to look to see what consumers  
5 actually came away with. It's going to be looking at  
6 performance in a fact based setting.

7 Okay. Eric, you were next, if you still want to  
8 talk?

9 MR. WENGER: Yes, I do. Eric Wenger from the  
10 New York AG's Office. I think with all due respect to  
11 David and John, they were talking about information that  
12 might be interesting to consumers, and that's not really  
13 the standard here. The standard here, as examined by the  
14 Commission when they looked at jewelry ads in light of  
15 section five, was that they created these guides to say  
16 that this is information that should be conveyed to  
17 consumers.

18 And so merely having information available in a  
19 way that could be seen by them if they were interested in  
20 looking for more information, I don't think meets that  
21 standard. If you look at what Carla said, she talked  
22 about that unavailability is not really the standard,  
23 because it's not the standard in other forms of media.

24 I think that the variety of consumer paths and  
25 choices that they make on web sites actually does make

1 unavailability a factor that should be looked at the  
2 Commission in evaluating whether or not a disclaimer is  
3 clear and conspicuous, because it goes back to the fact  
4 that this is information that the Commission has decided  
5 should be conveyed to consumers.

6 And, therefore, if you look at what Ron was  
7 saying, that information should be just placed in a way  
8 that consumers can find it if they're interested, I don't  
9 think that that's enough.

10 MS. KOLISH: Okay. Let me just comment on  
11 unavailability. Although we have not used it widely in  
12 other contexts, in fact the theory of it is viewed in  
13 many other Commission decisions. I mean, Commission  
14 decisions about putting something on the first page of a  
15 multi page document. It's getting out the notion that  
16 consumers are then going to see it. Requiring that  
17 important disclosures sometimes appear at the end of an  
18 ad, so that the recency effect comes into play, is a way  
19 of getting at unavailability. Requiring in an  
20 infomercial that the notion that this is paid advertising  
21 you're at be repeated multiple times is a way of getting  
22 -- a way of saying it's not avoidable.

23 So we haven't used those words, but the concept  
24 is there in other ways.

25 MR. WENGER: And also the Commission has decided

1 that -- or recommended that this language up here be in  
2 close proximity to the triggering term. And to have  
3 something that doesn't really point the consumers to the  
4 direction of exactly what they're going to be told and  
5 where they're going to find it, I don't think meets that  
6 standard.

7 MS. KOLISH: Thank you, Eric. Jean Ann, you're  
8 next.

9 MS. FOX: Jean Ann Fox, Consumer Federation of  
10 America. A small point. The word disclaimer on ad five,  
11 that's lawyer talk. A consumer looking at that --

12 MS. KOLISH: Is there something wrong with it?

13 **(Laughter.)**

14 MS. FOX: Yes. A consumer looking at just a  
15 general phrase, that jewelry disclaimer, they think that  
16 that's going to say, buying this set of earrings will not  
17 make me slim, beautiful and desirable and get me a date  
18 on Saturday night. It doesn't convey the idea of, we're  
19 going to give you important information that says you're  
20 really not going to get as much as you thought you were  
21 getting when you paid your thousand dollars.

22 MS. KOLISH: Thank you, Jean Ann. We're going  
23 to go to Teresa, then Elissa and then Carla.

24 MS. JENNINGS: My comment was based on what  
25 originally Kevin from AOL was saying, but then it kind of

1 developed with some of the comments and Eric and all of  
2 your comments.

3 I'm Teresa Jennings with the Direct Selling  
4 Association. And we have a unique requirement that was  
5 placed on our industry by the FTC back in the early 70's.  
6 We have a three day cooling off period for all of our  
7 sales, because we were selling -- we are selling outside  
8 of a fixed retail establishment. It's in the home,  
9 usually. And there is specific language that must be on  
10 the back of every Direct Selling sales receipt, in  
11 duplicate, in ten point type.

12 As an attorney with the Direct Selling  
13 Association, one of my responsibilities is to review the  
14 materials of all of our pending and current members to  
15 make sure that that requirement is in place and is  
16 accurate. And one of the frustrations that many of these  
17 new Direct Selling companies weren't aware of is that  
18 sometimes they have a warranty or a guaranty that goes  
19 much further than a three day cooling off.

20 It could be a 100 percent forever money back  
21 guarantee on anything you ever purchased from our  
22 company. But they can't put it on the back of the  
23 receipt, or anywhere on the receipt, because the receipt  
24 is full of information. It's full of the order that you  
25 placed and the amount of money you spent. And then four

1 paragraphs of ten point information that has to be handed  
2 in duplicate to the consumer.

3 The attorneys understand that the FTC requires  
4 this, but the marketing people frequently do not. And so  
5 I think here in the Internet, we're coming up to the same  
6 sort of thing in a different medium. There is required  
7 information. I think every business around this table  
8 understands that it is required information.

9 And we do want to convey that to consumers,  
10 because ultimately when the consumer is protected and  
11 happy, they come back to our businesses. I think we're  
12 on the same side here, team, but how do we do it  
13 adequately in this new medium. And we're still  
14 struggling with that.

15 MS. KOLISH: Thank you, Teresa. Elissa?

16 MS. MYERS: Teresa, I think that was -- Elissa  
17 Myers, Electronic Retailing Association. Teresa, I think  
18 that was very well said and an important point to be  
19 made. There is a certain skepticism about the retailer  
20 and the consumer experience that sort of has pervaded all  
21 of our comments today.

22 And I was thinking again from my personal  
23 experience. Even reading the disclaimer or the click  
24 through diamond weights are not exact, click here for  
25 weight ranges, as a personal shopper I probably ought to

1 be a lot more careful in my shopping than I am. But I  
2 don't find that entertaining.

3 I do expect to find a bunch of legal stuff  
4 underneath it that I'm not really interested in. And I  
5 was thinking -- and you probably won't like this idea.  
6 But I learned something this morning. I never knew that  
7 if I bought a three quarter carat pair of diamond  
8 earrings that I might get a pair of diamond earrings that  
9 were bigger than three quarter carats.

10 (Laughter.)

11 MS. MYERS: I never knew that. So I was  
12 thinking that if you really wanted to get me to read the  
13 message, maybe the statement at the top should be: you  
14 might get a bigger diamond than you're expecting.

15 (Laughter.)

16 MS. MYERS: And that I would click on.

17 (Laughter.)

18 MS. KOLISH: Good point.

19 MS. MYERS: And I was thinking that on the  
20 testimonials -- I was thinking, now how would I word it  
21 there. And where you have the little thing that's going  
22 to tell me that it's paid, you could have a statement  
23 that said something like you, too, can be paid for a  
24 testimonial, if you would like.

25 (Laughter.)

1 MS. MYERS: And I do think -- I do think that if  
2 you try to impose a standard on this that is -- that over  
3 complicates, that over legalises the experience, you're  
4 going to through the baby out with the bath water.  
5 You're going to loose the attention of the consumer.

6 MS. KOLISH: Thank you, Elissa. Carla? And  
7 then we want to move on, because we want to break at 12  
8 for lunch, or as close to it as we can. And there are a  
9 few more issues that we would like to cover before lunch.

10 MS. MICHELOTTI: Okay. Carla Michelotti from  
11 Leo Burnett representing the American Advertising  
12 Federation. Just a further point on the avoidability and  
13 unavailability. There is no debate that these are very  
14 -- it's important material information to be provided to  
15 consumers that the FTC is requesting that it be provided  
16 to consumers.

17 But as to the point of whether avoidability is a  
18 standard, to the extent that the web is a strip mall of  
19 the largest sort, what would be the standard that would  
20 be used if one would walk into a jewelry store, or one  
21 would walk into a K-Mart, or walk into any retailer --  
22 what would require, you know, that same person going in  
23 to spend a thousand dollars -- at what point does the law  
24 mandate that the retailer -- the clerk behind the counter  
25 -- tell them well, you understand that the weight ranges

1 vary, blah, blah, blah, or read this disclaimer.

2 And that's to my point of whether avoidability  
3 and unavailability has ever been the key pin prior to a  
4 purchase decision. Everyone -- all the lawyers around  
5 the room know that in every retail store, if you're  
6 buying a dishwasher or a television in a major retailer,  
7 you can find the three ring binder of the warranty book.  
8 But I don't know how many ordinary, reasonable consumers  
9 going to the store are directed to the warranty book.

10 So it's there, but is it unavoidable? No. I  
11 don't know how many people think of the label of a can of  
12 peas and know that the nutrition information is there,  
13 but whether -- or I'll use a better standard. The  
14 nutrition information on a pizza box. The nutrition  
15 information is there, but how many people really study  
16 and read it and make that comparison.

17 MS. KOLISH: Well, there they don't want to  
18 know.

19 **(Laughter.)**

20 MS. MICHELOTTI: Sorry I used pizza.

21 MS. KOLISH: Good comments, Carla. In terms of  
22 jewelry -- I'll just this as an aside -- you'll find that  
23 a number of major retailers are making much better and  
24 special efforts to ensure that consumers are getting this  
25 weight range information, because we think it's important

1 and we've asked them to beef up their procedures.

2 Let's now move on to ads seven and eight. It  
3 won't take long to do these two ads. So we have seven up  
4 already, and we're going to look at eight. Now, the  
5 difference between seven and eight is that the hyper link  
6 appears at the top of this page on seven, and on eight,  
7 if you scroll down -- if you scroll down, and down, you  
8 see it down here.

9 And, you know, we've talked about this a little  
10 bit, about the placement of a link and, you know, I've  
11 already heard people say maybe not even right there is  
12 the best place.

13 Is there any disagreement that this might not be  
14 an optimal place for it there? I mean, do people want to  
15 comment on this, or can we move onto some other issues?  
16 All right. Jean Ann is saying she hates it. Does  
17 anybody else have any -- and other people hate it, too.

18 All right. Let's look at ads 13, 16A and 16B.  
19 What we want to do here -- this is in the Quick DDRIP  
20 context. We want to look at some of the similar issues,  
21 but in the context of a different ad with a different  
22 disclosure, and see if a different disclosure and  
23 different fact pattern changes our analysis here.

24 And, Phillip, you should be well situated for  
25 this, since you kept anticipating this all along. Scroll

1 down on these ads a little bit so we can see the little  
2 endorsement on 13. Okay. Here on ad 13 you see that  
3 D. J. Blackhand's name is underlined showing it's a link.  
4 And in ad 16A there is a disclaimer button, and in 16B  
5 it's paid endorsements.

6 Do you think, for example, like D. J. Blackhand  
7 being underlined here is more effective than three  
8 quarter carat? Actually, I heard somebody already say  
9 no, they didn't think it was. They mentioned that it  
10 wasn't good enough, because you might go to a company  
11 name or something.

12 And then the same thing about the disclaimer.  
13 Is the disclaimer better here? Does it look less  
14 legalese when it's in bright blue color and it's button?  
15 And does paid endorsement help you? Well, somebody  
16 actually already said they think it's a way they could  
17 become a paid endorser. We all thought that, too.

18 **(Laughter.)**

19 MS. KOLISH: So, anyway, I'll take comments from  
20 people. I see Phillip has his hand up. Ron has his hand  
21 up and Dave has his hand up.

22 MR. MCKEE: Phil McKee, National Consumers  
23 League. Misgivings about all three. Let's be blunt up  
24 front on that. As I said earlier when I made the comment  
25 and you referenced it, on ad number 13 it could very well

1 go to something else. It is convention at this point  
2 that an underlining of an individual's name can either go  
3 to their personal web site or a mail to function. You  
4 click on it and all of a sudden an e-mail window pops up  
5 and you can send D. J. Blackhand a letter telling him  
6 what you think about his endorsement or something along  
7 those lines.

8 Or let's say instead of having the name of an  
9 individual up there, it was a link from someone at a  
10 corporation, say, who had installed these in all of their  
11 corporate computers, and that link might go to their  
12 corporate web site. You're not sure exactly where that  
13 one goes.

14 And 16A, still legalese. I look at that and I  
15 have to admit. I'm really not going to want to read it,  
16 even though I know I should. It's going to -- if I saw  
17 the phrase disclaimer, my guess is that that's the page I  
18 want to read right before I go to bed to help me go to  
19 sleep.

20 And on ad number 16B, at least it says paid  
21 endorsement up front. At least it gives me an idea that  
22 it's related there. And I might want to click a little  
23 bit further. I would bicker some on the placement,  
24 perhaps making it directly beside D. J. Blackhand, so  
25 that it's more obviously related to him, and not as you

1 just mentioned, a way of becoming a paid endorsement.

2 But they all have their problems.

3 MS. KOLISH: Thank you, Phillip. Ron, you  
4 wanted to comment?

5 MR. GOLDBRENNER: Yeah. Ron Goldbrenner of PMA.  
6 I don't think it's fair to state the question as which of  
7 these is the best, because I don't think that's the  
8 question. I think the question is, which is adequate to  
9 be clear and conspicuous. Which is good enough to be  
10 clear and conspicuous. And that's the question we need  
11 to be asking. And then further than that, does it have  
12 to be unavoidable or definitely assimilated by the  
13 consumer in order for it to be clear and conspicuous.

14 MS. KOLISH: Okay. Just to go back, we're not  
15 talking about best being the standard. We're talking  
16 about clear and conspicuous, which means is it an  
17 effective communication technique. And obviously, you  
18 know, it could be something that's, you know, very  
19 effective, or it could be a hundred percent effective.

20 But we're saying effective so that most  
21 consumers are not going to misled. And obviously you  
22 could have things that were better than that. So better  
23 isn't -- best isn't the standard. It's effective  
24 communication. Are consumers likely to be misled or not.

25 Dave?

1 MR. CLAUSON: Dave Clauson, IXL, representing  
2 the American Association of Advertising Agencies. I find  
3 myself echoing Phillip's comments to a degree, and again  
4 arguing the need for flexibility in interpretation here.

5 Across all three, you're not sure what any of  
6 those three are potentially. So, you know, if you go all  
7 the way to what appears to be the most extreme, the paid  
8 endorsement, the button if floating on the page, not  
9 anchored anywhere. If that were text that finished up  
10 the quote that said, you know, D. J. Blackhand is a paid  
11 endorser of, that's clearly even more descriptive.

12 So there are degrees of ranges here that you can  
13 -- I think we're all agreeing that it's a spectrum.  
14 Which leads me to the point that I'm trying to make,  
15 which is, these need to be designed for each experience  
16 and they are unique. They're not just -- you cannot make  
17 just generic comments about where things should be or how  
18 they should look.

19 Is the blue button more conspicuous? Yes.  
20 Actually the blue button, because of its use of color,  
21 white on blue, from an art direction standpoint is far  
22 more attractive to the eye than paid endorsement. So am  
23 I more likely to see the disclaimer by clicking the blue  
24 button and then paid endorsement? I don't know.

25 Which gets me to the final point that probably

1 the only metric that you can arguably use to say, is the  
2 consumer reading the disclosure, is to look at the click  
3 through rates to the disclosure page and find out what is  
4 the average length of time the consumer is spending on  
5 that page.

6 And I would argue that most manufacturers and  
7 most brands, if they are clearly -- what they do -- and  
8 I'm to the point that Teresa made. We are on the same  
9 team here. The cost of Dell to fulfill the wrong order  
10 is a number they want to cut. They want to make sure  
11 their customers are getting what they expect. And I  
12 think every good manufacturer does.

13 But the point being, that you can look at click  
14 through rates and see how long the average person spends  
15 on the disclosure page, and somebody needs to make a  
16 judgment, is that enough. Is 20 percent click through  
17 enough? Fifty percent? What is -- what are you going to  
18 accept? And, you know, it may mean that that paid  
19 endorsement needs to be flashing and spinning around. If  
20 that's what it takes to get to fifty percent, if that's  
21 what the FTC mandates, then maybe that's what we have to  
22 do.

23 But again, I don't think we're going to make any  
24 hard and fast decisions about what is the best. I think  
25 you need to keep the doors open to the fact that the

1 consumer will tell you by their behavior what is the  
2 best.

3 MS. KOLISH: Good point. And I always look at  
4 click through rates in an investigation. Eric and then  
5 Teresa and then we're going to move on.

6 MR. WENGER: I think one of the interesting  
7 things about the disclaimers that appear here is that the  
8 last one -- which one is that, 16B?

9 MS. KOLISH: Yes.

10 MR. WENGER: Is an example where even without  
11 clicking through, perhaps the heart of the endorsement is  
12 already conveyed -- I mean, sorry. The heart of the  
13 disclaimer is already conveyed to the consumer. And so  
14 while looking at the click through rate and which of  
15 these links is most likely to entice people to click  
16 through is an interesting thing to look at, you also  
17 might want to look at do these disclaimers right up front  
18 convey the information that the consumer needs to know.

19 If you look at the first one, again we have the  
20 question about whether or not it's clear to people that  
21 this is a hyper link. And then assuming that it is --

22 MS. KOLISH: In ad 13, you mean?

23 MR. WENGER: Right. In ad 13 and also in 16A,  
24 let's assume that in both of those cases you know that  
25 there is something that you're going to be clicking

1 through to. You don't really know, or have any idea  
2 without clicking, what that information is likely to be.

3 And so if people don't click through, then the  
4 information is not conveyed. And if the Commission's  
5 position is that that information must be conveyed, as it  
6 appears to be in the endorsement guides, then the  
7 question is, would it be overly burdensome. I think one  
8 of the factors would be, would it be overly burdensome to  
9 put that information right up front in the ad itself.

10 And if you look at the amount of text that is on  
11 this particular ad page, it doesn't seem like it's too  
12 much to require -- or to say that a paid endorsement is  
13 something that should appear there right next to the --  
14 in close proximity to the endorsement itself.

15 MS. KOLISH: Thank you, Eric. Teresa, and then  
16 we'll move on.

17 MS. JENNINGS: This is Teresa Jennings with the  
18 Direct Selling Association. I agree with what David  
19 Clauson was just saying about flexibility being key. The  
20 example I gave with the required language on the back of  
21 our sales receipt is a problem 25 years later, because  
22 that standard hasn't changed, but the protection have  
23 gotten greater.

24 And so how do you convey that additional  
25 information to consumers when there is less space? Now,

1 on the Internet, we don't have less space, but we're  
2 still trying to grabble with how do consumers use the  
3 Internet.

4 And my brother brought up an example last night.  
5 When we were at the University of Maryland 16 years ago,  
6 he volunteered for a study on computers, and the study  
7 was on using a mouse. Will people go up and down to get  
8 to where they want to go, or will they go straight across  
9 the page? Nowadays that seems utterly logical. Of  
10 course you're going to go straight to the place that you  
11 want to do.

12 But now we're looking at what will a hyper link  
13 do. What is the best way to communicate the information.  
14 Where is the disclaimer adequate and where it is not.  
15 It's the same thing that he was describing in the 16 year  
16 old study. Will you go straight to it or will you go up  
17 and down?

18 And I think that we're developing that  
19 information. We want to get that information and share  
20 it. But what I would hesitate to do is create a rigid  
21 standard, like maybe what happened in our industry 25 to  
22 30 years ago, that can't grow with the technology. That  
23 can't be useful with the technology as it expands and as  
24 consumers gain in their knowledge themselves.

25 MS. KOLISH: Thank you, Teresa. Can I just ask

1 sort of a summary question. We've talked a lot about  
2 this and about D. J. Blackhand and how people could  
3 interpret a lot. But just to focus on disclaimer, do I  
4 hear any sort of general agreement that that by itself  
5 might not be good enough to put people on notice that  
6 there is important information? That it is too legalese,  
7 that you need a better label?

8 **(Audience: no and yes.)**

9 MS. KOLISH: How about a show of hands? All of  
10 those in favor of a disclaimer as an adequate technique  
11 under some circumstances and barring other factors,  
12 taking them into account, raise their hand.

13 FEMALE SPEAKER: That it should work, right.

14 MS. KOLISH: That it should work? And those who  
15 don't think a disclaimer is usually not good?

16 MR. MCKEE: Usually not good or too complicated  
17 with legalese?

18 MS. KOLISH: Too complicated with legalese and  
19 may not be good?

20 FEMALE SPEAKER: Inadequate.

21 MS. KOLISH: Inadequate. Ineffective.

22 **(Laughter.)**

23 MS. KOLISH: Because I can't get the votes here.

24 MS. JENNINGS: I don't think you can have black  
25 and white.

1                   MS. KOLISH: It's too complicated. Never mind.  
2                   I can't get agreement on that. It's 12:00. We have a  
3                   couple more issues we were hoping to cover by lunch, but  
4                   I think that we could probably do them after lunch when  
5                   we cover some other issues.

6                   So we'll break now and we'll come back at 1:15.  
7                   Okay? Thank you all.

8                   **(Whereupon, a lunch recess was taken.)**

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**AFTERNOON SESSION**

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MS. KOLISH: We're back. Did everyone have a nice lunch? We're back. I hope you all had a nice lunch and refreshed yourselves so you can be equally passionate this afternoon. Great. That got your attention. If everybody takes their seat, maybe we'll find out that there are some empty seats up here, and if so, some folks from the overflow room might want to meander up. There are still a few empty ones.

So anybody in the overflow room, there are a few more empty seats up here if you want to take a chance that they'll still be here by the time you walk up.

Okay. We're going to turn now -- we're going to continue our hyper linking theme and look at a few more ads with hyper link presentations, although this probably won't take long based on the prior discussion that we've had.

We're going to look at ads 14 and 15. And ads 14 and 15 are for our lovely Quick DDRIP product, and we're going to again scroll down to D. J. Blackhand's endorsement. There you go. Stop. On both of them. And you'll see in ad 14 that there is an asterisk next to D. J. Blackhand's name with an underline, and in the other ad 15 there is a star icon. Both of these are meant to be links here.

1           One of the questions that we have for you is  
2           that since on web sites asterisks and icons are sometimes  
3           used simply as a way of attracting attention, can they  
4           resemble other graphics on a page as is the case of this  
5           ad. If someone scrolls down a little bit, they'll see  
6           that that star theme is repeated elsewhere.

7           There you go. And that star there is just a  
8           larger version of the star that you see next to D. J.  
9           Blackhand's name. And in light of this, the question we  
10          would like to pose for discussion is, are consumers  
11          reasonably likely to know that these are links that they  
12          should click on, or will they ignore them thinking they  
13          just graphics?

14          Yes, we have comments. Good. We know Phillip  
15          wants to talk. Anybody else? Okay. And John. All  
16          right, we'll start with you.

17          MR. MCKEE: Thank you very much, Elaine.  
18          Phillip McKee, National Consumers League. And I'll try  
19          to take that not as a comment that I always want to talk.

20                 **(Laughter.)**

21          MS. KOLISH: I was just observing that you were  
22          raising your hand.

23          MR. MCKEE: First, in regards to -- let's start  
24          off with ad number 15. That's the one where I have the  
25          most negative comments. Ad number 15, it's not readily

1       apparent that it is a link, as you said. It's a graphic  
2       that is very similar to a graphic that's used for a  
3       bullet point later on.

4               And I have to admit, when I first looked at it  
5       -- yes, I do need reading glasses that I'm not wearing  
6       today. But when I first looked at it on the printout, it  
7       did look like a printer's smudge. But I don't think  
8       that's a very effective way of drawing people's  
9       attention. More often than not, when you look at a link  
10      on many well designed web sites, the links are  
11      contextual. That is a comment that applies to both of  
12      them.

13              The item that is making you want to link is the  
14      link itself. For example, up at the menu, what customers  
15      say would most probably be the link, not the yellow space  
16      on either side of it. So in this case, either the little  
17      star or the asterisk that has been turned into the link,  
18      would be less obvious to the consumer that the link is  
19      there, especially in regards to the red star. And also,  
20      it isn't quite as eye catching as simply having something  
21      larger that is very obvious as the disclaimer, or the  
22      item itself being the link.

23              MS. KOLISH: Thank you. Well, there are a lot  
24      of people who want to talk, but I want to hear from all  
25      of those people who defended all those links on prior

1 occasions and see if they want to defend these, too.

2 Elissa and then John. Oh, you don't want to  
3 talk? Okay. John?

4 MS. MYERS: It's not that I don't want to talk.  
5 I don't defend it.

6 MS. KOLISH: Okay, fine.

7 **(Laughter.)**

8 MR. FRUEHE: John Fruehe from Dell Computer.  
9 It's interesting this morning that we talked a lot about  
10 gemstones. And gemstones, when you actually grade them,  
11 there are four c's that you deal with: the color, the  
12 cut, the carat weight and the clarity.

13 And as we look at some of these -- as we get  
14 through some of the real kind of simple semantics on how  
15 we're actually identifying links and things like that, it  
16 really brings out that there are kind of three c's that  
17 we also need to start to think about. Which are, number  
18 one, the context, which I think Phillip just hit on. And  
19 it's important that we keep in mind that this is a very  
20 complex medium and that you're not just dealing with a  
21 particular bullet point in time, but you're actually  
22 dealing with an entire experience for the customer.

23 And as it's complex I think that -- I would love  
24 to be able to say, you know, we've done the research and  
25 Dell has really figured it out. We've got the magic

1 formula and it's do X, Y and Z and you'll be successful.  
2 And we're continually spending a lot of money doing  
3 research and doing usability testing and revising our  
4 site in kind of an effort to bring ourselves closer to  
5 what the consumers are looking for.

6 And the second thing is really caution. And  
7 with the way that everything changes today, looking at  
8 these links and saying, you know, these may not be  
9 applicable today, that doesn't mean that six months ago  
10 or six months from now they may be, or they have been in  
11 the past. So we have to kind of think that this is a  
12 changing environment, and we've got to keep that in mind  
13 instead of focussing in maybe on the details of does this  
14 link work.

15 And the last thing really to focus in on is the  
16 consumer, because in my mind, the consumer is my best  
17 friend. And I'm not interested in selling a consumer one  
18 computer, but I want to sell them ten. I want to make  
19 sure that in the year 2050, I'm still selling computers  
20 to their family. And so an educated consumer is really  
21 the person that we want to be able to market to.

22 And I think that's the stress that we should  
23 have moving forward. How do we educate the customer?

24 MS. KOLISH: Okay. Well, let me ask -- add  
25 another question to the table. Which is, would consumers

1 reasonably know where to look for that asterisk's  
2 reference? I mean, in the off-line world, I think you're  
3 pretty familiar with the fact that if you see an asterisk  
4 in the headline, you look to the bottom of the page or  
5 the bottom of your television screen.

6 Is that going to be the case here, especially if  
7 consumers end of having to -- in this case in ad 15 you  
8 would have to scroll through multiple pages -- multiple  
9 screens -- to get to the bottom of the page. Is there  
10 any concern about -- because sometimes these figures --  
11 these asterisks and icons -- are used as blinks, and  
12 sometimes they're just used to mean go elsewhere on the  
13 page.

14 Does anyone have any comments about how  
15 consumers are going to react to that, that they might  
16 know which is the case? And if they did figure out that  
17 they have to scroll, would they know that they had to  
18 keep scrolling and keep scrolling?

19 Okay. David?

20 MR. CLAUSON: Dave Clauson, IXL, with the  
21 American Association of Advertising Agencies. I think  
22 these examples point out the fact of just how complex,  
23 flexible and differentiating these kinds of links can be.  
24 I'll go to the gentleman from Dell's comment earlier this  
25 morning. They use a yellow arrow. If I'm a regular user

1 of dell.com, I know what that yellow arrow means, because  
2 my behavior pattern has been educated to know -- to  
3 associate that yellow arrow with a link to go to more  
4 information.

5 So again, it depends on where the consumer is in  
6 their experience with the site and the information that  
7 they can begin to put any of these graphical elements in  
8 context. So whether it was a star, whether it was a  
9 square, if it was my first time at a site like this, I  
10 might not know it. If it was my tenth time, I would  
11 absolutely know what it is.

12 So again, the issue of a graphical mark needs to  
13 be held in the context of where it is used, how it's used  
14 and how often it's used.

15 MS. KOLISH: But, Dave, was it you who mentioned  
16 earlier that it's useful to have consistency with how you  
17 do your hyper links?

18 MR. CLAUSON: Absolutely.

19 MS. KOLISH: So that if you use a variety of  
20 techniques on a page that might end up being more  
21 confusing or distracting?

22 MR. CLAUSON: Yeah. We call that -- we use the  
23 word, blunk, in the design community.

24 MS. KOLISH: What word?

25 MR. CLAUSON: Blunk. Blunk is a term -- look it

1 up. It is in the dictionary.

2 MS. KOLISH: Oh.

3 MR. CLAUSON: That which means is confusing, or  
4 disorganized. And in fact, if you continually modify  
5 your site to change graphical elements all the time for  
6 the sake of changing them, you're putting yourself in the  
7 way of the consumer's experience with you. And not only  
8 that, if I do come back to your site more than once, or  
9 I'm a regular visitor, I come with a certain set of  
10 expectations, and that is clarity and consistency.

11 So if we're not meeting those expectations, I'm  
12 not as likely to return.

13 MS. KOLISH: Okay. Ron?

14 MR. GOLDBRENNER: I'm not going to defend these  
15 two particular examples. But again, I think it's a  
16 contextual matter. Just as you said before, the asterisk  
17 in a newspaper ad, the consumer knows what to do with it.  
18 I think it could very well be adequate in an Internet  
19 context as well. We don't know from this kind of a  
20 limited example. I think one has to take the whole  
21 context of how an Internet ad or Internet information is  
22 conveyed. And so I think one of the mistakes we can make  
23 is to say automatically this is no good and should not be  
24 allowed.

25 The other thing is kind of a twisted view of

1           these things. Suppose you had one asterisk, as you do,  
2           with nothing else on it, and suppose you had another one  
3           that said information you must have, and then you had a  
4           third that said disclaimers. If you did a test on that,  
5           I'm not sure that the blank one wouldn't win in terms of  
6           more consumers going to it than the other two.

7                        So you have to take those kinds of things into  
8           consideration.

9                        MS. KOLISH: Okay. Thank you. Kevin, Else, you  
10          had a comment?

11                       MR. ELSE: Yes.

12                       MS. KOLISH: Okay.

13                       MR. ELSE: Kevin Else with QVC. I really hate  
14          to be -- or least put my employer at a disadvantage  
15          compared to our competitors with the print media. I  
16          don't know how many times I've gotten especially a credit  
17          card proposal in the mail. And there may be something  
18          with a single asterisk, something has two, something has  
19          three, and sometimes I can't find the references  
20          anywhere.

21                        In this situation the asterisk, as soon as you  
22          hit it, it may be a hyper link to another spot on the  
23          page. It's actually much better than what I'm getting in  
24          print media. And therefore, you know, if we were going  
25          to say well, is this adequate, if the print media is

1           adequate, then this should be adequate.

2                       And as far as whether or not a person that gets  
3           on the page would actually click on that spot, at least  
4           in my experience, I tend to click on anything that looks  
5           like it could be informational as opposed to disregarding  
6           things. Just because oh, the hand changed here, boom,  
7           you know, and I go and jump to it.

8                       MS. KOLISH: Thank you. Well, actually if you  
9           look at past Commission cases, there are a variety of  
10          cases where asterisks have not been held to be  
11          acceptable. But occasionally, depending on the type of  
12          information in a section five case, it may be okay. More  
13          typically they're going to have to say where to find the  
14          information, like see bottom of page, as opposed to just  
15          a general asterisk reference.

16                      We may not go after everybody who uses them,  
17          though.

18                      MR. ELSE: Well, I understand.

19                      MS. KOLISH: And then Jeff?

20                      MR. RICHARDS: Jeff Richards, Internet Alliance.  
21          Just real quickly. I think it's important to remember  
22          here looking at these examples, or some of the discussion  
23          we just had, to remember that we're still so early in the  
24          web experience that in many cases we do things simply  
25          because we can do them, not because they're wise or

1 informative.

2 For example, whatever happened to blinking text?  
3 Six months ago or a year ago, you know, text blinked all  
4 over the place. It's stopped now, thank God.

5 **(Laughter.)**

6 MR. RICHARDS: Why is that? It's because  
7 consumers probably hated it, and people figured out  
8 pretty quickly that blinking text was not an attention  
9 getter. It was just the opposite. It screamed amateur  
10 and get out of here.

11 Similarly, underscored text typically means it's  
12 a hyper link. But, of course, we find in many badly  
13 designed sites, text that is underscored that's not a  
14 link to anything. It's meant to be an underlined like  
15 text. And so consumers also make a judgment about the  
16 professionalism or trustworthiness of that.

17 So I think we -- and conventions. Many of us go  
18 and look at the bottom of the page if we're looking for  
19 copyright, because we're aping the legal style of today.  
20 Already that convention is beginning to end, and very  
21 important copyright notices are going to where they are  
22 effective, not the bottom of the page.

23 So I'm suggesting that we should be really  
24 careful about thinking that conventions are going to last  
25 more than three months, that they're anything other than

1 consumer driver, and that we should be cautious about  
2 doing things simply because we can.

3 MS. KOLISH: Thank you. Next is Jerry Cerasale,  
4 then Roy and then Craig.

5 MR. CERASALE: Yes. Jerry Cerasale with Direct  
6 Marketing Association. I wanted to add to David, when he  
7 talked about blunk and confusing things. I think in ad  
8 number 15, if in fact the star -- and I'm not talking  
9 about the adequacy of whether you just put a star next to  
10 the person's name or whether that meets what you need.

11 But if the star next to the name is a hyper  
12 link, and the star further down the page is just a dot,  
13 not a hyper link, that's really very confusing. So, I  
14 mean, I think that does the opposite of, for example,  
15 what Dell does with the arrow. The yellow arrow means  
16 that wherever you see it, it's a hyper link.

17 So I think that if your ad -- and I don't know  
18 whether you meant them to be hyper links or just points.  
19 If you meant them not to be hyper links, then I would  
20 think that that is very confusing from our perspective,  
21 that you've actually switched a symbol to be a hyper link  
22 and not a hyper link on the same page.

23 MS. KOLISH: Thank you. Roy?

24 MR. GREEN: Yes. Roy Green with AARP.

25 MS. KOLISH: Do you want to speak into a

1 microphone?

2 MR. GREEN: Sorry. All right now?

3 MS. KOLISH: Yes.

4 MR. GREEN: Okay, good. It strikes me from a  
5 consumer point of view that one of the ways to look at  
6 the incredible variation in consumers that you have  
7 coming onto the net with different kinds of experience,  
8 plus the incredible variety of advertisements are the  
9 symbols that we're look at today.

10 One of the ways to begin to approach that is a  
11 standardized format. For example, a banner heading at  
12 the end of every advertisement that has an index of the  
13 two or three symbols that are used inside of that  
14 advertisement, so people don't have to worry about some  
15 kind of official designation of what the various  
16 standards or symbols used are.

17 It seems to me that would help facilitate from  
18 the consumer's point of view, regardless of their  
19 experience as either computer users or as people who have  
20 not necessarily visited your Internet site frequently, to  
21 learn your convention and would be a way to standardize  
22 access.

23 MS. KOLISH: Thank you, Roy. Craig?

24 MR. JORDAN: The comment that Kevin made about  
25 the asterisk disclosure and competitive disadvantage --

1 MS. KOLISH: It's Craig Jordan.

2 MR. JORDAN: I'm sorry. Craig Jordan from the  
3 Texas Attorney General's Office. Raised some thoughts  
4 for me that I think they're saying here that we've been  
5 talking about context. There are a couple of contexts in  
6 which asterisk disclosures can be used. And your comment  
7 briefly was that there are some cases where the  
8 Commission has said that's fine. There are some cases  
9 where the Commission has said that's not fine.

10 I was going to elaborate on that a little bit.  
11 From my point of view, as someone who reviews ads on a  
12 daily basis for deciding whether or not this is something  
13 we're going to bring an action about or not, if it's  
14 important information, the more important it is, the less  
15 likely an asterisk is going to be appropriate.

16 The mere fact that someone in another ad has  
17 used an asterisks to make a disclosure doesn't  
18 necessarily mean that all other asterisks are going to be  
19 fine. The information that they may have been saying in  
20 that ad may not have been as important.

21 Another important distinction that I think can  
22 be made here is about what is the function of the  
23 disclaimer. There are two kinds of categories of  
24 disclaimers. Some disclaimers just add additional  
25 helpful information. For example, the Truth in Lending

1 Act is a fine example of this. If a car dealer  
2 advertises that you can buy X car for \$2,000 down and  
3 \$199 a month, that's a true statement. There is nothing  
4 misleading about it.

5 It's helpful from a comparative shopping point  
6 of view to also know what the APR is and some of the  
7 other information you get from the Truth in Lending Act.  
8 But there is no misleading or false statement made in the  
9 body of the ad that the asterisk is trying to correct.

10 On the other hand, if we look at one of the  
11 Quick DDRIP ads, for example, where you have the customer  
12 testimonials, and the company has chosen testimonials  
13 which substantially exaggerate the typical performance of  
14 the product, at that point the disclosure is now  
15 correcting a false impression. And at that point I would  
16 say an asterisk or a hyper link is never really going to  
17 be acceptable, except in very rare circumstances, for  
18 correcting that kind of interpretation.

19 MS. KOLISH: Thank you, Craig. Our financial  
20 practices staff, you know, want to disagree about whether  
21 those Truth in Lending advertisements might not be  
22 deceptive on their own because of implied claims that  
23 they may give rise to. And so they don't view it just as  
24 additional helpful information, but imperative  
25 information.

1 MR. JORDAN: Okay.

2 MS. KOLISH: So I had to note that for the  
3 record so they would be happy. Thanks. Let's move on to  
4 ads 27 and 28. Here on ad 27 we're back to our pages of  
5 testimonials. And you'll see at the top of the page --  
6 you can read the testimonials.

7 Okay. If you scroll down a little bit, you'll  
8 see scattered throughout this page, order now, order now.  
9 And if you clicked on that order now, you would go to  
10 page 28, where you see the actual disclosure that the  
11 speed improvements are not the ones that -- you know, may  
12 not be something that everybody will get to the same  
13 degree. And then you have the order form.

14 And the question that we pose for you is, are  
15 consumers going to notice this disclosure prior to  
16 purchase? The outfit is right there on the last page  
17 where you're going to order. But one question I have is,  
18 if you just pressed order now, are you going to go right  
19 to this little yellow form and start filling it in and  
20 never read this? Is this in fact designed -- you know,  
21 set up so that consumers are less likely to notice it?

22 On the other hand, would tinkering with it, like  
23 making it, you know, in color contrasting type as opposed  
24 to this black type, boxing it, increasing its type size  
25 or moving its location, would that make it work?

1                   And then the final question to keep in mind is,  
2                   is this close enough to those endorsements to be  
3                   effective in qualifying them so that people understand  
4                   that these experiences are not necessarily typical ones?

5                   So that's a whole lot of questions I put out  
6                   there, but you're a great group and I know you'll be able  
7                   to keep up with them. So --

8                   MR. GOLDBRENNER: Elaine, could I just ask you  
9                   to clarify one thing?

10                  MS. KOLISH: Yes.

11                  MR. GOLDBRENNER: Do you mean -- you said if  
12                  you're taken directly to the order form, are you going to  
13                  see what's above it. Do you mean that the screen would  
14                  be lowered --

15                  MS. KOLISH: No.

16                  MR. GOLDBRENNER: -- so you only see the order  
17                  form?

18                  MS. KOLISH: No.

19                  MR. GOLDBRENNER: Or come up like this?

20                  MS. KOLISH: Just that you go this screen.

21                  MR. GOLDBRENNER: And the screen would look like  
22                  it does now?

23                  MS. KOLISH: Yes. It would look like it does  
24                  now. And my question --

25                  FEMALE SPEAKER: Right. And if we click on the

1 order now button in ad 27, you'll just see what comes up?

2 MS. KOLISH: Yeah. So the question was, if you  
3 do that, because you've decided to take the action of  
4 ordering, do you go just directly to this page and start  
5 filling it in and avoid other text?

6 Ron, Bill, Jean Ann.

7 MR. GOLDBRENNER: I find it difficult to  
8 understand how the page here with the order form can be  
9 anything other than the quintessential clear and  
10 conspicuous. It's there. If your standard is not clear  
11 and conspicuous, but the consumer must absorb it and  
12 assimilate it and read it, maybe it's not adequate. But  
13 I don't think that's the standard.

14 And as far as the endorsements, it being  
15 proximate enough to the endorsements, we're trying to get  
16 information to the consumer before he makes the important  
17 decision of purchasing. Before he makes some important  
18 decision where he commits himself. And I don't think it  
19 matters if it's right next to the endorsement, if it's  
20 right ahead of the order where he's making that important  
21 decision.

22 The object of the game here is not to get him  
23 the information at the same time you make the trigger  
24 claim. The object of the game is to get him to have a  
25 fair and balanced view of the information conveyed

1 overall. And certainly in some circumstances, putting it  
2 above the order form or next to it or even below it, can  
3 be adequate. We just have to look at each one.

4 And I think it would be a mistake to prescribe a  
5 rule that says it must be on top, or it must be on the  
6 side, or it can only be proximate to trigger words, etc.  
7 We have to look at the context of each ad.

8 MS. KOLISH: We agree that's what net impression  
9 is all about, and what we're trying to identify are  
10 factors that are going to be more or less helpful in  
11 ensuring that something is clear and conspicuous.

12 Anyway, Bill, did you have comments?

13 MR. MACLEOD: Bill MacLeod with the Grocery's  
14 Manufacturers of America. I think this is a good  
15 example, Elaine, of what we were talking about this  
16 morning in talking about how the Internet really adds a  
17 separate dimension to this thing.

18 Proximity -- if you want to look at it simply in  
19 terms of the definitions and the guidelines, proximity is  
20 not just left, right, up or down. Now, proximity can be  
21 a separate dimension away, and it may well be that that  
22 is more proximate to these particular testimonials than  
23 anything anywhere on the page where the testimonials  
24 appear, because it is in between those testimonials.

25 And if I have just read one -- maybe I quickly

1 scroll down to a particular testimonial that is neither  
2 at the top of the page nor the bottom of the page. And  
3 unless I had something that was qualifying it running all  
4 along the page or constantly there, that might be the  
5 most proximate thing of all.

6 And that is what I was talking about earlier  
7 this morning in saying that proximity is kind of a design  
8 standard. There are -- you can look at that as  
9 proximate. But you can also look at it in the context  
10 that John was describing a couple of minutes ago, in that  
11 you are doing perhaps better than the old proximity  
12 standard -- what that proximity standard intended to do.

13 MS. KOLISH: Okay. Jean Ann and then Carla and  
14 then Craig.

15 MS. FOX: Jean Ann Fox, Consumer Federation of  
16 America. I still think it's better to have the  
17 disclosure on the page with the testimonials. Even  
18 though you haven't finally committed yourself to purchase  
19 it when you click on the order now, your decision making  
20 process has already moved one step beyond evaluating the  
21 testimonial claims you've already decided you're going to  
22 act on whatever information that you've accumulated.

23 On the format for ad number 28, the fact that  
24 there is no white space between the colored bar and the  
25 please note makes it less likely that you're going to

1 catch it. It just all sort of globs together. That's  
2 not like blunking, but we say it in Virginia. Globs  
3 together.

4 **(Laughter.)**

5 MS. KOLISH: Great. Carla?

6 MS. MICHELOTTI: It's really just following up  
7 on Bill's about the cyber space environment, and it's  
8 worth repeating because it's so important as we apply the  
9 standards and we apply our historical perspective of  
10 proximate, close, conspicuous, immediate adjacent to. We  
11 have all these terms of art legally that are in a  
12 measurable, physical environment. And cyber space is not  
13 a measurable, physical environment.

14 So we are in a third dimension or a fourth  
15 dimension, but it's not a dimension that's measurable.  
16 And what's important is the consumer behavior, in that  
17 the consumer involves himself and engages himself in this  
18 environment and what is reasonable and understandable for  
19 the consumer to have access to and make available to him.  
20 It is not an environment that is any longer measured in  
21 inches or distance, which is what I was trying to say  
22 this morning when I talked about geography not being  
23 important.

24 MS. KOLISH: Thank you, Carla. Craig?

25 MR. JORDAN: Craig Jordan with the Texas

1 Attorney General's Office. I think Bill made a good  
2 point that on the Internet, at least in the context of  
3 the web as we use it today, a disclosure on another page  
4 might be in some sense more proximate to the term that  
5 modifies a disclosure elsewhere on the page where the  
6 trigger term is.

7 A caution there and a real concern I would have  
8 is if you put them on different pages, you now have to  
9 start anticipating what a user's click track is going to  
10 be through the web site. I might not be one to buy Quick  
11 DDRIP today. I might just be shopping around. I might  
12 -- if Quick DDRIP costs \$2,000 and sold by someone like  
13 Dell, I might come to that site four or five times before  
14 I decide I want to buy Quick DDRIP.

15 If I don't find out until I get to the last step  
16 of the process, the order form, I may no longer be  
17 interested in reading disclosures. I may have already  
18 made up my mind, or I might be quite disappointed and  
19 might have wasted a lot of my time that I could have  
20 spent going to another manufacturer who is going to tell  
21 me about the product up front.

22 MS. KOLISH: Well, Craig, let me vary your  
23 hypothetical a little bit, because it goes to a point we  
24 wanted to ask about. Which is, say a person is reading  
25 some of these endorsements, and they decide, well, you

1 know, now I'm going to go click on how Quick D works.  
2 I'm going to go read their privacy policy, an intriguing  
3 notion, or see what experts say, and then they decide to  
4 buy it. It's not their fourth or fifth visit, but it's  
5 the same visit, but they've gone to lots of different  
6 pages and then they go here and then they see this.

7 Now, this may be not, you know, many inches  
8 away, but it could be many different plains away. I  
9 can't remember the type of geographical terms you used,  
10 Bill. But anyway it's now separated, you know, probably  
11 a fair bit in time, as well as textually, from the claims  
12 that they started reading before deciding to click  
13 around.

14 Does that make a difference in people's  
15 analyses? And I know, Roy, that you had your hand up, so  
16 if you want to go ahead.

17 MR. GREEN: Again, Roy Green with AARP. I'm  
18 always interested in the characterizations of consumers  
19 from the standpoint of the seller. One of the options  
20 here might be to set up your format in any number of  
21 these combinations, but to have as a default at the end,  
22 particularly if someone hasn't gone through the  
23 disclaimers, automatically -- I would think in this  
24 context proximity might mean proximity to the  
25 transaction. That is, to the decision to transact. Buy

1 something.

2 And that if they haven't done it before -- they  
3 haven't done so before, that one would automatically be  
4 directed -- or in fact the software would automatically  
5 take you to a disclaimer and that you would have to, in  
6 fact, opt out of that decision. So at least there would  
7 be one mandatory look at the disclaimers, if they hadn't  
8 chosen to do so individually as they're working through  
9 the web page.

10 MS. KOLISH: Okay. Are there any other  
11 comments?

12 MR. FRUEHE: There are two things. One is I  
13 think that we need to think about the consumer  
14 expectation. When a consumer clicks on the order now  
15 button, I think their expectation is, I'm going to place  
16 an order now. So the next thing they're going to do is  
17 go to the next page, and they're going to zero in on, the  
18 first thing I need to do when I give somebody an order is  
19 I have to give my name. So I go from the order now. I'm  
20 starting to fill in the form. And I think of the  
21 expectation of where a customer is going is extremely  
22 important when you talk about proximity.

23 And the other piece is that if this company  
24 sells more than just Quick DDRIP, if they're selling a  
25 multitude of products, now you've either got the

1 situation that Kevin brought up earlier where you have  
2 multiple disclaimers at the top, possibly obscuring the  
3 order form and making the customer think I've gone to the  
4 wrong place. Because I've clicked order form and all I'm  
5 seeing is legalese, so I go back.

6 So you've confused the customer. You've made it  
7 harder for them to make that purchase. Or you've got to  
8 do some programming to look at what the customer is  
9 buying and put the appropriate disclaimer up. Now, for a  
10 large company like Dell to do that type of programming is  
11 a relatively expensive task, but we can do it. We've got  
12 the resources. But that may disadvantage a lot of the  
13 smaller businesses who rely on less complex electronic  
14 commerce applications.

15 MS. KOLISH: So, John, what would you do to make  
16 certain -- to have an effective disclosure for these  
17 endorsements?

18 MR. FRUEHE: There are a variety of different  
19 things you could do. One of the things I think that may  
20 have been beneficial was actually handling it on the page  
21 prior. But that's not to say that this may not  
22 necessarily work. Again, a lot of it goes back to we  
23 need to sit down and test it and understand can consumers  
24 really pick up on it.

25 You know, there is a lot of conjecture here.

1           Everybody seems to believe that we know what the consumer  
2           wants and how the consumer acts. And I as one, who deals  
3           with, you know, 1.6 million consumers a week, can tell  
4           you that we're not really all that clear on exactly what  
5           they do and how they act. And it changes. So to kind of  
6           make a blanket statement that, you know, all consumers  
7           would see this and it would be conspicuous is kind of  
8           difficult to do.

9                       MS. KOLISH: We agree. I mean, I don't think we  
10           can ever project that all consumers are going to act in  
11           any particular way. We're just trying to say other  
12           factors that are going to make it more or less likely  
13           that people will look at it. I mean, we understand the  
14           difficulty that that engendered.

15                      Craig and then Jeff.

16                      MR. JORDAN: Just a quick point about the  
17           earlier point I made about where the click track might  
18           lead. I just want to point out that the click track  
19           might lead off line. That is, someone might decide, I  
20           can get a better deal on this at Best Buy than I can  
21           going to the company. So I'm going to go and get my car.  
22           I'm going to go down to Best Buy and I'm going to buy  
23           this product.

24                      They may never see the disclosure. Who knows  
25           what is at the store -- at Best Buy. If there's not an

1 endorsement on the box, there's probably not a disclosure  
2 on the box. Or they might never ever even go to the  
3 order form, depending upon, you know, what their  
4 perceptions of the product, where they can get it and  
5 what their best opportunity to buy it is.

6 MS. KOLISH: Good point. Thank you. Jeff and  
7 then Dave.

8 MR. RICHARDS: Jeff Richards, Internet Alliance.  
9 We should look carefully at this order form, because this  
10 is one of the last times we'll see an order form like  
11 this. Order forms are no longer order forms. In fact,  
12 interestingly enough, one way -- there are many ways  
13 around the conundrum of how to ensure customer  
14 satisfactory and disclosure and all of that -- is to  
15 build it right into the order form.

16 You know, what are the factors that affect the  
17 speed and quality, and you build it into the order form.  
18 So as you're testing it out, in other words. Before  
19 you're finally buying it, you're putting in -- I don't  
20 know -- maybe that you know you're within ten miles of  
21 the central office -- telephone central office. Or, you  
22 know, the basic things that people could really do.

23 That's why this fill out the handwritten form is  
24 going away real fast, and why we want to give every  
25 encouragement into building in these disclosures. I

1 can't agree -- Internet Alliance members have strong  
2 experience with consumers who get to this point in the  
3 purchase process and then get this ah ha, they'll turn  
4 away and say well, this is perhaps not a reliable vendor.  
5 So it's in the merchant's strong interest to integrate  
6 this information in very, very early.

7 MS. KOLISH: Okay. I think Jerry was first, and  
8 then we'll go to Dave.

9 MR. CERASALE: Jerry Cerasale, Direct Marketing  
10 Association. I wanted to make a comment -- two comments.  
11 One is that especially in this context here on the  
12 Internet, it may be that you will only see ads for items  
13 that can work on your computer. That you can set this  
14 thing up so that they know what your equipment is, and so  
15 that you have to take a look at the whole ad in the whole  
16 context of what is happening.

17 For example, you could have -- if I had one  
18 computer, I might see a different set of ads at a web  
19 page, or a different set of text at a web page, than if I  
20 had another computer with other capabilities, or  
21 different products. Some products wouldn't work on my  
22 slow computer I won't even see.

23 So there are a lot of things that the Internet  
24 can offer us, and that's why I think that -- reiterate  
25 again that you really have to look -- and I think you've

1           said it, Elaine -- on a case by case basis.

2                     The other thing I wanted to raise was a comment  
3           that was raised, I think, by Roy, of the mandatory pop up  
4           screen that you have to then click through to go out.  
5           That creates from our -- what we've seen, and of course  
6           we would need more study on it, I'm sure. That creates a  
7           disincentive to go on the net and go through here.  
8           That's an annoyance and people don't want to do that.

9                     And I think that it also places the Internet at  
10          a disadvantage compared to other media, because you're  
11          mandating you have to go through this. It's not -- and I  
12          think that what we would like to see here is that the  
13          Internet not receive any favored treatment, but also not  
14          disfavored treatment. That you just apply things in  
15          relationship to the technology, but not create any  
16          special advantage or disadvantage for the net.

17                    MR. GREEN: Could I respond to that?

18                    MS. KOLISH: Sure, Roy.

19                    MR. GREEN: Thanks. Well, again, the Internet  
20          has many rights -- many opportunities for seniors, but  
21          consumers of all kinds. And I understand the point that  
22          you're talking about there. But the issue here is that  
23          it is a default. That is, if people have not taken the  
24          opportunity to look at a disclaimer beforehand, that it  
25          pop up and that it be made efficient so that they can opt

1 out if they don't want to read it. It doesn't require  
2 that they read it. It just requires that they be  
3 confronted with that information momentarily. I think  
4 that might be an important principle.

5 On the other hand, in the way we're talking  
6 about, so far in most of the advertisements and ways for  
7 presenting disclosures, all of the responsibility falls  
8 on the consumer. And you're talking about a variety of  
9 techniques and strategies here for different web sites  
10 over different time periods involving lots of  
11 advertisements and lots of companies, and with lots of  
12 people coming online with the tremendous variation in  
13 experience.

14 So again, from the consumers' point of view, it  
15 seems to me that one might consider the trade off here,  
16 that there needs to be at least some formal presentation  
17 of the disclaimer somewhere in the process. If they  
18 choose to do it voluntarily -- that is, when they're  
19 working through an advertisement up front -- then the pop  
20 up doesn't appear, because they've already explored a  
21 piece of information or chose to interfere with it -- to  
22 interact with it, rather.

23 But if they haven't, the question is, should  
24 they be required to at least be exposed to the fact that  
25 there are disclaimers present in that advertisement.

1 It's not meant to put the Internet at a disadvantage, but  
2 rather if you're talking about a new environment -- that  
3 is, an electronic environment -- in which there is this  
4 tremendous variation of inexperienced people online,  
5 providing some basis protection to them.

6 MS. KOLISH: Thank you, Roy. All right. We'll  
7 go back to Dave and then Elissa, and then we'll wrap this  
8 up, because we have some final points about hyper links.  
9 Then we're going to go to a different topic.

10 MR. CLAUSON: I'll go very quickly. Dave  
11 Clauson with IXL. You asked a point earlier, Elaine,  
12 about should the disclaimer print on the order form and  
13 what happens. It was Jeff's point earlier. That order  
14 form should be filled out for me if I've been to  
15 dell.com. I wouldn't even have to do that in many cases,  
16 so that's going to change.

17 A couple of quick points. Again, this gets back  
18 to the issue of information design. The objective is to  
19 permeate to the consumer as much relative information on  
20 the consumer's terms. If we don't accept the fact that  
21 the Internet is not like traditional -- it is not  
22 television. It is not print. It is not -- it is not  
23 media, okay.

24 It is a community of interests. It is an  
25 environment where I am in control. The minute we begin

1 to start down the path of words like mandatory, words  
2 like forced, must view this before you're allowed to  
3 purchase, (1) you're fighting the whole context on which  
4 the Internet was created, and (2) you will engender -- I  
5 guarantee you if you had that policy up today there would  
6 be about 10,000 programmers who would be out trying to  
7 find a way around that immediately.

8 The truth is, the consumer will tell you. And I  
9 think, again, what the best marketers on the web  
10 understand, is empowering the consumer with information.  
11 You asked where should disclosure information go. I  
12 would argue it should be in many different places in many  
13 different forms, Because you want the consumer to  
14 understand and appreciate as much information as they  
15 possibly can.

16 But to say that all our disclosure information  
17 belongs in this one place, I believe is a mistake, and I  
18 think the consumer would tell you so very quickly.

19 MS. KOLISH: Elissa and then Dan, and then we're  
20 going to move on.

21 MS. MYERS: As I was looking at page 28, the  
22 order form of the ad, the thought process that ran  
23 through my mind was that -- although we're not taking the  
24 position that it should or shouldn't be on this page. It  
25 occurred to me that this is a useful place for this

1 message, because the content of the message in that  
2 paragraph modifies not only the testimonials, but in fact  
3 the description of the product.

4 Which led to me to a train of thought in which I  
5 went back to the -- Elissa Myers, Electronic Retailing  
6 Association.

7 **(Laughter.)**

8 MS. MYERS: And we've just published online  
9 marketing guidelines. And in the online marketing  
10 guidelines, one small paragraph that we require our  
11 members to adhere to is that testimonials and  
12 endorsements in online advertisements may not make  
13 representations that would be deceptive or could not be  
14 substantiated if the advertiser made them directly.

15 And the nature of a disclaimer, as I was sitting  
16 here thinking about, what does that word mean, and do I  
17 really understand it. It implies that a misstatement or  
18 a misunderstanding has been generated which has to be  
19 disclaimed. So there is something -- we believe at the  
20 Electronic Retailing Association -- call me Pollyanna.  
21 But we believe, and we're asking our members as a matter  
22 of contract with the organization, to tell the whole  
23 truth -- tell the truth, the whole truth and nothing but  
24 the truth to consumers.

25 And if you're doing that, perhaps this whole

1 issue of where the disclaimer appears and how we treat  
2 disclaimers becomes an issue of slightly less critical  
3 importance.

4 MS. KOLISH: Thank you, Elissa. Thank you also  
5 for noticing that we wrote such a good disclosure, that  
6 it does give you a lot of information even if you're not  
7 looking at the endorsement. We thought that was one of  
8 its flaws for this purpose, actually.

9 Dan?

10 MR. JAFFE: Well, this discussion brings me back  
11 to a point I made earlier, but I think it has more point  
12 here, which is that if you start having forced pop ups --  
13 first of all, I'm Dan Jaffe with the Association of  
14 National Advertisers.

15 MS. KOLISH: Actually the court reporter has  
16 said she's actually getting us now.

17 MR. JAFFE: But in these ads, again, you could  
18 have multiple disclosures. You would have to have  
19 multiple pop ups. You would have to have multiple  
20 agreements for the consumer to go through them whether  
21 they read them or not. It's going to become a very  
22 cumbersome way to do things.

23 So I would really like to associate with what  
24 Mr. Clauson said, which is that you have to let the  
25 consumer be sovereign here. We have the goal of making

1       sure that these things are noticed. But I really believe  
2       it's going to be very tricky at this point for the most  
3       knowledgeable people the most expert in this area to  
4       really predict what we're going to be facing six, nine or  
5       12 months from now, because we really don't have the  
6       richness of consumer experience that we've had in many  
7       other areas.

8                Maybe there will come a time -- I'm not sure  
9       there will. But there may come a time when we really can  
10      know enough so that we can set up some rules. I'm pretty  
11      positive that if we set up rules now, we'll get them  
12      wrong. This is a moving target where we're going to  
13      shoot at, and it's going to be past us and we're going to  
14      miss and actual damage the selling efforts.

15               So I think we've got to be very careful, because  
16      these ads -- well, I think they're excellent for the  
17      discussion. I really do. I think they bring up a lot of  
18      the key points. They are very simple as to what is  
19      already out there, and what is going to come soon is  
20      going to be so much more complex, because we keep getting  
21      more and more sophisticated every day.

22               MS. KOLISH: Thank you, Dan. Thank you  
23      everybody. We'll move on. We're going to look at ads  
24      19, 22 and 23, and we're still talking about hyper links.  
25      And what we want to get out here is repetition. We

1 raised in a Federal Register notice and many of your  
2 commented on a possible need for repetition. We're not  
3 saying it's mandated. We're just raising a question  
4 about this. And it's going back to our seven screens of  
5 endorsements, which is the equivalent of four printed  
6 pages, as you'll see from your printouts.

7 And the question is -- we're talking about  
8 effectiveness and communication, and what is going to be  
9 communicated, and what's still going to be communicated  
10 at the end of the scrolling. And so in ad 19 you see  
11 that the lovely clear and conspicuous -- ha, ha,  
12 laughing; just kidding -- blue, color contrasting  
13 disclosure is at the top. And in ad 22 you see there is  
14 a disclaimer button after every single endorsement. And  
15 in ad 23 you see that there is a hyper link, your  
16 experience may vary.

17 And we thought, well, let's look at it in this  
18 context. Do we think that this disclosure at the top of  
19 the page, you know, is effective. I mean, a lot of  
20 people said yes, it could be good. Maybe it should be  
21 when you're really further into it.

22 Assuming it's good here, is it still good in  
23 terms of a communication technique? When consumers go  
24 down to the bottom of the page, will it still have the  
25 effect of qualifying the impression that people take

1 away? And what about this disclosure -- well, let's talk  
2 about that first, and see if anybody has views shortly.

3 Ron and Kevin, okay.

4 MR. GOLDBRENNER: Ron Goldbrenner. Again, I  
5 would measure it against the inadequate test. I think  
6 all three are adequate. I think one may be better than  
7 another. One may be better than another in a particular  
8 context. But they're all adequate for clear and  
9 conspicuous disclosure, and that's what we want.

10 MS. KOLISH: Okay. Kevin?

11 MR. ELSE: Kevin Else with QVC. I think in  
12 looking at these, one of the things that QVC tried to do  
13 more than anything else is to make sure we don't have  
14 returns. And we sell a lot of products. And I think you  
15 would find that if we were designing a site like this, we  
16 would be more likely to do the your experience may vary,  
17 just because the other limited disclaimers really don't  
18 give our customers enough information so that we won't  
19 get the returns from the product.

20 I think that the marketplace will actually lean  
21 toward the more inclusive, your experience may vary kind  
22 of disclosure.

23 MS. KOLISH: Thank you. Well, it's interesting.  
24 And would you put it each time -- after each endorsement?  
25 You can be honest.

1           MR. ELSE: Well, I think -- not to say that, you  
2 know, it would be absolutely necessary in every  
3 circumstance. It may be that some of these testimonials  
4 really are proper for any consumer. So it really does  
5 depend when you look at the disclaimer whether or not,  
6 you know, there is some general statement in there that  
7 says, you know, in an affirmative statement that it will  
8 work for everything. And then I think you absolutely  
9 have to put it a disclaimer.

10           And if there was just some oblique reference  
11 that perhaps really what you're looking at are four --  
12 you know, four statements that are very similar and they  
13 just sort of well, it may work, you know, with things, it  
14 may be appropriate to then just simply have one, you  
15 know, your experience may vary button.

16           MS. KOLISH: Okay. Carla, did you want to say  
17 something?

18           MS. MICHELOTTI: Well, you were asking how it  
19 would be incorporated in -- Carla Michelotti representing  
20 AAF from Leo Burnett. You asked how it would be  
21 incorporated in the real world. Number one, as far as  
22 this being signed, legally approved, is this good enough,  
23 I would say all of these three -- as Ron said, all of  
24 these three are adequate and it's disclosed.

25           In the real world, I don't think anyone would

1 really design a web site like this. And the testimonials  
2 would be reviewed, and probably the creatives would come  
3 up with some kind of introduction, and maybe they would  
4 call the whole area, fan mail. You know, read our fan  
5 mail. You know, your experience may not be exactly like  
6 this. They could come up with some way of disclosing  
7 that. You know, you don't know how creatively the same  
8 concept may be conveyed, which all speaks to -- it's hard  
9 to interpret a strict application of the rules, which I  
10 know is what you all are saying.

11 MS. KOLISH: Right. And in fact, you know, one  
12 of the reasons we did this is it's not uncommon to go on  
13 web sites to see consumer experiences and to see quite a  
14 few screens worth of information. We didn't sort of just  
15 make this up out of whole cloth.

16 We were wondering -- we knew in terms of  
17 creativity that this was probably not ideal. I mean, I  
18 think the text of the endorsement is very cute. It  
19 amuses me to no end.

20 MALE SPEAKER: It's well written.

21 MS. KOLISH: Thank you. Bev and Dean deserve  
22 all the credit for that, I think. We thought that having  
23 disclaimer, disclaimer, disclaimer after everyone might  
24 be overkill, and in fact might detract from its  
25 effectiveness, even though it's a use of a hyper link to

1 be able to repeat the information.

2 But does it end up being over used and so less  
3 effective? John?

4 MR. FRUEHE: Yeah. I was going to bring up that  
5 exact point. A year ago when we designed our web site,  
6 we designed a left hand column that was dark blue. And  
7 in the first few months that we worked with it, it was  
8 very well received. Customers always said, you know, I  
9 know that that's where I go to get that information.

10 And over time over testing as the medium  
11 changes, as customers tastes change, and the Internet  
12 changes, suddenly now we find out that people start to  
13 zone that out. So now that left hand column, which is  
14 where sometimes there is important information, can be  
15 ignored.

16 So the repetition is good. But repetition to  
17 the point on this particular page, you may be at the  
18 point where you're actually doing more harm than good,  
19 because people start to say, well, if everything has a  
20 disclaimer, it probably isn't that much of a disclaimer.

21 So it may actually have a negative effect in  
22 some cases.

23 MS. KOLISH: Okay. Mark, did you have your hand  
24 up?

25 MR. UNCAPHER: Well, I was going to comment. I

1 mean, obviously the issue that you're getting at is this  
2 kind of gray line that develops between the clear rules  
3 on disclaimer and where you provide an open forum for  
4 consumers to provide information about products.

5 And where you have kind of a log, if you will,  
6 in which consumers are able to comment and it can be a  
7 valuable source of information, there is probably a  
8 continuum there between the clear example of a paid  
9 endorser, where that is part of the copy which has to be  
10 disclosed, and one where you really are providing an open  
11 mic that allows for consumers, say, to provide book  
12 reviews. And really there is no particular vested  
13 interest in the marketer to -- you know, the person is  
14 going to buy one thing or another.

15 But clearly what we don't want to do is to  
16 inhibit that kind of exchange of information. I think  
17 Jeff made the point very eloquently before. We should  
18 not look at this medium as simply, you know, consumer and  
19 marketer as separate, but where there is an interaction  
20 between consumers and marketers in an exchange of  
21 information that can be quite useful for all concerned.

22 MS. KOLISH: Okay. One tiny final remark, Ron,  
23 and then we'll move on.

24 MR. GOLDBRENNER: I think John has made a couple  
25 of very critical remarks. The doctors have an important

1 part of their ethics that says first do no harm. And I  
2 think that that has to be a paramount principle for  
3 regulating the Internet. And I think you have to measure  
4 anything you want to do against that test.

5 Secondly -- and that's the technological  
6 freezing -- occasion technological freezing. That's  
7 perhaps a greater harm than not making full disclosure.  
8 And I think John's point about this development in the  
9 blue line on the side is very important in that manner.  
10 We don't know yet what technological freezing is and what  
11 it's going to do -- its impact.

12 Another point that John made before is that  
13 there are a lot of small businesses engaged in this  
14 Internet game. There are fewer barriers to entry in the  
15 Internet than anything else. The more we create in the  
16 way of rules and the way you must do things, the more the  
17 guy has got to have a lawyer by his side when he creates  
18 his web. So that's another harm that you've got to  
19 consider and measure against the good that you're going  
20 to do with full disclosure.

21 And finally, John said the other one was  
22 overkill. If you repeat it and repeat it and repeat it,  
23 you're going to turn the visitor off. He's not going to  
24 go to that site. And the information will all be there  
25 -- the greatest information in the world -- and nobody is

1 going to visit the site.

2 MS. KOLISH: Thank you. Roy and then we'll move  
3 on.

4 MR. GREEN: Looking at the end point and  
5 actually turning it around, there is, as we say, a great  
6 variation of people who come online to shop. But there  
7 is also, as you were just pointing out, a tremendous  
8 variety of skills and talents that are putting  
9 advertisements on the web. You have some of the best  
10 brains around the country represented by the table here  
11 in terms of the state of the art.

12 There are an awful lot of people coming on and  
13 putting advertisements on the web that aren't state of  
14 the art. And the question in developing standards is  
15 what the minimum has to be for everyone. Because the  
16 best usually are the best, and probably need less  
17 guidance than anyone else.

18 But the question we're looking at here overall  
19 is what kinds of standards have to be required, not only  
20 of the burden on the consumer to know what they're doing,  
21 but on the minimum level of anyone who decides to in fact  
22 hang out their shingle on the net and to do business.

23 So I think there is an aspect of that that needs  
24 to be considered here as well in terms of the minimum  
25 standard that we're talking about.

1 MS. KOLISH: Thank you, Roy. Final comment,  
2 Jean, and then we're going to definitely move on.

3 MS. FOX: Jean Ann Fox, Consumer Federation.  
4 Since all of these rules and guides already are legally  
5 binding on Internet commerce, correct, and since  
6 certainty is a term I keep hearing -- when you talk to a  
7 business, they want certainty. They want to know what  
8 they're supposed to do.

9 I think you would be less likely to have to have  
10 a lawyer at your elbow if the Commission issued a general  
11 policy statement on how you plan to apply these rules to  
12 this venue than if you didn't.

13 MS. KOLISH: I know all the lawyers in town  
14 might not like that, Jean Ann.

15 **(Laughter.)**

16 MS. KOLISH: We're not going to go to these  
17 questions. But as you think about post-workshop  
18 comments, if you're inclined to write one, if you think  
19 about other issues or factors that could affect -- you  
20 know, that are great ideas about hyper links or things  
21 like, oh, you know, this is something that is hardly ever  
22 going to be effective, or is likely to be ineffective,  
23 please put that in your comment. And if you have  
24 research, we would love to see it. And we would love to  
25 hear more of your views about this.

1           But we're going to switch gears now, and we're  
2 going to go to the link to page from the hyper link. And  
3 Laura DeMartino is going take over and lead this part of  
4 the discussion, because I'm sure you're sick of my voice  
5 by now. I know I am.

6           MS. DEMARTINO: So far we've talked about the  
7 hyper link itself, and now we would like to continue on  
8 and discuss what is seen on the link to or the click  
9 through page. As you recall, for the diamond weight ads  
10 -- and if we could pull up ads seven and eight, please?  
11 For the diamond weight ads, there needs to be a  
12 disclosure that diamond weights are not exact, and a  
13 disclosure of the range of weights that are used for the  
14 three quarter carat.

15           And on seven and eight we have two links. On  
16 eight you have to scroll down to get to it. And if we  
17 could click on those links and see where they take us,  
18 they take us to two different pages. On number nine the  
19 link to page has information about diamond weights. And  
20 imagining that an advertiser might put links on all of  
21 its diamond product home pages, there is a lengthy chart  
22 of weight ranges for each fraction.

23           Page 10, on the other hand, contains information  
24 about colored gemstones and pearls and also diamonds.  
25 Assuming we thought that the hyper link that took us here

1 was adequate -- it was effective -- we would like to hear  
2 your views on whether our analysis ends there. Or if  
3 not, what considerations need to be taken into account  
4 when we're looking at this link to page.

5 Phillip McKee?

6 MR. MCKEE: Phillip McKee, National Consumers  
7 League. The analysis can't end there. It has to keep on  
8 going. It has to look at what kind of information is  
9 provided on the disclosure page, if you're going to make  
10 a disclosure page.

11 In this case the disclosures that we're talking  
12 about refer to the weight ranges. Page nine very  
13 directly takes you to a page that discusses the weight  
14 ranges, what could possibly be there in a three quarter  
15 carat ring. Ad number 10 takes you to a page with lots  
16 of general information. Yes, there are interior links  
17 that allow you to go down to where the diamond section  
18 is, but it's rather buried. You have to look for that  
19 information. It makes it more difficult for the consumer  
20 to find the required disclosure.

21 If the FTC is looking at a site that has to make  
22 a required disclosure, but then when it makes the  
23 disclosure hides it among all sorts of other useful, but  
24 not necessary information at that point, the disclosure  
25 becomes ineffective.

1 MS. DEMARTINO: Does anyone else have any other  
2 views? David Clauson?

3 MR. CLAUSON: Dave Clauson, IXL. I just want to  
4 be careful when we use terms like hide and buried. If  
5 you were a consumer, I would argue that, again, if you're  
6 a diamond jeweler expert, you don't need to be told what  
7 a carat was.

8 If you're a novice -- if it's your first time  
9 that you've bought a diamond, a lot of the information  
10 that is on -- and by the way, I would not call this an  
11 advertisement. But on this page is very useful  
12 information. It begins to -- this is what consumers who  
13 are uneducated need to know.

14 MR. MCKEE: If I may respond?

15 MR. CLAUSON: Just let me finish, please.

16 MR. MCKEE: Okay.

17 MR. CLAUSON: And when you go through that  
18 information and the fact that yes, you can find what a  
19 carat is -- and again, I'm not doing a legal  
20 interpretation here. But in terms of again what I can  
21 speak to, which is the information architecture, this is  
22 a very useful way of conveying even more information than  
23 just what I would get in the disclosure.

24 And as a consumer, I am going to feel more  
25 empowered to make a better purchase, because the provider

1 of this information has made sure that I'm more expert by  
2 reading this page than when I was before.

3 MR. MCKEE: If I may respond to that? The  
4 reason I said hidden or buried is that the information  
5 concerning diamonds is exactly the same on both pages.  
6 So if you linked the diamonds only page, you're going to  
7 get all the useful information, such as the carat,  
8 definition, etc.

9 The problem that I have with page 10 is not a  
10 lack of information on diamonds. It's that you're  
11 linking -- you're trying to make a disclosure concerning  
12 diamond weight, and you're putting it several screens  
13 down behind information on the cleaning instructions for  
14 colored gemstones and the way in which cultured pearls  
15 are made.

16 That information is not material to a purchase  
17 of diamonds, and it's not material to the description of  
18 the method of stating a diamond's weight. That's the  
19 information that might not necessarily need to be on this  
20 particular page. Instead, have this page and a link to  
21 further information on other gemstones. That way you're  
22 not over powering the consumer with information at one  
23 spot.

24 MS. DEMARTINO: Okay. We'll go to Carla, then  
25 to Wendy and then John.

1 MS. MICHELOTTI: Carla Michelotti representing  
2 the American Advertising Federation. Both of these pages  
3 are fine as jump to pages, and there are dozens of other  
4 ways -- probably hundreds of other ways to convey this  
5 information. And yet again, and I'm probably repeating  
6 things that have been said all day. But they're so  
7 important.

8 There is no way to limit the creativity of how  
9 information can be conveyed in this medium, which is  
10 going to be designed to enhance an invitational  
11 environment for the consumer. Because unless the web  
12 pages are invitational, they're not going to work and the  
13 consumer is not going to engage himself in the web pages.  
14 And it's not a mandated force communication. It is in  
15 fact a communication that the consumer is going to invite  
16 into his home and get deeper into.

17 So this is not a world where we can mandate. It  
18 is not a world where we can mandate specific language,  
19 specific locations and specific type size. Because also  
20 we have to remember that there are a lot of people on the  
21 web. There are many, many people on the web.

22 And if we think we are going to create a  
23 baseline that this is the minimum standard, if in fact --  
24 and the FTC has never said this. And they have been very  
25 solid in encouraging a pro -- you know, a

1 nondiscouraging, now don't stifle the creativity, now  
2 don't stifle the economy, don't stifle the marketing  
3 opportunity of the Internet. And that's been very  
4 positive, yet do this in a nondeceptive environment. And  
5 that's been very positive.

6 If, in fact, we had the ability -- if we could  
7 say okay, here is the minimum standards, everybody must  
8 comply with these standards, this is the minimum  
9 language, and this is how you have to do it, what that  
10 really would do is force the advertisers with integrity  
11 and the honest, ethical, huge corporations that are out  
12 there doing the right thing and trying to comply with the  
13 rules of the road, they would just give it up.

14 And the web would be still there. You would  
15 still have people noncomplying with the minimum the FTC  
16 would establish, and the web would become graffiti. It  
17 would become graffiti without advertisers of integrity.  
18 So it's important to maintain not to stifle creativity,  
19 not to stifle the technological development, and not to  
20 stifle future opportunity.

21 And I haven't heard anything from the FTC  
22 inconsistent with this.

23 MS. DEMARTINO: Right. Exactly right. And that  
24 is all good points. If I could just, you know, follow up  
25 with you. For page number 10, then, I mean, is it your

1 view that the message that diamond weights are not exact  
2 and that a three quarter carat diamond could range from  
3 .70 to .80 -- I mean, is it your view that that message  
4 doesn't get lost in this page?

5 MS. MICHELOTTI: It's fine. It's fine.

6 MS. DEMARTINO: Even though a consumer might  
7 need to scroll down to get it, or sees colored gemstone  
8 information first? Just to clarify?

9 MS. MICHELOTTI: Yes.

10 MS. DEMARTINO: Okay. We were going to go to  
11 Wendy.

12 MR. SKILES: Wait. Carla, could I ask a follow  
13 up question? Would you have that same position if this  
14 was an ad for a 900 number, and down at the bottom it  
15 said it was a \$3.75 per minute charge?

16 MS. MICHELOTTI: Well, how would it work,  
17 because what would be the page? You would have a 900  
18 number --

19 MR. SKILES: Just envision an ad for a 900  
20 number. It says call this 900 number for information  
21 about jewelry.

22 MS. MICHELOTTI: Okay. And then you go to the  
23 other -- then what are the three items that you're  
24 clicking to on the 900 number?

25 MR. SKILES: Just an ad for fashion jewelry.

1 Call this number for information about our jewelry sale,  
2 50 percent off. And then at the bottom of the page it  
3 says, \$3.75 per minute.

4 MS. MICHELOTTI: But it would --

5 MR. SKILES: All the way at the bottom of the  
6 page. Scroll down to where the diamond weights are.

7 MS. MICHELOTTI: That kind of speaks to what we  
8 were talking about this morning, whether important  
9 information -- whether the location of important  
10 information, where it's located on the page and the  
11 reasonableness of whether somebody would understand that  
12 they should scroll down the page, and how long the bar  
13 is. It kind of goes back to what we were talking about  
14 this morning.

15 MR. SKILES: Right. But would you say that's  
16 okay down there?

17 MS. MICHELOTTI: I'm not -- if in fact -- if  
18 the consumer -- I'm not understanding your example. I  
19 really am not. I'm not trying to be tricky. I'm not  
20 understanding the example, because in what we're looking  
21 at here, you're talking about diamonds. I clicked on  
22 diamonds and I go over. I'm talking about the weight,  
23 and I get to a weight and diamond information and I go to  
24 diamonds.

25 MR. SKILES: And I'm leaving the weight example

1 and substituting for that a 900 hundred number example.

2 MS. MICHELOTTI: But I don't understand.

3 MS. DEMARTINO: David?

4 MR. CLAUSON: I've got it. Do you want me to  
5 try?

6 MS. DEMARTINO: Yeah. Let David respond.

7 MS. MICHELOTTI: The gentlewoman from Illinois  
8 passes to the gentleman from Atlanta.

9 **(Laughter.)**

10 MR. CLAUSON: I think I can take a whack at  
11 that. The screen on the right -- I believe it's ad  
12 number ten. Could we just scroll up a bit? I just want  
13 to make, again, a point -- right there, that's great. A  
14 point about the architecture.

15 It is very common practice on a jump page to  
16 come to an indexing. Remember, look at the title. It  
17 says Jewelry Information. This would assume that this is  
18 in a site in the FTC jewelry site that the FTC also has  
19 colored gemstones and pearls and diamonds that it is  
20 offering. It is not inconsistent that I would find  
21 diamond information along with pearl information and  
22 colored gemstone information.

23 In fact, if it was well designed, I could click  
24 on diamonds -- click -- and come right to this page,  
25 okay, which is common navigational practice. Will every

1 consumer click on the diamonds on that page? No, not  
2 sure. Will many of them do it? Yes, especially the more  
3 educated. The more time they spend on the web, the more  
4 natural environment of click. Because I can actually get  
5 to that information very, very quickly by click, click,  
6 click.

7 To answer the gentleman's question about if it  
8 were a 900 number, again, the first question I would ask  
9 is, if I'm moving to the information about the call, am I  
10 giving you clear conveyance in that architecture at the  
11 top what you will be charged. If there were -- instead  
12 of diamonds it had what you'll be charged, that's a very  
13 quick information -- it's a quick way -- rather than  
14 scrolling through that text to find it, it's actually  
15 designed to be a more effective way of getting to the  
16 information that I'm most concerned about, which is what  
17 are you going to charge me by minute for taking that 900  
18 call.

19 So the answer to your question, I think this  
20 could absolutely be just as effective, if it was designed  
21 properly.

22 MS. DEMARTINO: Well, if I can just jump in to  
23 continue for this page and for, you know, the 900 number  
24 rule hypothetical, we've just clicked on a link to come  
25 here. Is there any reason not when you click -- is there

1 any reason that when you click on the first link it  
2 doesn't take you directly to the middle of this page?

3 MR. CLAUSON: None at all. And that's the way  
4 you can design the link to take you to specific areas on  
5 the page. Again, the information architecture matters.  
6 So if the link is designed to take you to the cost  
7 information about the call, it can take you right to the  
8 sentence that says you will be charged X per minute. If  
9 that's the way it's designed.

10 I'm not a frequent user of 900 number web sites,  
11 so I can't --

12 **(Laughter.)**

13 MR. CLAUSON: -- comment on that, and I'll defer  
14 to someone else on that one. But I think the point,  
15 again, that I just want to reiterate, is how you design  
16 does matter. And you need to design in terms of the  
17 experience that the consumer wants. And if I want  
18 information about what you're going to charge me, I'm  
19 very smart to design it so you get that information fast,  
20 or I'll go some place else.

21 MS. DEMARTINO: We got a little sidetracked. I  
22 think, Wendy, you had some comments?

23 MS. SCHMIDT: I would like to say -- and this  
24 sort of emphasizes why it's important to keep flexibility  
25 and keep context in mind. I mean, many diamonds come

1 with gemstones. So you might send someone to this page  
2 so that they can get a variety of information on one  
3 piece of jewelry. And in fact it's easier.

4 And from a web site perspective, each of us is  
5 at a different technical level. I can tell you when we  
6 started our web site, we couldn't jump around that much.  
7 And as we get more sophisticated, we can. But you don't  
8 want to take the smaller marketers or the newer web sites  
9 out of the picture, and for them doing something like  
10 this satisfies the requirements. It meets the baseline  
11 test, and they may not be able to meet a higher standard.

12 I think, again, we're trying to figure out will  
13 prevent deception and what will a reasonable consumer be  
14 able to look at and find information on. And I have to  
15 say that if you go into most jewelry stores, the  
16 information on gemstones, diamonds and pearls is all  
17 going to be in one booklet that they have to look  
18 through.

19 So I don't think it's unreasonable to say that  
20 someone should be looking -- paging down a little bit on  
21 a web site.

22 MS. DEMARTINO: John Fruehe from Dell. You had  
23 your hand up a while back.

24 MR. FRUEHE: Yes. Actually David stole one of  
25 my points, which was an anchor link, which as you said

1 from the other page, would take you directly to that  
2 diamonds piece is a very common occurrence, actually.  
3 That would be the proper way to code it. Not to say that  
4 whoever did this didn't do it right, but that is  
5 generally how we would do it at Dell, and I think how  
6 most of the people on the Internet would do that. So  
7 you're taking the person directly to that relevant  
8 information.

9 The other piece, though, that I wanted to touch  
10 on is that in this particular case, you've taken the  
11 colored gemstones, the pearls and the diamonds and you've  
12 put it all on one page with the anchor links. And while  
13 some people may say it would be better to split that all  
14 off on separate pages, having a single consistent page  
15 that you can consistently across your site link to is  
16 very important.

17 And in addition, I've got 150 web designers that  
18 I've got at my company that I can have them go off and  
19 drive all the different pages, create them and manage  
20 them. But for a lot of smaller companies -- smaller  
21 businesses -- they don't have the ability to create large  
22 sites with lots of pages. And the ability to consolidate  
23 will help a small business to be able to compete in the  
24 Internet.

25 MS. DEMARTINO: Okay. Beth-Ann Eason.

1 MS. EASON: Thank you. Beth-Ann Eason from  
2 DoubleClick. We spoke about this earlier, but I think  
3 it's important to keep in context that the decisions that  
4 are made and the rules that are put into effect are broad  
5 enough to think about the changing technologies.

6 A lot of assumptions are being made about this.  
7 But a web site actually exists. And the technology today  
8 allows you to actually transact within a banner, never  
9 having to leave that space.

10 So it's important to keep in mind that the  
11 changing technology and evolution is that this is a good  
12 format to start with and it addresses one aspect of it.  
13 But it's a constantly evolving medium, and the broader we  
14 can make the regulations, the more effective they will be  
15 today and moving forward.

16 MS. DEMARTINO: Phillip?

17 MR. MCKEE: One thing I would like to say about  
18 page number 10, so I don't use the word ad. David and  
19 John have both made really great points about the page  
20 and the use of anchor links. As it is designed now when  
21 you link to it from the original jewelry page, it just  
22 takes you straight up to the top. And that doesn't do  
23 justice to showing the disclosure.

24 If you're using the anchor links properly, as  
25 both of them have stated, it will take you directly to

1 the diamond section. And in that way making sure that  
2 the first thing you see is the disclosures and not  
3 information on one of the other topics, it is a perfectly  
4 acceptable way of making sure that people see it.

5 And anchor links are very easy to do. They're  
6 very easy to create. And so it's not something that is  
7 overly burdensome at that point. So you're quite  
8 correct, David, in saying that the properly designed site  
9 will be able to use a single page and provide the  
10 information.

11 The biggest problem with the particular site was  
12 that it didn't take you directly to diamonds. It showed  
13 you something else and there was the possibility of a  
14 consumer looking at it and saying oh, it's just general  
15 information. Whereas if they get jumped directly to  
16 diamonds, they'll know that it's not just general  
17 information. It's something that was directly related to  
18 what they clicked on a few seconds before.

19 MS. DEMARTINO: Okay. Greg Jordan, I think you  
20 had some comments?

21 MR. JORDAN: I would just say that the anchor  
22 point is a good point. I think it brings up a different  
23 consideration, one that I think about when I'm making  
24 decisions about what's prosecutable and what should be  
25 prosecuted. And it has to do with kind of a real world

1 analysis. There are lots of different ways to  
2 communicate things. Some are better and some are worse.  
3 And this, I think, goes perhaps to the PMA point about  
4 what's adequate as opposed to what's best.

5 It may well be better to do this with a link --  
6 a direct link to the anchor point. Excuse me. And I  
7 might think about as a prosecutor, do I want to require  
8 that or not. And when I think about that, I'm going to  
9 think about why didn't they do that. Is there some good  
10 reason for them not doing that. Is there some consumer  
11 benefit. Is there some resource restriction that the  
12 company faced.

13 For example, is it very common in a television  
14 ad. That question comes up all the time. How much time  
15 do they have to communicate important information in the  
16 ad. Is the information accurate. We have all those  
17 kinds of concerns all the time.

18 In this particular instance, I would have to say  
19 that I don't see any resource restriction or other good  
20 reason for not going to the anchor link. So the  
21 implication from my point of view would be that there was  
22 an intentional element, or at least a lack of  
23 consideration for people who are not going to get  
24 closure. And I would lean towards prosecuting as opposed  
25 to away from prosecuting.

1 MS. DEMARTINO: Okay. We're going to actually  
2 look at this issue, but in another context, and then  
3 maybe I'll get to you once we pull up these next ads.

4 For our Quick DDRIP product that was ad 16B,  
5 which is lost.

6 **(Laughter.)**

7 MS. DEMARTINO: For 16B remember D. J.  
8 Blackhand, and D. J. Blackhand was paid for his  
9 endorsement. And if we clicked on a link that was on the  
10 page, it would take us to 17, which, you know, sets out  
11 the disclosure quite clearly, or it could take us to 18.  
12 And if we could maybe just go straight to page 18?

13 All right. If you click on the link on 16B, it  
14 will take us straight to page 18. Maybe. Okay. We  
15 didn't purchase Quick DDRIP. This is why it's taking so  
16 long. Okay. So 17 sets forth the disclosure. It's not  
17 really controversial, so I would like to focus our  
18 attention on ad number 18.

19 There is a lot of information here about Quick  
20 DDRIP. And if we could scroll down a little bit, there  
21 is a lot of fun information here. Is it likely -- or  
22 would it be reasonable for consumers to find --

23 **(Laughter.)**

24 MS. DEMARTINO: In fact, would a consumer find  
25 the disclosure on this page? And we could, of course,

1 have a little test here, you know, to see who finds the  
2 disclosure first.

3 Jean Ann, I think you really want to comment.

4 MS. FOX: Jean Ann Fox, CFA. No. It took me a  
5 while to find it hidden here down in the first box under  
6 hot, hot, hot, that you had paid Mr. Blackhand for his  
7 glowing endorsement.

8 If I were looking at that, I would say that was  
9 an obvious effort to hide that information. And when you  
10 print it off, it doesn't even come out on the first page.  
11 On my poky computer it comes out on the second page.

12 MS. DEMARTINO: Bob Goldberg, did you still --  
13 did you have a comment?

14 MR. GOLDBERG: Well, the only comment I had on  
15 the last series was I thought those disclosures were  
16 good. But are we missing some of the very basic points?  
17 I hope our prosecutors over here might look at the  
18 jewelry ads. I still haven't determined if it's three  
19 carats for each or both together.

20 **(Laughter.)**

21 MR. GOLDBERG: And what is the FTC going to do  
22 about this retail price on an Internet market that's  
23 nationwide? Whose retail price are they comparing it to?

24 MS. DEMARTINO: We're not doing deceptive  
25 pricing today. Sorry.

1                   **(Laughter.)**

2                   MS. DEMARTINO: Or maybe ever. Didn't we say  
3 total carat weight there? I can't remember. Well,  
4 focussing on the page number 18, there is a lot of fun  
5 features on this page. There is a lot of animation.  
6 There is a lot of vivid information that, you know, Quick  
7 DDRIP is 129.95. And this is, at least in my view, one  
8 of the benefits of the Internet. There is a lot of fun  
9 graphics and things that can catch your eye.

10                   But we would like to hear your views about how  
11 we should evaluate these graphics and animations in the  
12 context of when a disclosure is being made.

13                   Roy Green?

14                   MR. GREEN: Roy Green with AARP. One of the  
15 things that fascinates me, if you have a machine that can  
16 handle this kind of animation, is it important that --  
17 getting back to Jean Ann's comment a moment ago -- that  
18 it be printable out? Whatever you see can be printed,  
19 and particularly if you have maybe a color monitor, but  
20 you have a black and white printer.

21                   Because I've had the experience, for example,  
22 with being unable to see a fair amount of what was on the  
23 screen. I couldn't reproduce it on a printer. And it  
24 seems to me that might be an important feature as well  
25 for disclosures in particular. You want them to put them

1 in the file after a purchase.

2 MS. DEMARTINO: Phillip? Phillip McKee?

3 MR. MCKEE: I would think another important  
4 thing that one should look at is what is the purpose of  
5 the page you're linking to. When you've got a link here  
6 on 16B where it says paid endorsement, and your purpose  
7 is to provide the disclosure, and you then move over to a  
8 page that has a disclosure on it, but then a lot of  
9 nondisclosure information, you should look at what the  
10 purpose of that nondisclosure information is.

11 If the disclosure is done in very drab print in  
12 the middle of the page that you might not notice or you  
13 might skim over, and you've got all these other flashy  
14 things taunting the benefits of it, you might to say that  
15 this really isn't a disclosure any more. You've lost the  
16 force of the disclosure, especially if it's impossible to  
17 find.

18 It's a little different on this page than on the  
19 jewelry information page, where the information was still  
20 interesting and might even be considered part of your  
21 necessary information for the other products, be they  
22 colored gemstones or pearls. In this case, the other  
23 information on this page doesn't seem to serve much,  
24 aside from continuing the advertising and possibly even  
25 hiding the disclosure, to use the phrase that I'm not

1           supposed to use.

2                   MS. DEMARTINO:   Okay.  While we're on the topic  
3           of fun, unique Internet features, let's shift gears a  
4           little bit and take a look at some examples we have  
5           prepared using unique features online to see if they can  
6           be used to make disclosures clearly and conspicuously.

7                   And if we could pull up ads 25, 26 and 16C?  
8           I'll go backwards as we're waiting to load.  Ad 16C on  
9           the right hand screen demonstrates the use of a marquee  
10          or scrolling text bar to make the disclosure that Quick  
11          DDRIP has paid D. J. Blackhand.  Ad 26 demonstrates the  
12          use of a pop up to make the disclosure.  And 25, which  
13          we're still waiting to load, demonstrates the use of  
14          frames.

15                   We would like to hear your views about whether  
16          any or all of these are effective in making the  
17          disclosure clearly and conspicuously, and particularly  
18          keeping in mind what are the benefits of anyone of these  
19          techniques, or any drawbacks or concerns.  Or whether  
20          they're even practical.

21                   And John?  John Fruehe?

22                   MR. FRUEHE:  John Fruehe, Dell Computer.  On the  
23          first, the scrolling marquee, that is something that is  
24          browser dependent.  So depending on which browser you  
25          have, it will display differently.  So that probably is

1 not a good use for that.

2 On the second, the pop up, as the gentleman that  
3 pointed it out before, why don't we have a pop up that  
4 can, you know, ask me these questions or give me this  
5 information. One of the real drawbacks with that is that  
6 with this pop up technology, generally the consumer tends  
7 to click and immediately gets rid of anything that pops  
8 up in front of them.

9 If they were to actually read it, can anyone in  
10 the room tell me how you print that?

11 MS. DEMARTINO: No.

12 MALE SPEAKER: No.

13 MR. FRUEHE: I think if you write, click your  
14 mouse on that screen -- on the pop up -- it may actually  
15 -- no. It doesn't even give you an option to print. So  
16 there is absolutely no way to send that to the printer.  
17 So there is my important disclaimer, and there is no way  
18 for me to actually save that and archive it somewhere.

19 The third, which is frames, and I think we're  
20 seeing a great example of why frames on a web site may  
21 not be the best strategy.

22 **(Laughter.)**

23 MR. FRUEHE: One of the real problems we have  
24 with frames, also, is that in older browsers, which a lot  
25 of times you feel, you know, consumers and education

1 people that aren't onto the latest technology, they may  
2 not be able to adequately print within the frame. It's  
3 real tricky. Even the later version browsers, the four  
4 and five version browsers, can print frames now, but it's  
5 much more difficult. It's still not a one click process.

6 So you really may just confuse your customer.

7 MS. DEMARTINO: Well, even with frames -- if I  
8 could just follow up. You know, are there any other  
9 considerations about browsers that don't support frames?  
10 Or, you know, computer -- you know, if you have older  
11 computer equipment that doesn't support frames, are there  
12 any concerns that the consumer will miss the disclosure  
13 altogether?

14 MR. FRUEHE: Generally from what we see -- and  
15 I'll just say that this may be Dell specific information  
16 and maybe we skew a little more of a technical crowd.  
17 We're at about somewhere between 75 and 80 percent of the  
18 people who come to the site can actually use frames.  
19 They've got a browser level that allows them to do that.  
20 But that still leaves out, you know, ten to 15 percent of  
21 the population.

22 MS. DEMARTINO: Okay. Maybe Jean Ann Fox and  
23 then Philip and then Carla.

24 MS. FOX: Jean Ann Fox, CFA. I'm one of those  
25 people in the 25 percent. I couldn't even look at that

1 mock ad, because the frames didn't even come up. It was  
2 just a blank page. I would think you would write your --  
3 and I need to take one of these technical people home  
4 with me to help me.

5 **(Laughter.)**

6 MS. FOX: But it would seem to me that for the  
7 purposes of providing minimum standards, you would write  
8 your rules to the basic level of what's out there,  
9 knowing that some folks can do better with better  
10 technology.

11 But this is a matter of trying to provide basic  
12 fundamental protection to all consumers who are able to  
13 shop on the Internet. So you need sort of a threshold  
14 rather than the optimum.

15 MS. DEMARTINO: Okay. We'll go to Phillip.

16 MR. MCKEE: As we were seeing a little while ago  
17 and as Jean mentioned, one of the biggest problems with  
18 frames is not all browsers can handle them. Yes, it's an  
19 ever dwindling share of the Internet community that  
20 cannot handle frames. But they're still there. And  
21 there are some people who still have a deep seated hatred  
22 of frames, and so they've altered the browsers. I know  
23 very few people alter their browser settings, but there  
24 are some who do turn off frames.

25 The biggest problem, then, is that when you make

1 a frames enabled site, as a web master you give it the  
2 option to display a different page, if you cannot view  
3 frames. Some web masters put a page up that says if you  
4 can't view frames, download a browser that can. Other  
5 web masters just decide to simply put up a non-frames  
6 version of their site.

7 That would put the advertiser in the position  
8 where they either had to have two completely separate  
9 versions of their site: one that was frames enabled and  
10 would show the disclosure in a side bar, and another that  
11 had the disclosure inside the main site itself so that it  
12 could be viewed by both. Or in a situation where when  
13 you don't see frames, they just pop up the other main  
14 page and you never see the disclosure. Either you  
15 eliminate the disclosure for the non-frames people, or  
16 you make the manufacturer have to create double the  
17 number of pages.

18 MS. DEMARTINO: Okay. Carla, did you have a  
19 comment?

20 MS. MICHELOTTI: Just real quick. I think they  
21 are all from a legal standpoint -- the information is  
22 being conveyed in all three. So I would have a problem  
23 legally telling somebody any one of these is illegal.  
24 But from a technological standpoint listening to these  
25 guys, I don't know if any of them would be chosen because

1 of how effective they are in the real world whether they  
2 work.

3 MS. DEMARTINO: Okay. Roy?

4 MR. GREEN: A different issue here actually  
5 about these advertisements is how long the advertisement  
6 is valid for. By that I mean, what about what's being  
7 sold that might change, particularly the price. So it  
8 seems to me that an additional feature that one would  
9 have to consider is if you were making a transaction and  
10 were trying to not print it out, put it on a disk or  
11 whatever in terms of having a record of what the  
12 disclosure was at the time you purchased it, it would  
13 seem that there would have to be some kind of dating and  
14 timing mechanism that matched up the advertisement to  
15 when the transaction occurred.

16 Because some of these -- or some of the products  
17 would change over time. I'm sure even the price of  
18 diamonds was up.

19 MS. DEMARTINO: Kevin. Kevin Duke?

20 MR. DUKE: Kevin Duke with America Online. I  
21 agree with the comment that at least as displayed these  
22 all, you know, convey the information. I think that's  
23 the important point. Obviously if technological  
24 limitations prevented people from even seeing it, that  
25 would be a separate issue.

1                   There is going to be a discussion, I guess,  
2                   about, you know, whether something is written or in  
3                   writing and whether it's printable. But I don't think --  
4                   I mean, if the information is displayed on the screen  
5                   with the rest of the ad, whether it's printable or not I  
6                   don't know is an issue as to whether it was clear and  
7                   conspicuous.

8                   MS. DEMARTINO: All right. Well, just to follow  
9                   up, then, for the pop up, are there any concerns? I mean  
10                  putting aside the printing issue, are there any concerns  
11                  that if you click some place else on the ad -- and I tend  
12                  to do that, because I tend to click very quickly going  
13                  through ads -- that you minimize the pop up and a  
14                  consumer might miss the disclosure and in some cases may  
15                  not be able to return to it?

16                  MR. DUKE: That's possible. But you could also  
17                  minimize your whole screen and go do something else.

18                  MS. DEMARTINO: Right. I'm just talking in the  
19                  context in thinking about making pop ups to -- or using  
20                  pop ups to make the disclosure and that's the one time a  
21                  consumer is going to be exposed to the disclosure. You  
22                  know, I've gone to the Quick DDRIP home page and clicked  
23                  on what consumers might say. And I come here and the pop  
24                  up comes up, and I'm clicking so quickly that I miss --  
25                  the pop up disappears. I miss it.

1                   Is that a valid concern regarding the use of pop  
2 ups? Well, I know some people have comments, so we'll  
3 come back to you, if you want. Maybe go to Ron and to  
4 John?

5                   MR. GOLDBRENNER: I think the question you just  
6 asked has to do with is it adequate rather than is it the  
7 best. If your standard is I want the best, then you  
8 worry about pop ups in the manner you described. If your  
9 standard is I want it adequate, then you don't worry  
10 about pop ups.

11                   And I think that one of the things we've seen  
12 from the discussion just now, particularly Phillip's  
13 remarks, is that if we're going to try and implement a  
14 series of minimum standards as has just been talked  
15 about, not only will you need a lawyer. You're need a  
16 technological expert as well.

17                   MS. DEMARTINO: Okay. Bill next.

18                   MR. MACLEOD: Bill MacLeod, GMA. I think your  
19 question points up a very important distinction that we  
20 need to keep in mind here. When we're talking about  
21 disclosures, we're talking about disclosing information.  
22 We're not talking about indoctrinating the consumer.

23                   I thought the pop up was kind of a slap in the  
24 face and something that was very hard to ignore, and it  
25 may well be that that is starting to point up some of the

1 complexities and some of the traps in the inter-activity  
2 of this medium. If you make a disclosure so in your face  
3 that the first thing the consumer is going to do is to  
4 push it away, then you have started to make the perfect  
5 the enemy of the good.

6 And that's why I think Ron's standard is a very  
7 good standard to follow here. Adequacy is what you're  
8 looking for.

9 MS. DEMARTINO: Okay. Roy, I think you had a  
10 comment over there?

11 MR. GREEN: Just a follow up to the business of  
12 printing out. If there is no way to reproduce the  
13 disclaimers relevant to even the positioning of the  
14 location or proximity of buttons or the pop up with the  
15 text, it seems to be that if there is in fact  
16 disagreement about what that disclaimer said, or whether  
17 in fact it comports with the law, how will there be  
18 evidence. It will just disappear into space, will it  
19 not?

20 MS. DEMARTINO: Well, we'll go to Phillip next  
21 and then back over to this side.

22 MR. MCKEE: Normally to get the pop up back, you  
23 just need to kind of -- if you're in a Windows  
24 environment, just keep alt tabbing and sooner or later  
25 your pop up should come back. But not everyone realizes

1 to do that.

2 And you're quite right. Frequently when you get  
3 a pop up, you -- there you go. Frequently when you get  
4 -- I deal with these things all the time. When you get a  
5 pop up, it is the first thing that comes up, and a lot of  
6 times you're clicking at other points. Especially if you  
7 see that there is a large amount of stuff coming up,  
8 you're maybe already down to the scroll bar. You're kind  
9 of seeing whatever graphics are coming up.

10 If you're doing it -- if you do have part of the  
11 pleasurable experience in mind, you're moving around the  
12 web site a lot. You don't wait patiently for everything  
13 to come up, and then you interact, and then you wait  
14 patiently, and then you interact. That's not how a lot  
15 of people do it.

16 And so the pop up can very easily get lost. And  
17 as we've seen, it's very -- not everyone realizes how to  
18 bring it back up onto the screen. That's a little bit of  
19 an unfortunate point to that type of technology.

20 MS. DEMARTINO: Okay. We'll go to Elissa.

21 MS. MYERS: Just as a point of clarification --  
22 a question -- all of the points that are being made about  
23 the pop ups, I think we're dealing with some complex  
24 issues. I think we've agreed on that today.

25 I noticed that in a consent decree that is

1 currently pending but drafted, I believe, by the staff  
2 here that there is a section of definitions that was  
3 issued this month. And in it it says, in addition to the  
4 foregoing, in interactive media the disclosure shall also  
5 be unavoidable and shall be presented prior to the  
6 consumer occurring any financial obligation.

7 So although we're discussing this generically  
8 and how we feel about this, am I mistaken, or how am I to  
9 interpret how the FTC is -- where the FTC is on this  
10 issue?

11 MS. KOLISH: Okay. You know, in consent decrees  
12 we often, you know, are more prescriptive to remedy pass  
13 violations. And as you noted, it said in addition to the  
14 foregoing. That foregoing said it has to be clear and  
15 conspicuous.

16 And the unavoidability part is added in to make  
17 certain that you don't have a great vivid, wonderful  
18 disclosure, but a consumer could go and buy the item  
19 without ever seeing it because of the way the click  
20 through pattern would be.

21 And because that was an important disclosure  
22 that we wanted consumers to see, that was put in as part  
23 of the remedy. And also there has to be --

24 MS. MYERS: So this definition applies to this  
25 particular situation?

1 MS. KOLISH: Yes. Those are in cases.

2 MS. MYERS: Okay.

3 MS. KOLISH: And, you know, they can be  
4 instructive for people. And you'll notice they'll say  
5 prior to purchase. Because you could have an unavoidable  
6 and you could say after you submitted your purchase  
7 information, when the screen pops up and says thank you,  
8 and by the way, we want to disclaim the following facts,  
9 that wouldn't be good enough.

10 So that's why they put all of those elements  
11 together. But we've actually been sort of talking about  
12 unavailability in this context as part of the clear and  
13 its inconspicuousness. This is just hammering it home in  
14 those orders.

15 MS. MYERS: Thank you.

16 MR. PEELER: And, Elaine, there is a difference  
17 between what is charged in the complaint, which sets out  
18 what the Commission found to be the violation of law, and  
19 as Elaine said, what's in the order, which is often  
20 remedies to fence in future conduct.

21 MS. MYERS: Okay, thank you.

22 MR. DEMARTINO: I think we had a couple of more  
23 comments. John and then we'll go to Beth-Ann and Randi.  
24 So John first.

25 MR. FRUEHE: Two quick comments. One is that

1 we've just spent ten minutes here trying to understand  
2 how we grapple with the idea of using technology to solve  
3 what really is an education problem.

4 And as we start to look at this, we start to  
5 realize that we've got a lot of technologies and things  
6 are changing, and there are a lot of things that you're  
7 able to do today that you weren't able to do in the past.  
8 And that will continue to change.

9 So trying to come up with solutions that wrap  
10 themselves around particular technologies, maybe advanced  
11 technologies like pop ups, that, again, you know, you're  
12 back to this issue of now I may require additional -- I  
13 may put an undue burden on some businesses that can't  
14 afford to have not only a web master, but also somebody  
15 who can do java script programming to make the pop ups  
16 work.

17 So we want to make sure that as we go through  
18 these tactics that we look at really what are  
19 technologies that are going to be conducive to the  
20 customer as well as the business, because not everybody  
21 has a lot of resources.

22 MS. DEMARTINO: Right. Beth-Ann?

23 MS. EASON: Beth-Ann Eason from DoubleClick.  
24 Well, clear and conspicuous is the goal. Invasive isn't.  
25 And putting the pop up window -- or even taking a third

1 of the page is the equivalent in traditional media of  
2 putting the equivalent of a post-it size over a four  
3 color print ad, or asking to take instead of the full  
4 page for that ad, one third of it for the disclaimers.

5 And that seems extreme, and does put undue  
6 pressure on the advertiser and the message that they're  
7 trying to convey, and have the right to convey.

8 MS. DEMARTINO: Randi, you had a point?

9 MS. ALBERT: Randi Albert representing the  
10 Center for Media Education. My problem with the pop up  
11 was not that I closed it, but that once I just scrolled  
12 down it disappears, right, and then that's when I already  
13 -- that's when I need that information, because I started  
14 reading all the things that the disclosure actually  
15 applies to. And I didn't know I was supposed to alt tab  
16 to go back to it.

17 So I couldn't ever find it again. So it just  
18 wasn't -- it wasn't in the right place. I just wanted to  
19 -- someone had raised the point that consumers are just  
20 trying to get rid of these pop ups because they're so  
21 annoying. And it wasn't that. It was just that I --  
22 it's not like I tried to get rid of it.

23 **(Laughter.)**

24 MS. DEMARTINO: Okay. Dan Jaffe, we'll give you  
25 the last word before we move on.

1           MR. JAFFE: Dan Jaffe from the Association of  
2 National Advertisers. Just in this discussion today, I  
3 had always thought of the inter-activity aspect as a  
4 positive thing to the consumer. But you can have a  
5 tremendous disclosure wear out if you start training the  
6 consumer that the disclosure is coming at them all the  
7 time. That could very well happen if you were going  
8 through a lot of material. You know, when you start  
9 bringing catalogs online, etc., etc.

10           And if most of that information is when they pop  
11 to it and it's really not something that they can get  
12 very interested in, you will find out that they're not  
13 going to be looking.

14           So I think that as a regulatory matter, it may  
15 become even more important in this area to give people  
16 the ability to put this in ways that are going to be  
17 consumer friendly, or you're going to get the situation  
18 where Dell wanted people to see the information. They  
19 did see the information for a while, and then they got  
20 tired of it.

21           And then you have to have Dell then figure out a  
22 new way to make sure that people see the most critical  
23 information. And it's going to be very hard for any of  
24 us, to repeat what I said earlier, to guess that now.  
25 Because just when you think you've figured it out, the

1 consumer surprises you and shows you you've got it wrong  
2 and then you have to redo it.

3 MR. DEMARTINO: Okay. Ron, we'll give you the  
4 final word before we move on.

5 MR. GOLDBRENNER: I would be very interested in  
6 a survey done by the FTC or anybody which asks consumers  
7 does clear and conspicuous mean the same things -- the  
8 same thing as you can't miss it.

9 And then the next question I would put in that  
10 survey is, do you want information that is clear and  
11 conspicuous and you can find if you want it, or do you  
12 want something that you must read because somebody told  
13 you to do it.

14 MS. KOLISH: Okay. Well, this will conclude our  
15 session on links. We're going to move to an entirely  
16 different web technique. I just want to note, we had  
17 planned initially on breaking at 3:30, but I think we've  
18 run on a little bit here, because we started a little  
19 late with some stuff from the morning that went over.

20 So I thought we would go from 3:00 until 3:45  
21 and then we'll take a break, come back at 4:00, and then  
22 we'll go into our last session of the day on printed or  
23 written. Is that all right with everybody? If you need  
24 to run out, that's fine.

25 Okay. So we're going to move on, and we're

1 going to talk about banner and badge ads. And Dana  
2 Rosenfeld, one of Jodie's Assistant Directors in her  
3 office is going to lead this part of our discussion.

4 MS. ROSENFELD: Thank you, Elaine. Can we put  
5 up ad number 29, please? This discussion will involve a  
6 disclosure required under the Commission's guides  
7 concerning the use of the word free and similar  
8 representations. For the purposes of our discussion, the  
9 relevant provision in the guides requires that any terms  
10 or conditions of any free offer be set forth clearly and  
11 conspicuously at the outset or in close conjunction to  
12 the offer.

13 Before we get started, I wanted to thank  
14 DoubleClick for creating this ad for our use today.  
15 We've made some minor changes to suit our discussion.  
16 And we've also based the next ad, ad 30, that we'll take  
17 a look at soon, on the original submission. So we really  
18 appreciate that help.

19 Before we discuss it, I want to just describe  
20 the ad a little bit, as soon as it comes up. There we  
21 go. As you can see, the ad is for free flowers. And  
22 both ads are really identical, the badge ad and the  
23 banner ad, but if we click on the banner -- we click on  
24 the banner. If we could display it on another computer,  
25 too.

1 MS. KOLISH: Yeah, maybe that would be a good  
2 idea.

3 MS. ROSENFELD: Okay. We find out that indeed  
4 the bouquet is free, but the consumer must pay a 5.95  
5 shipping and handling fee to receive the flowers. And  
6 this is explained right there in the first linked page.  
7 And it also explains that following the delivery of the  
8 free flowers, the consumer will then have the opportunity  
9 to sign up for the bouquet of the month club and then  
10 receive flowers on a monthly basis.

11 But if we could go back to -- there we go -- to  
12 the banner and badge ads? The question here -- I think  
13 the overriding question is how should banner  
14 advertisements be analyzed. Should they be considered as  
15 a separate ad, or as part of the web site that they link  
16 to?

17 And in discussing that, I would like us to think  
18 about whether it's desirable to place a button or a  
19 disclosure in the banner ads. Any -- would anyone like  
20 to comment? Ron?

21 MR. GOLDBRENNER: I think you need to ask  
22 yourself, where do you get to from the banner. If you  
23 have nothing on the banner but free flowers, how is the  
24 consumer harmed?

25 MS. ROSENFELD: Does anyone want to respond to

1           that?  Renee?

2                   MS. BARUCH:  I think there is more here than  
3           consumer harm.  I mean, if we talk about, you know,  
4           simple advertising where the consumer doesn't actually  
5           purchase something -- we can't look at this in terms of  
6           consumer harm.  We just can't.

7                   But what you can say is that I think that there  
8           is a completely different expectation of banner  
9           advertising than any other advertising that we've ever  
10          seen to date, because nobody really expects the whole  
11          story there.  I mean, that is -- that is the current  
12          expectation of every Internet user and every Internet  
13          advertiser.

14                   MS. ROSENFELD:  Roy?

15                   MR. GREEN:  Building on your comment earlier,  
16          what's the harm in getting free flowers?  Nothing, if  
17          they're genuinely free.  Nothing if they're free and  
18          there's nothing associated with it, like the collection  
19          of information about the person who is responding -- I  
20          mean, clicking on the banner.

21                   Then you have something -- then you have an  
22          exchange occurring.  You're having the free flowers for  
23          information collected on the individual, whether that's  
24          done voluntarily or not.

25                   MS. ROSENFELD:  Okay.  I think we want to stick

1 to the factual situation that we have here. Carla?

2 MS. MICHELOTTI: The question is whether the  
3 free banner ad -- the free ad with the click here,  
4 whether that complies with the free rule and whether  
5 there is an adequate disclosure.

6 And i would reinforce what Ron said, which is  
7 when someone looks at the web page and they have a banner  
8 ad, either -- and DoubleClick knows this better than I  
9 do. Either the banner ad is going to be totally ignored,  
10 or somebody is going to get engaged in the banner ad.  
11 And if they say, okay, free flowers, let me figure this  
12 out.

13 It's like a flyer on your car window shield or  
14 something, you know. And it's like, okay, I'm interested  
15 in that. And then they go in and they're interested in  
16 it, and they'll learn whether -- you know what the  
17 conditions of that free flower bouquet are.

18 MS. ROSENFELD: Teresa?

19 MS. JENNINGS: I would agree with Carla that a  
20 banner ad is a much different type of an ad than the ones  
21 we've seen previously today. If you do go on the  
22 Internet -- I frequently go on the Internet and the  
23 banner ad is the last thing to come up, because it  
24 usually has the most graphics. And I'm very impatient  
25 with them. But if it is something that strikes me for

1       some reason, I'll click on it and go in and that's where  
2       I expect to find more information.

3               I think because of the nature of what a banner  
4       ad is, I don't think any consumer -- at least any who  
5       have been on the Internet more than once -- expects to  
6       see everything in that ad immediately. They expect to  
7       get more information the moment they click into it.

8               MS. ROSENFELD: Phillip?

9               MR. MCKEE: Teresa and the others are right.  
10       The banner ads are something different. But something  
11       else that we need to take into account is that not only  
12       are the banner ads different from other forms of  
13       advertising, the button ads themselves are different from  
14       banner ads.

15               They use the same technology. But something  
16       that was mentioned before -- I believe it was by Ron and  
17       by several others -- a part of it is also the creativity  
18       involved. Banner ads -- as she said, they're very  
19       elaborate. They do take a really long time to come down.  
20       They're packing in a large amount of information.

21               The statement was made by Ron just now, what is  
22       the harm in not putting it in. If they're already going  
23       to almost over clutter that section of screen with moving  
24       graphics and little bits of sound -- some of them now  
25       also play sounds at you. There's also no harm for the

1 full banner ad, such as in 30, to in an empty space that  
2 it's not really using aside from the redundant click here  
3 on 29, to say shipping and handling not included.

4 If it doesn't destroy the ad, if it doesn't harm  
5 the creativity of the ad, and it doesn't harm the  
6 company, there is nothing which shouldn't -- there is  
7 nothing that -- there is no reason why it shouldn't also  
8 say shipping and handling not included, as well as simply  
9 click here. That doesn't destroy the ad in any way,  
10 shape or form.

11 Now, to mandate that all of that information  
12 show up on that little itty bitsy button ad, that would  
13 be a little overly burdensome. At the same time, you  
14 have to take into account the type of ad and the way it's  
15 being used on the Internet.

16 MS. ROSENFELD: Thank you, Phillip. We're going  
17 to get to ad 30 in a minute. But Renee?

18 MS. BARUCH: I think there is a kind of  
19 advertising to which a banner ad is analogous that is  
20 currently in existence, and that is to an outer envelope  
21 on direct mail. And I think that they serve the same  
22 purpose. And to the extent that this would be deceptive  
23 were it on an outer envelope, then you have to use the  
24 same standard, I think.

25 MS. ROSENFELD: Jean Ann?

1 MS. FOX: Jean Ann Fox, CFA. I think consumers  
2 look at banner ads -- besides the fact that they're  
3 aggravating, that they take so long to load up. If you  
4 can get the material disclosure that says it's not really  
5 free, give me a break, that that helps keep down people  
6 being grumpy with you.

7 But part of the problem on 29 is, you do the  
8 click here. You get over to this two inches of text that  
9 all looks alike, and the 5.95 got you is buried in the  
10 middle of it. No highlighting. No nothing. So even if  
11 you agree that you can just have the click here on the  
12 banner, the actual disclosure is deficient within the  
13 link.

14 MS. ROSENFELD: So the 5.95 should perhaps be  
15 more prominent. Okay. Elissa?

16 MS. MYERS: How do they get the money? How do  
17 you get the money?

18 MS. ROSENFELD: Oh, cash on delivery. No. The  
19 order form provides for credit card information, I  
20 believe. I thought it did.

21 MALE SPEAKER: No.

22 MS. ROSENFELD: No?

23 MALE SPEAKER: No.

24 MS. ROSENFELD: COD.

25 MS. MYERS: The reason I asked the question is

1           because most -- I mean, if the truth was that the guy  
2           arrived at the door and you had somebody collecting it  
3           forever. But otherwise you don't have free flowers, and  
4           you haven't accepted them until you get to the place  
5           where you acknowledge somehow that you're going to pay.  
6           And it seems obvious than that you know that there is  
7           some kind of a fee associated with them.

8                       MS. ROSENFELD: I think we would want to include  
9           a line for credit card information. That was probably  
10          just an omission. Carla?

11                      MS. MICHELOTTI: A couple different things.  
12          One, I want to again go back to the concept of a banner  
13          ad not really saying much, because it doesn't say much.  
14          You can't do anything as a result of it.

15                      If you had free flowers and take away the click  
16          here -- just free flowers -- that's really what the  
17          banner ad would look like. And you would have to --  
18          people would either understand they could click on it or  
19          not click on it. And there is no -- there is little  
20          information that is conveyed in banner advertising, and  
21          the content of the offer is being made in the jump page.  
22          And I think that's important.

23                      And I think it is distinguishable from the  
24          outside of an envelope, which is, again, back in the  
25          print/paper world. I think it's dangerous when we get to

1 the hard copy print/paper world when we're in this  
2 twilight zone of cyber space of, you know, neither time  
3 nor space. You know, another dimension. We're in the  
4 twilight zone.

5 So I don't think there are any standards that  
6 are mandated in a banner ad because the offer, to the  
7 extent there is any offer in the ad, isn't until you  
8 reach the jump page.

9 And to an extent, I agree with the Consumer  
10 Federation of America. I think that, you know, this jump  
11 page -- there are better ways to have written this jump  
12 page.

13 MS. ROSENFELD: Craig?

14 MS. MICHELOTTI: And it goes to the question of  
15 whether it's adequate.

16 MS. ROSENFELD: Yeah. Craig?

17 MR. JORDAN: Craig Jordan from the Texas  
18 Attorney General's Office. I think that it's valid to  
19 say that there are ads like banner ads which are teasers.  
20 That is, they don't give necessarily the full picture.  
21 They want to get you to a place where they can give you  
22 the full picture. I don't see anything necessarily wrong  
23 with that.

24 I have a problem with this banner. And that is,  
25 the flowers aren't free. They're 5.95. And I think this

1 is probably outside the scope of the hypothetical. The  
2 hypothetical here is that the 5.95 is not the price of  
3 the flowers. It's somehow a term and condition.

4 As a practical matter, I think for the ad to be  
5 truthful, it ought to say 5.95 flowers. Cheap flowers.

6 **(Laughter.)**

7 MR. JORDAN: Cheap is probably not a good  
8 marketing term.

9 **(Laughter.)**

10 MALE SPEAKER: Inexpensive.

11 MR. JORDAN: But the point that I want to make,  
12 and it may be outside the scope of this hypothetical, is  
13 that teasers cannot misrepresent fundamentally in and of  
14 themselves. From my point of view, I think a teaser that  
15 affirmatively misrepresents what the offer is going to be  
16 when you get to the main offer page should not be  
17 permitted.

18 I think that's a different case from a teaser  
19 that doesn't tell you the whole story and then you get it  
20 later. I think we ought to be careful about that. It's  
21 something that certainly --

22 **(Laughter.)**

23 MS. ROSENFELD: Okay. John, you had your hand  
24 up?

25 MR. FRUEHE: I think that in context --

1                   **(Laughter.)**

2                   MR. FRUEHE: In context I think that also  
3 something that you have to consider when you look at an  
4 advertising banner is that yes, it does say free flowers.  
5 Now, when we get to that other page, what is the  
6 expectation. Is there going to be paper flowers? Is it  
7 going to be a graphic of flowers and here, download this?

8                   So I think that, you know, we haven't set up  
9 really that this is a free set of tulips that will be  
10 delivered. And so we really haven't gotten into actually  
11 what the deal is. You know, it's just the teaser. So I  
12 think that we have to think about things in context  
13 again, as we do on just about everything that we look at.

14                   And one other piece is that as you get into the  
15 animations and the click heres, those tend to increase  
16 the size of the graphic, which makes it longer to  
17 download, which means that, you know, again, consumers  
18 are dealing with longer pages to download and slower  
19 Internet surfing.

20                   MS. ROSENFELD: The point that you raised about  
21 you don't really know what you're getting, you know, one  
22 of the things that we thought free flowers could also  
23 mean was that you were going to get a coupon to take to  
24 the store and get your flowers there. Or maybe show up  
25 at your local Safeway and be one of the first, you know,

1 100 people to receive flowers, so that the free flowers  
2 doesn't tell you all that much.

3 Who was next? Jeff?

4 MR. RICHARDS: Jeff Richards, Internet Alliance.  
5 This is one of those great examples where we're assuming,  
6 number one, that banner ads are forever -- in fact,  
7 they're changing extremely fast -- and two, that's  
8 because consumers are merciless. And that includes all  
9 of us in this room.

10 How many of us have clicked on a banner ad which  
11 was less than what it appeared to represent, and what is  
12 our judgment about that. And, again, we all -- I think  
13 one theme I've heard here today is we all need to  
14 understand consumer behavior much better than we do.

15 But this is one of the few times that I'm going  
16 to volunteer my own personal experience -- which I think  
17 that it's similar to everyone in the room -- which is  
18 that our tolerance here is low for enjoying  
19 misrepresentation, and our ability to do something about  
20 it is unprecedented. It takes about a second to get out  
21 of a bad place, and places that host bad banner ads are  
22 places we don't go after a while.

23 So there is an incredible learning curve that's  
24 never been possible in any medium before, and the  
25 punishment by the consumer is swift and merciless.

1                   **(Laughter.)**

2                   MS. ROSENFELD: Ron, did you want to make a  
3 comment?

4                   MR. GOLDBRENNER: No.

5                   MS. ROSENFELD: No. Okay, Kevin?

6                   MR. DUKE: Kevin Duke, America Online. I think  
7 somebody said that there is a lot of information -- yeah,  
8 I think they said there was a lot of information in  
9 banner ads. I wanted to correct that. Space is  
10 extremely limited. It's at a premium. You know, people  
11 have described this as really just a teaser.

12                   And the context of the ad is what comes next.  
13 You know, again, that concept of proximity in terms of,  
14 you know, physically or at least on the flat screen it's  
15 not next to it, but it is the next -- can be the next  
16 thing I see when I click on it. And again, that's the  
17 context of a banner ad, not, you know, the four corners  
18 of that button or banner.

19                   MS. ROSENFELD: This might be a good lead into  
20 ad number 30, if we could put that up. As you can see,  
21 the ad has changed a little bit, and the offer is now  
22 free flowers delivered to your door. And then we have  
23 some rotating text in the corner, indicating that  
24 shipping and handling is not included.

25                   So the offer here now has gotten a little bit

1 more specific. You know that they're going to be  
2 delivered. And again, the second page hasn't -- the jump  
3 to page has not changed. So you've got the same  
4 disclosures on the second page, which indicate the 5.95  
5 charge, the exact fee of the shipping and handling.

6 So does the analysis change about whether the  
7 banner is just a teaser when you have a more specific  
8 offer, such as free flowers delivered to your door?  
9 Anyone? Ron?

10 MR. GOLDBRENNER: With respect to that claim,  
11 and with respect to the claim before about free, you have  
12 to measure it against what's delivered. Is it free?  
13 Well, if shipping and handling is truly a cost just for  
14 shipping and handling, it is free. If the 5.95 includes  
15 enough money to cover the seller's cost of the flowers,  
16 then it's not free.

17 And so I don't think you need any limitation on  
18 the word free in the beginning. We have to see what the  
19 offer has to say. I don't think because you have some  
20 kind of charge in there the offer is automatically  
21 illegal or automatically unfair.

22 It's a very interesting point about delivered to  
23 your door. I think that is offering flowers plus. It's  
24 offering two dozen tulips or five dozen roses. It's  
25 offering something very specific. So then when you go

1 and read it, you have to see, am I getting that specific  
2 thing for free.

3 MS. ROSENFELD: Teresa?

4 MS. JENNINGS: Teresa Jennings with the Direct  
5 Selling Association. I wouldn't necessarily say that ad  
6 number 30 is better than ad number 29. Ad number 30 is  
7 different, in that as you just pointed out, you're now  
8 specifying that they're delivered to your door, but  
9 you're also specifying that the shipping and handling is  
10 a part of what you're getting at. Ad 29 just said, free  
11 flowers. Click here if you want more information,  
12 basically, and you can go there.

13 I think that we've all discussed what type of an  
14 ad these banner ads are. I don't think either one of  
15 these are per se misleading. And I think it goes back to  
16 what we've been saying all day long: flexibility here.  
17 The ability to change with the technology, with what we  
18 learn about what the consumers are doing and not doing  
19 based on what we do, and, you know, a minimum standard of  
20 truthfulness and not misleading, but also not a concrete  
21 mandate of it must look this way in order to be correct.

22 I think they're both correct.

23 MS. ROSENFELD: There was someone else?

24 Phillip?

25 MR. MCKEE: The banner ad number 30, one thing

1 -- when you said free, delivered to your door, it's not  
2 necessarily that that changes anything on the face of the  
3 ad. But if you're going to say something like delivered  
4 to your door on the ad, at that point I would think it  
5 would become absolutely necessary that you make the  
6 statement that shipping and handling is not included.

7           You're offering not just the free flowers, but  
8 you're also implying a delivery service. And you may --  
9 there are people who may imply that the free modifies  
10 both. Now, that's not a logical assumption from my  
11 perspective, or maybe even from a grammatical  
12 perspective. But there may be some people who might  
13 misinterpret it that way and not see it in this.

14           One last point. This is slightly different.  
15 From our perspective from the types of reports that we  
16 get at the National Consumers League's National Fraud  
17 Information Center, we have in mail solicitations and in  
18 phone solicitations oftentimes the offer for a free  
19 service or a free good. And they may even cover the  
20 initial shipping and handling to get it to you.

21           And people think wonderful, that's great. I'm  
22 getting something for free. What they're not realizing  
23 is at that point that they are enrolling in a negative  
24 option situation.

25           That's not the case here. Here you actually

1 have to positively state you wish to join the club. But  
2 that is a problem which needs to then be addressed  
3 overall on the banner ads, because there will be the  
4 situation. It's not a maybe. Let's face it. There will  
5 be the situation where people, who would not themselves  
6 wish to be sitting at this table discussing anything and  
7 wish they wouldn't be sitting in a room with the FTC, who  
8 are going to create negative option ads with banners that  
9 look very similar to a legitimate company's promotional  
10 offer, but that are instead used as lures into negative  
11 options that do not offer easy cancellations.

12 MS. ROSENFELD: That's a good point, but we just  
13 felt that we ought to limit our analysis to one set of  
14 rules at a time.

15 **(Laughter.)**

16 MS. ROSENFELD: So we purposely avoided the  
17 negative option plan, as you can tell. Beth-Ann?

18 MS. EASON: Beth-Ann Eason from DoubleClick.  
19 The advertisers purchased an ad such as that to be able  
20 to communicate their message to the customer. And that  
21 dialogue is an ongoing dialogue that begins with the  
22 banner and continues into the site that they're clicked  
23 through on.

24 So 29 does convey effectively all of the  
25 information before the individual is going to transact.

1           When you're trying to fit all of the information to 30 --  
2           and again we're talking about trying to come up with  
3           broad rules that will apply to multiple advertisers with  
4           different types of stipulations.

5                         This is a relatively simple one. There are four  
6           things that you need to fit into that little segment, yet  
7           that alone is taking up about 15 percent of the banner.  
8           You really couldn't get it any smaller. So it's  
9           prohibitive to the advertiser to take up that much of  
10          their creative space to put a disclosure in that they are  
11          in fact communicating in the next phase of that  
12          discussion.

13                         And, again, to keep it broad so that it does  
14          apply and is applicable for advertisers, who have to take  
15          into consideration people that will have more information  
16          than just shipping and handling not included to  
17          communicate in that space.

18                         MS. ROSENFELD: I think Carla and then Wendy.

19                         MS. MICHELOTTI: Carla Michelotti representing  
20          American Advertising Federation. I think it's important  
21          to think about the intent of the banner ad, consistent  
22          with what DoubleClick just said.

23                         And the intent of a banner ad here is not to  
24          provide an offer for free flowers. It's an offer to go  
25          to a web page where you learn about what the advertiser

1 is talking about. It's an invitation to go some place  
2 where the consumer can learn a lot more information. And  
3 toward that point, you don't need the S & H not included,  
4 and whether you say delivered to your door or not,  
5 because it is just -- it's an invitation to go further.

6 Now, what would make the banner ad deceptive, in  
7 my opinion, written as it is, is if I would click on the  
8 banner ad and then go to a page -- a pornography page. A  
9 completely -- you know, all of a sudden it sends me into  
10 Afghanistan or something. Then that banner ad has been  
11 misleading to me, because all the banner ad did is invite  
12 me to learn about an offer regarding free flowers.

13 MS. ROSENFELD: Okay. Wendy?

14 MS. SCHMIDT: Wendy Schmidt, Federated  
15 Department Stores. My understanding of the free rule and  
16 some of the others is that you don't want to just have a  
17 free offer without details, because you're asking someone  
18 to go into a store, or make a phone call, or send it to  
19 the post office. In this case, all they have to do is  
20 click and then they can click right back. So it's  
21 appropriate to have fewer restrictions here.

22 And I think the same would be true with  
23 something like an interstitial where you are -- my  
24 understanding of that is you can show a picture of a  
25 product on someone else's site. You click on that

1 picture and it takes you to the web page, directly to the  
2 part of your site that displays that picture.

3 And I think similarly if we're talking about the  
4 jewelry guides, in the interstitial on someone else's web  
5 site, it's going to be smaller. You can't get in a lot  
6 of detail. You're counting on the fact that the consumer  
7 has to come to your web site to get additional detail,  
8 and I think you have to treat those very differently.  
9 They are truly teasers, and you're not causing the  
10 consumer to do something that costs them money or time,  
11 because it's so easy to click back and forth.

12 MS. ROSENFELD: Actually, let me just say, that  
13 raises a good point. Which is, suppose that instead of  
14 clicking on the banner ad to get to the order form,  
15 instead it asks you to call an 800 number to take  
16 advantage of the offer.

17 It changes the analysis a little bit, but I'm  
18 wondering what people think, since you can't click back  
19 and forth, and indeed perhaps some consumers have to  
20 actually go off line to make a phone call because they  
21 only have one phone line in their house.

22 On that point, Dave and then Ron.

23 MR. CLAUSON: Dave Clauson, IXL. I don't  
24 understand what the difference would be between this and  
25 an outdoor billboard with an 800 number on it. This is

1 on a screen. That is on the freeway. There is a message  
2 call the number. And if that's what you have to do to  
3 get fulfilled or place your order, there's very little  
4 difference there.

5 Again, I think the point is that we're  
6 disrespecting the consumer's right to choose. If they  
7 don't like what they see, they will back away quickly.  
8 And in particular, if you're going to try to cramp --  
9 first of all, think about, again, the benefit to the  
10 consumer and in that small space trying to convey that  
11 much information. You may be confusing the consumer by  
12 throwing all that stuff in there, rather than making a  
13 simple message and having an appropriate area, perhaps in  
14 the middle screen here, where the offer is clear,  
15 consistent and easily understandable. Or whatever the  
16 DMA's comments were: easy to read, easy to view, etc.

17 MS. MYERS: Easy to find, easy to read and easy  
18 to understand.

19 MR. CLAUSON: Thank you.

20 MS. ROSENFELD: Ron, I think you had a comment?

21 MR. GOLDBRENNER: Yeah. I thought that Wendy  
22 Schmidt raised a really terrific point that we haven't  
23 focussed much on today. And that is, in what ways does  
24 the Internet bring information to the consumer, both in  
25 quantity and accessibility, that obviates the need for

1       some of the rules we already have. Do we need to do  
2       things in the same way we have with respect to free and  
3       clear and conspicuous and a lot of other things.

4               There are, I think, many ways that the Internet  
5       gives a consumer information that may obviate the need  
6       for some of the things we've been doing.

7               MS. ROSENFELD: Space constraints obviously is a  
8       big issue that a number of you have raised. And as we  
9       see in ad number 30, we have here the rotating text that  
10      has S & H not included, and in 29, of course, we have  
11      click here.

12              Are there any other techniques or other kinds of  
13      technology that can be used to include a disclosure or  
14      other important information in the banner ad? I think  
15      DoubleClick had raised earlier on the fact that some  
16      banners -- there is a new form of banner technology where  
17      you can -- you don't have to leave the web page that  
18      you're on.

19              Is that something that would be significant to  
20      our analysis or help to make information more effective?

21              MS. EASON: I think it's consistent with  
22      everything that we're saying here, which is it's an  
23      ongoing communication process. And if you were to  
24      continue to just transact in the banner, that you didn't  
25      click on the banner and go some place else, you can start

1 to interact in the banner if it's an HTML based program.

2 And that will enable you to then go to the next  
3 bit of information. They're still communicating in the  
4 same space, but I think what is important, what are they  
5 communicating. And you can take the information you have  
6 on the second page and condense that and break it up into  
7 sound bites that flows and communicates the same  
8 information -- the same important information -- that  
9 makes the customer aware of what they are going to be  
10 entering into the transaction for.

11 So it's just taking what would be on the jump  
12 page and then making it the next banner that appeared,  
13 and then the next banner, so that it all happened within  
14 that space, instead of going some place else. So the  
15 same rules apply.

16 MS. ROSENFELD: Could you complete your order on  
17 the banner then?

18 MS. EASON: Um-hum.

19 MS. ROSENFELD: Okay. Jeff?

20 MR. RICHARDS: Very quickly. Dave Clauson keeps  
21 making a point that we all need to hear about -- design.  
22 This is a pristine example of one to a page. Of course,  
23 we've all seen banner ads 20 and 30 to a page. We have  
24 human limitations of information ban width, flashing and  
25 rotating and flipping and whirling.

1                   And I'm reminded of the Times Square of old.  
2                   The new one -- the new Times Squares actually is a lot  
3                   more coherent. But the old Times Square had flashing and  
4                   beeping and everything else all at once, and in fact, was  
5                   very hard to see what was going on for lots of people.

6                   And so I think another theme I keep hearing  
7                   today is we're talking about tools, some of which are  
8                   already developing very rapidly; some of which are very  
9                   primitive. We're talking about fascinating concepts and  
10                  we're doing so very much in the abstract.

11                  And this is a lovely example. I've learned a  
12                  lot from this discussion. But then I think about this  
13                  times 30 on a page and I know my eyeballs would cross.

14                  MS. ROSENFELD: I'm sorry. Bill?

15                  MR. MACLEOD: Bill MacLeod from the Grocery  
16                  Manufacturers. Dana, i think you have found one of the  
17                  rare instances of virtual consensus in the room on one  
18                  thing.

19                  **(Laughter.)**

20                  MR. MACLEOD: And that was, people were pretty  
21                  happy with 29. And what we are talking about now is how  
22                  we might be able to improve 29 as a creative execution,  
23                  but not necessarily as an execution that better satisfies  
24                  the requirements, or at least the suggestions of the FTC  
25                  guides.

1 MS. ROSENFELD: Thank you, Bill. Anyone else?  
2 Elissa?

3 MS. MYERS: In addition to tagging onto Jeff's  
4 point, in addition to the multiplicity of -- the problem  
5 of multiplicity banner ads on a single page, earlier the  
6 point was made that often there are many disclosures.  
7 And the example that you've used asks for a single  
8 disclosure.

9 But let's say that this was a banner ad for free  
10 Viagra and there were a whole series of disclosures that  
11 would have to be made. And you probably physically  
12 couldn't fit in all of those -- all of that information  
13 on the banner. And it's probably more typical than this.  
14 Most offers are probably more complex.

15 MS. ROSENFELD: Phillip?

16 MR. MCKEE: One thing that I would like to say  
17 about banner number 29, DoubleClick did do a very good  
18 job of designing a simple, easy to see banner ad. It's  
19 not just a problem of having 30 some odd banner ads on a  
20 single page. Half of the time it's only one or two  
21 banner ads, but each one takes minutes upon minutes to  
22 download and is incredibly complex in and of itself.

23 There are large amounts of animation and  
24 graphics. Almost all information is lost within it, and  
25 I personally tend to tune them completely out. And if we

1 do -- something that did occur to me right now is that if  
2 we do decide -- if you do decide to have some form of  
3 disclosures within the banner ad, then it will become  
4 more difficult to find them in these very complex ads.

5 At the same time, if the industry says that  
6 well, you can't enforce us to make a disclosure because  
7 it will clutter up the ad, my response to that statement  
8 is, why have you cluttered up most of the ads in the  
9 first place to make them almost unintelligible.

10 MS. ROSENFELD: I guess one point I sort of  
11 touched on, but, you know, the click here -- I guess the  
12 simple click here on 29 as opposed to the rotating text,  
13 I think there is some literature out there -- I've read a  
14 little bit -- that suggests that click here makes people  
15 click here and will increase click rates. I'm not sure,  
16 you know, whether there is conflicting evidence about  
17 that. There may well be.

18 But if that's the case and advertisers are  
19 putting click here in the banner, is there any real  
20 difference than including the rotating text, or is that  
21 less accessible to consumers, or too distracting?

22 Dave?

23 MR. CLAUSON: Yeah, a quick response. Dave  
24 Clauson, IXL and the four A's. The issue about the  
25 rotating text, I think we've been staring at it now for

1 quite a bit.

2 MS. ROSENFELD: Right.

3 **(Laughter.)**

4 MR. CLAUSON: One of the problems of rotating  
5 text is distraction. If you look at most of the Internet  
6 research out there, speed is an issue in all things on  
7 the Internet. Purposeful sourcing of information is the  
8 primary use of the web. If you have to wait for things  
9 to rotate, click, spin, etc., it's a distraction and an  
10 annoyance.

11 That's way everyday marketers wrestle with the  
12 issue, how much information. I won't go into the  
13 technical issues of file size and things like that. But  
14 those are real concerns about delivering information in a  
15 clear, concise, compact, efficient manner, which is what  
16 most consumers on the web want. Give me what I want,  
17 when I want it, quickly, efficiently, effectively.

18 And so if you start to play around with  
19 animation a little bit too much, especially in small  
20 size, it becomes almost a distraction and an annoyance,  
21 much like Jeff's point about blinking text and why it's  
22 gone away.

23 MS. ROSENFELD: Jill?

24 MS. PHILLIPS: Yes, I do have a voice. I'm  
25 thinking that it depends on -- Jill Phillips from Ford

1 Motor Company. To me it would depend on how much you  
2 need to say. Here it is pretty simple, because there is  
3 -- shipping and handling is the only thing that really  
4 makes it not free.

5 But what if it said win an Austin Martin, you  
6 know, and there are all these sweepstakes rules. There  
7 is no possible way you could fit them in there, and they  
8 would have to take an affirmative action to go see what  
9 all those rules were.

10 MS. ROSENFELD: One of the last issues I just  
11 want to cover with these banners is, if the disclosures  
12 aren't made directly in the banner but in a link to page,  
13 where should they be made in the web site that follows?  
14 Should it appear on the first screen that the consumer  
15 sees, as here, and does the disclosure become less  
16 conspicuous if the consumer needs to scroll through the  
17 link to page, or yet on another link to get there? Could  
18 a disclosure that appears, say, on the second or third  
19 page be effective under these circumstances?

20 Does anyone think so? Okay, consensus?

21 MR. RICHARDS: I'll just say I think it depends  
22 on the context of the web site. If the next page of the  
23 web site is some sort of -- how shall we put it. The  
24 technical term is a splash page, that shows a flower  
25 blooming that has nothing to do with the offer, I don't

1 see any reason they would have a disclosure there.

2 But if the next page is the offer, the  
3 disclosure ought to be on that offer page.

4 MS. ROSENFELD: Thank you.

5 MR. RICHARDS: And subject to all the things  
6 that we've already said today.

7 MS. ROSENFELD: Anyone else? Okay. Now, we're  
8 just going to move onto one other issue quickly before we  
9 break. And that is, claims that are made through audio  
10 and video means. Some comments objected to the proposal  
11 that the disclosure be made in the same medium as the  
12 claim. And others objected to the proposal that the  
13 disclosure be made in both the audio and video portions  
14 of an ad, because this would be expensive or take up  
15 greater bandwidth.

16 And I guess typically the requirement is that  
17 the disclosure be made in the same medium as the claim  
18 that it's modifying. And I wanted to see what comments  
19 anyone has about that, if any.

20 Ron and then Bill.

21 **(Comments of Mr. Goldbrenner were not picked**  
22 **up.)**

23 MS. ROSENFELD: Bill, did you have a comment?

24 MR. MACLEOD: Yes. Bill MacLeod from GMA. I  
25 was going to make about the same point that Ron did. And

1       that is, there is a perfect example of a design standard,  
2       and it's there for a good reason. So you don't have to  
3       spend millions of dollars litigating with the advertiser.  
4       Every time you say that ain't good enough, the advertiser  
5       says it is.

6                But the fundamental question, or the ultimate  
7       question, is indeed what Ron said. It doesn't  
8       necessarily have to be that way, but it's obviously a  
9       little harder to tell sometimes whether it is effective  
10      if it is not that way.

11             MS. ROSENFELD: Phillip and then Roy.

12             MR. MCKEE: For problems with the concept of an  
13      audio disclosure, one goes back to something Roy had  
14      mentioned several times on the pop ups. For many  
15      consumers it would be absolutely impossible for them to  
16      create a copy of it for themselves. They will not  
17      realize how to grab that wave file and store it on their  
18      own hard drive.

19             So they have no way of duplicating the  
20      disclosure and verifying that it was even made to them.  
21      They have no way to listen to it again later. They are  
22      not able to do those kinds of things.

23             Secondly, from personal experience I've gotten  
24      incredibly tired of going to web sites and having beeps,  
25      whistles, songs, jingles and all this other stuff playing

1 at me out of my speakers. I just turned the speakers off  
2 on my computer forever. Just turned them off. I don't  
3 bother any more.

4 If you have a situation where it's dependent  
5 solely on the audio, you will get some people who decide  
6 either (a) they can't -- they don't remember what it was  
7 and they can't get it to play again, or (b) they never  
8 heard it anyway, because they got rid of the speakers, or  
9 their computer doesn't have a good enough sound card to  
10 play it, depending on what type of file they've used.

11 If you're going to use something like an audio  
12 disclosure, it should be supplemental to a written  
13 disclosure on the web site, not in replacement of, but it  
14 should also not be required. There are going to be those  
15 smaller businesses that can't afford to create those  
16 kinds of audio files, that can't afford to hire technical  
17 people, and you're going to put an undue burden on them.

18 It's fine to get additional information, but I  
19 don't think it should be required or the only source.

20 MS. ROSENFELD: Roy was next.

21 MR. GREEN: One of those remarkable times when I  
22 actually don't have anything to add to what I've heard.

23 MS. ROSENFELD: Oh, all right. Kevin?

24 MR. ELSE: Just a point. If someone chooses to  
25 make an audio claim and then an audio disclosure, the

1 fact that, you know, the computer user isn't able to  
2 record it and store it is no different than the person  
3 driving their car isn't able to stop and record the radio  
4 advertisement.

5 So that in and of itself, you know, does not  
6 make it deficient.

7 MS. ROSENFELD: Well, now we'll go to Roy and  
8 then go over, since he had his hand up before.

9 MR. GREEN: Well, that did elicit a comment.

10 MS. ROSENFELD: Okay.

11 MR. GREEN: And that is that if there is no way  
12 to verify -- if the advertisement itself is audio or  
13 visual or a combination thereof, that would mean then for  
14 consistency sake that disclaimers would be in that same  
15 format, and you still have the same record keeping  
16 responsibility.

17 If there is a disagreement about what the  
18 disclaimer involved, the burden then falls on the  
19 consumer to figure out a way to maintain it. It seems to  
20 me it's not deficient, but there has to be an  
21 extraordinary effort to be sure that people are  
22 forewarned that they're going to have to keep some kind  
23 of record in case there is a disagreement about what the  
24 disclaimer and the advertisement said.

25 Otherwise, once again, the evidence goes to

1 ether space, and you have no way -- unlike television  
2 where in fact the networks keep a record of what has been  
3 broadcast over the air and it's retrievable. Here it's  
4 between -- unless you have some other notion, it's  
5 between the marketer and the individual consumer based on  
6 an advertisement that's audio visual and a disclaimer  
7 that also may be audio visual.

8 MS. ROSENFELD: Randi?

9 MS. ALBERT: Randi Albert, representing the  
10 Center for Media Education. As FTC knows, we have been  
11 working mostly on behalf of children in these issues, and  
12 children are subject to a reasonable child standard. And  
13 we think that for children having written and audio would  
14 be useful.

15 MS. ROSENFELD: Carla?

16 **(Comments of Ms. Michelotti were not picked up.)**

17 MS. ROSENFELD: Are you going to repeat what you  
18 said or do you have a new point?

19 MR. MCKEE: No. I'm going to comment on what  
20 she just said.

21 MS. ROSENFELD: All right.

22 **(Laughter.)**

23 MR. MCKEE: Just to reinforce and to comment on  
24 yours. The reason why you need to print out the online  
25 ad is when you get into a dispute with the company. What

1 we see in consumers who complain to us is, they then go  
2 back to say, hey, wait a second. You didn't tell me that  
3 this could be a problem. And the company says, oh, yes,  
4 we did, and all of a sudden there is it on the web site.

5 And when they then go to a government agency,  
6 they can say, see, there it was. Well, there's no proof  
7 that it wasn't there in the past. And from the  
8 consumer's perspective they never saw it, or they saw a  
9 disclaimer that said something substantially different.

10 On the radio, the radio station has copies. On  
11 the TV, the TV station has copies. The newspaper, it's  
12 on microfiche and God only knows how many places. The  
13 web is different. And it's not there because they have  
14 to be able to print it out. It's not there because they  
15 have to print it out. It's there because if they get --  
16 it's an option, because if they get into a situation  
17 where they're in a dispute with the company, it's their  
18 only means of showing exactly what that company promised.

19 MS. ROSENFELD: I think we'll go to Dan.

20 MR. JAFFE: Dan Jaffe, Association of National  
21 Advertisers. I just want to at least associate with this  
22 side of the room.

23 **(Laughter.)**

24 MR. JAFFE: And some people on this side of the  
25 room. I believe this would be an extremely dangerous

1           idea to demand both audio and visual. I think you not  
2           only would go against small business, you would have some  
3           real technological problems, even for, you know, mid size  
4           people, and lots of consumers who are just coming on,  
5           because people do listen in different ways. And so if  
6           they're listening to other things and that was required,  
7           that could be very annoying to them.

8                        I don't see much good coming from it. I think  
9           it would in fact raise -- I didn't want to bring the  
10          Constitution in here, but I think this is --

11                       **(Laughter.)**

12                       MR. JAFFE: This is where I think you really  
13          would start running into some serious questions about  
14          whether you meet the constitutional test, that you're  
15          doing a narrowly tailored restriction.

16                       MS. ROSENFELD: Carla, did you have an answer to  
17          the evidentiary point that Phillip was making?

18                       MS. MICHELOTTI: Yeah.

19                       MS. ROSENFELD: Because I was wondering whether  
20          it -- wouldn't you have like text or code?

21                       MS. ROSENFELD: Wait. Can you stop for one  
22          second, Carla? Sorry. Okay.

23                       MS. MICHELOTTI: The idea that you need to print  
24          out the computer ad in order to prove what the claim is,  
25          it would not be necessary. One, it's a burden on the

1 consumer to be buying printers. Two, if there is a  
2 controversy over a commercial offer, or over a TV  
3 commercial or a radio commercial, you secure a copy of  
4 that commercial the same way you would secure a copy of a  
5 banner ad from the advertiser. And that is, you would  
6 ask them for a copy of the commercial. If brought to  
7 court, you would subpoena for a copy of the commercial.

8 You do not need to be able to print out the ad.

9 MR. MCKEE: It's the contradictor, once again.

10 **(Laughter.)**

11 MS. ROSENFELD: All right, Phillip.

12 MR. MCKEE: I know it seems like I'm hammering  
13 away the point. It's the type of people that we get  
14 referred to us, ma'am. I'm very sorry. It's just the  
15 type of complaints we get. They are not people who would  
16 be members of the American Advertising Federation. These  
17 are not the companies that would want to be members of  
18 the Promotion Marketing Association.

19 These are the type of people who are out there  
20 to cause harm and to make ill gotten gains. And these  
21 rules don't just limit legitimate companies. Legitimate  
22 companies should not be doing that in the first place,  
23 and as you've said, they're not going to be intentionally  
24 trying to defraud a consumer in the first place.

25 A part of these rules also keeps in check those

1 people who want to. And we have plenty of people who  
2 call us, who write us, who have problems, and it's simply  
3 because there is no independent third party that they can  
4 go to, such as a TV network that has a copy of the  
5 broadcast, or a radio station that has a copy of the  
6 broadcast.

7 They're having to go directly to the person that  
8 they're suing. And while a legitimate company will have  
9 the original, the illegitimate companies, the crooks out  
10 there, won't. That's the problem.

11 MS. ROSENFELD: All right. We're going to --  
12 I'll just wrap that up to say, you know, of course there  
13 are legitimate and less legitimate companies and fraud ad  
14 owners out there. And the fraud ad owners are probably  
15 going to be making lots of claims that violate lots of  
16 things, and whether there is an issue of a disappearing  
17 disclosure is probably going to be the least of their  
18 worries.

19 **(Laughter.)**

20 MS. ROSENFELD: And we'll be nailing them on  
21 many other grounds, period. So with that, let's take a  
22 break until 4:00, and then we'll come back and have our  
23 final session on use of the terms written and printed.

24 **(Whereupon, a brief recess was taken.)**

25 MS. KOLISH: If there's anybody in the overflow

1 room downstairs, there's lots of space up here now, if  
2 you would like to join us.

3 Welcome back everybody. Okay. Everybody is at  
4 the table who's going to be at the table? Okay,  
5 everybody, we'll get started now. And if we get through  
6 everything, perhaps we'll leave early, and you can have  
7 an early start on your weekend or your weekend work.

8 This session on written and printed and what  
9 those terms may mean as used in our rules and guides is  
10 going to be an interesting, but shorter session than  
11 we've had before. And leading the session are going to  
12 be two new moderators to give you a break from the rest  
13 of us.

14 Mary Engle, to my right, who is an Assistant  
15 Director in the Division of Enforcement, and Alice Saker  
16 Hrdy, who is one of Jodie's Legal Advisors, are going to  
17 moderate this session. And they have some power point  
18 slides -- a few -- that they're going to use with their  
19 presentation and with this dialogue.

20 MS. ENGLE: Good afternoon. We're going to  
21 shift our focus for this session to using electronic  
22 media to comply with our rule or guide, in particular  
23 when a rule or guide refers to something that's written,  
24 or in writing, or printed, how that applies to  
25 advertising on the Internet.

1           In other words, if a rule says provide a  
2 consumer with a disclosure in writing, or refers to a  
3 printed catalog, how does that apply to advertising or  
4 catalogs on the Internet?

5           The two main points that we will discuss this  
6 afternoon are the use of electronic media, mainly e-mail  
7 and web sites, to provide consumers with information  
8 required by an FTC rule or guide, and second, application  
9 of the terms written, writing and printed in the rules  
10 and guides. Those terms have been traditionally  
11 associated with text on paper, but it seems that with the  
12 use of computers, it could also apply to electronic  
13 information.

14           So we would like to discuss how that application  
15 could occur. And I think now we want to go back to one  
16 of the examples that we used earlier this morning with  
17 the Quick DDRIP product.

18           MS. HRDY: Yeah. We thought to illustrate this  
19 concept of complying with the rule or guide -- generally  
20 we mean via e-mail when we say electronically -- we do  
21 two case studies. The first of which we'll go back to  
22 the Quick DDRIP product, and we'll take a look at the  
23 order form.

24           And in this case study, we would like just to  
25 throw out a few facts that we'll presume for the purpose

1 of the case study, and then open it up for discussion.  
2 And let's assume that after being featured at our  
3 workshop, Quick DDRIP starts accepting quite a number of  
4 online orders.

5 And let's say that a consumer decides to fill  
6 out this order form. And although if you'll scroll down  
7 you'll notice there isn't a space for the consumer to  
8 enter his or her e-mail address, let's just presume that  
9 there is, and that the consumer fills out the order form  
10 and puts in the e-mail address.

11 And let's go ahead and submit the order form,  
12 and you'll see that Quick DDRIP thanks us for the order  
13 and indicates that all orders will be processed and  
14 mailed within two business days.

15 And let's also just assume that Quick DDRIP  
16 realizes quickly that they are experiencing a high volume  
17 of orders, and they realize they're not going to be able  
18 to ship it within two days as promised.

19 And as you all know, under the Mail and  
20 Telephone Order rule, if sellers can't ship within the  
21 promised time period, they need to offer the consumer an  
22 option either to consent to the delay or to cancel the  
23 order and to get a refund. And as you also might know,  
24 the rule now no longer specifies that this notice has to  
25 be done by first class mail, so other means can be used.

1                   So with that background in mind, we would like  
2                   to throw out a few issues. As a starting point, given  
3                   that the consumer in our case study did provide the  
4                   e-mail address when they fulfilled the order online, do  
5                   you all think it would be reasonable for Quick DDRIP to  
6                   provide a notice of delay of shipment via e-mail, given  
7                   the fact that the consumer provided an e-mail address  
8                   when ordering?

9                   Yes? Is it a consensus, yes?

10                  MALE SPEAKER: Yes.

11                  MS. HRDY: Anyone feel maybe ambivalent? Jo  
12                  Reed?

13                  MS. REED: Jo Reed from AARP. Just my  
14                  experience with how often our system goes down -- is this  
15                  on -- makes me a little worried about relying entirely on  
16                  e-mail for that use.

17                  MS. KOLISH: Do you mean as the business  
18                  recipient that you would be concerned that you wouldn't?

19                  MS. REED: As the consumer who has ordered  
20                  something. If I understand the case correctly, the  
21                  consumer has ordered something by e-mail. The question  
22                  is, if the product can't be delivered as planned,  
23                  notifying them that it's going to be delayed?

24                  MALE SPEAKER: Right.

25                  MS. KOLISH: Correct.

1 MS. REED: I mean, on the face of it, it seems  
2 logical and reasonable. I'm just suggesting there is  
3 some concern I would feel about relying on that  
4 exclusively.

5 MS. HRDY: And maybe that brings us to the next  
6 point. You know, to the extent there is -- I think we  
7 generally agree that, you know -- in fact, I think this  
8 is a common business practice of using e-mail to notify  
9 consumers who have ordered online, obviously when the  
10 consumer has provided the e-mail address.

11 Should Quick DDRIP -- maybe this gets to your  
12 point, Jo. Should Quick DDRIP notify the consumer -- if  
13 we could go back to the order page? Notify the consumer  
14 at the time that the consumer is inputting the e-mail  
15 address that Quick DDRIP wants to be able to contact the  
16 consumer by e-mail.

17 Is that a reasonable thing for Quick DDRIP to  
18 do? Is there any reason why they shouldn't do it? Go  
19 ahead.

20 MR. CERASALE: Why are they asking for the  
21 e-mail address, then, is the first question I have, if  
22 that's the notice. The other is that if in fact the  
23 statement -- or how you had it here and at least the  
24 setup is that the two day notice and they're not going to  
25 make the two days come through the electronic medium, so

1 if the trigger isn't electronic medium, I don't see any  
2 reason why to discriminate against electronic medium for  
3 the notice that's required.

4 If the trigger for the notice is electronic,  
5 then if it's physically possible, an e-mail response  
6 would make some sense. I'm not sure -- you have a -- I'm  
7 not sure you need to have the notice, if we're looking at  
8 it just from our perspective of getting back and saying  
9 -- giving notice on whether or not you can make it on  
10 time.

11 Whether you have to give a separate notice that  
12 we can contact you by e-mail if we get your e-mail  
13 address, I mean, you're not asking them can we -- it's  
14 not a privacy problem, because you're not asking, can I  
15 contact you by first class mail to tell you that I've  
16 delayed, because it's required. So you can still contact  
17 them. Or can I contact you by phone, because I have your  
18 home phone number and the FTC is requiring a notice.

19 And I don't think unless you're going to require  
20 -- and you have never done it. That we will contact you  
21 by first class -- is it okay to contact you by first  
22 class mail. What if they say no.

23 **(Laughter.)**

24 MR. CERASALE: Then you can't meet the rules.  
25 So I think that that kind of notice doesn't seem to make

1 any sense. You're not looking at it from a privacy  
2 perspective, but you're looking at it from a notice  
3 perspective.

4 MS. HRDY: Right. I guess maybe one issue might  
5 be that if the consumer isn't -- you know, with the phone  
6 call or a piece of mail, you know, we generally accept  
7 those. And this is information the consumer wants.

8 But if the consumer doesn't know to expect the  
9 e-mail, is it sort of a reasonable -- is the consensus  
10 that it's reasonable to expect that the consumer will go  
11 back and check the e-mail for this important information?  
12 Particularly, you know, two days go by and no receipt of  
13 the package, maybe they will go back, because they want  
14 to contact the company and find out why they don't have  
15 it.

16 But I guess that was a point.

17 MR. CERASALE: Okay.

18 MS. HRDY: I'm sorry. I was going to go to --

19 MR. CERASALE: Let somebody else go first, since  
20 I've already had the floor. I'm sorry.

21 MS. HRDY: All right. Kaye, I think, had her  
22 hand up.

23 MS. CALDWELL: Kaye Caldwell with CommerceNet.  
24 I think one of the other things you need to take into  
25 consideration here is that the consumer does have the

1 option of not providing their e-mail address as part of  
2 filling this out. So that if you are concerned that you  
3 don't want to be communicated with by e-mail, there is  
4 that ability.

5 And also, the seller has the option of checking  
6 to see if that e-mail address is there. And if they  
7 don't want to deal with people who they can't communicate  
8 with by e-mail, then they may have the ability -- they  
9 may have the option of building into their web site  
10 something that says we need your e-mail address. We need  
11 you to fill this in. And somehow deal with, you know,  
12 what happens when they don't provide their e-mail  
13 address.

14 MS. HRDY: Jeff?

15 MR. RICHARDS: Quickly, I agree with that. Real  
16 world practices have all been really fast here. And  
17 smart merchants tell consumers what they're up to, and  
18 they're saying -- for example, they're saying give us  
19 your real e-mail address versus the one you might use for  
20 Spam or annoying relatives.

21 **(Laughter.)**

22 MR. RICHARDS: Because if we have a delay, we  
23 would like to get in touch with you. In other words,  
24 right now we're seeing the real world evolution of this  
25 relationship. And so software companies with whom I

1 deal, I give my real e-mail address for real, because  
2 they're going to tell me about patches or flows or, you  
3 know, important consumer notices. And they tell me  
4 they're going to do that and it becomes a very, very  
5 clear transaction.

6 So I think the day of where -- this is  
7 absolutely right, and consumers and companies both will  
8 prize developing this efficient relationship.

9 MS. HRDY: Elissa and then back to Kaye.

10 MS. MYERS: I think also, piggy backing on  
11 Jerry's argument, you know, when I go home tonight my  
12 mailbox is going to be full of wonderful advertisements  
13 through direct mail.

14 **(Laughter.)**

15 MS. MYERS: Some of whom -- some of which I will  
16 scrutinize carefully and some of which I'll put in my to  
17 read later pile. And it wouldn't be unusual to get --

18 FEMALE SPEAKER: The round one?

19 MS. MYERS: The round one, right. And it  
20 wouldn't be unusual to get a communication through the  
21 mail that I didn't open, just as I didn't open -- just as  
22 I might not open the e-mail message.

23 If the postal service or another carrier fails  
24 to deliver the postcard that the merchant that I was  
25 doing business with me -- boy, is that a convoluted

1 sentence. If I don't get that postcard the merchant sent  
2 because the carrier didn't deliver it, nobody knows. I  
3 would eventually figure out that I didn't hear something  
4 I should have heard.

5 But on the e-mail message, if your server is  
6 down, a message is going to go back to the sender of the  
7 e-mail saying this message didn't go through. It doesn't  
8 assure that you'll open the envelope, but you can't be  
9 sure I'm going to open the print envelope.

10 So I would second what Jerry has said.

11 MS. HRDY: Okay. Back to Kaye.

12 MS. CALDWELL: I also think there is an  
13 expectation on the part of the consumer that they are  
14 going to be receiving notices by e-mail. I know when I  
15 order something over the Internet, I expect to get  
16 something before a notice that I'm not going to get  
17 delivery. And that is, I expect to get an invoice or a  
18 confirmation or something back in my e-mail immediately.

19 So, you know, I've given that e-mail address  
20 because I expect those kinds of communications.

21 MS. HRDY: And Dan and then Phillip.

22 MR. JAFFE: So just to summarize, I think that  
23 there is -- I don't see the downside, in other words, as  
24 compared to the mail. The e-mail may be as effective and  
25 in some ways more effective as to record keeping and as

1 to speed. And therefore I think it's in the consumer's  
2 interest to allow that, and therefore in the FTC's  
3 interest to facilitate it.

4 MS. HRDY: Okay. Phillip?

5 MR. MCKEE: From my experience as a very  
6 prolific online shopper, much to the detriment of my  
7 credit card bill, I very commonly buy things online. The  
8 sites that I enjoy using the most and that I use the most  
9 frequently do communicate with me by e-mail.

10 They make it very obvious within the order form  
11 and during the order process that they're going to --  
12 that's why they're collecting the e-mail address -- and  
13 what kinds of things I can expect to be receiving, such  
14 as the confirmation of my order, statements about  
15 shipping and any delays that are going to be occurring. I  
16 get that information much quicker.

17 And with one company, they sent me a notice that  
18 the item I had ordered was going to be delayed. And  
19 instead of having to wait for it to get to me and then  
20 make the decision based on the options they had offered,  
21 do I still want it, or do I want to order something else,  
22 or do I wish to just cancel the order, if it had been  
23 done by mail, a few weeks would have passed quite  
24 possibly before I found this out, concerning the way the  
25 mail is delivered in my neighborhood.

1           By e-mail it was there the next day. I knew  
2 immediately that I wanted to change what I wanted to  
3 order. And if handled properly, it can be a much more  
4 effective way of communicating with the consumer.

5           MS. HRDY: Jerry?

6           MR. CERASALE: Yeah. You asked one question  
7 about the reaction of consumers. And our members are  
8 starting to find that e-mail responses back to customers  
9 have the greatest increase in customer satisfaction of  
10 anything they have ever done.

11           They send out notices, thank you for the order  
12 and confirms the order. They send out -- let's say  
13 everything is going fine. They send out a notice your  
14 order was shipped today, so that people know when to look  
15 for it. And the customer service response has been  
16 fantastic.

17           So the customers who purchase on the web tend to  
18 be looking for e-mail as a response back.

19           MS. HRDY: Jean Ann?

20           MS. FOX: Jean Ann Fox, CFA. But to also go  
21 with this request for all this information, it  
22 underscores the importance of each of these commercial  
23 sites having a clear privacy policy and abiding by all  
24 the elements of Fair Information Practices.

25           Once consumers are comfortable and confident

1 that that is going to be done, then they will be much  
2 more likely to give that information accurately and  
3 smooth the way for this good customer service.

4 MS. HRDY: And, Kaye, did you have a comment?

5 MS. CALDWELL: I just wanted to follow up on  
6 something that was said a little earlier about the  
7 ability of the e-mail message to perhaps offer more  
8 benefits to the consumer in terms of what they're  
9 communicating.

10 If you get a postcard in the mail, you're being  
11 asked to make a decision. Do you want to cancel this  
12 order. Do you want to wait. Do you want to order  
13 something else. You need to go find a telephone, or you  
14 need to go remember what the web site was, or whatever.

15 If you get this in an e-mail message, it's very,  
16 very easy for the consumer to immediately respond, either  
17 by a reply message or clicking on maybe a web site that  
18 they've set up to let them know what you want if you need  
19 to make some sort of an affirmative action there.

20 So you're really offering a lot more to the  
21 consumer in terms of the ease of their response than you  
22 would be in a mail message.

23 MS. HRDY: Okay. Well, seeing as there is  
24 consensus, we'll move on to the next case study -- the  
25 next slide. And we'll go back and revisit Sandy's

1 Bouquet of the Month Club. And let's go ahead and go to  
2 the order form on Sandy's Bouquet of the Month Club.

3 And let's assume that you went ahead and you got  
4 the free bouquet. You paid the shipping and handling.  
5 And you liked it so much that you decided to enroll in  
6 the Bouquet of the Month Club, which is described on the  
7 order form.

8 And let's assume that Sandy's Bouquet of the  
9 Month Club sends the negative option notice each month  
10 describing the monthly bouquet and giving you the option  
11 to accept or decline. And they send this by e-mail to  
12 consumers who provide their e-mail addresses on the order  
13 form.

14 And so this is a little bit different than the  
15 Quick DDRIP, in that we're going to have successive  
16 e-mail messages every month, and there is sort of an  
17 immediate, you know, cost to the consumer if they don't  
18 respond and actually would have preferred not to have  
19 gotten the bouquet that month.

20 I wonder, does this raise any different issues  
21 or, you know, the same issues as the Quick DDRIP, to  
22 order online? Jerry?

23 MR. CERASALE: Yeah. I think it raises one  
24 different issue. I think that in this context with a  
25 negative option, you have to ensure that you inform the

1 consumer how the consumer is going to receive that  
2 negative option.

3 I mean, you should be required to tell them if  
4 you're going to send it through e-mail that it in fact is  
5 coming in e-mail, to know where to look for it. Or if  
6 it's going to come through -- just as current negative  
7 option rules, every month you're going to receive  
8 something in the mail. You're informed of that. That  
9 should be a requirement.

10 But I think that if it's informed that way, you  
11 send it e-mail and then you're set to roll with it.

12 MS. HRDY: Okay. Jean Ann?

13 MS. FOX: Because it is so easy to communicate  
14 with people by e-mail, it really makes you wonder why  
15 there is any justification from the consumer's point of  
16 view of having a negative option. If you have agreed to  
17 join the club, and they can send you the notice every  
18 month and say, this month it's tulips, would you like  
19 some, you can do a positive thing so it's an opt in  
20 rather than an opt out.

21 I know that's off the subject.

22 **(Laughter.)**

23 MS. HRDY: Then Phillip?

24 MR. MCKEE: I want to say that I completely  
25 concur with what Jean Ann said about turning it into a

1 positive option instead of a negative option.

2 But from a more practice perspective, in case  
3 anyone else out there is thinking of such a thing, if you  
4 are going to use a negative option -- since you do have  
5 an automatic bounce back for e-mails that are not  
6 functioning for any particular reason -- that would be  
7 the perfect location to make that an automatic negative,  
8 that you do not want it if it gets bounced back.

9 MS. HRDY: I guess just to pick up on what Jerry  
10 was saying that the Bouquet of the Month Club should  
11 definitely inform the consumer when they're signing up  
12 that they're going to send it via e-mail, should the  
13 Bouquet of the Month Club get an express consent? An  
14 e-mail coming back from the consumer agreeing to this?  
15 Or if they notify them that's enough?

16 MS. FOX: Consent is better.

17 MS. HRDY: Consent is better.

18 MR. MCKEE: It's so easy, why not?

19 FEMALE SPEAKER: What is the law in other areas?

20 MR. CERASALE: Yeah, the law -- if you sign up  
21 for it -- here are the rules of the sign up and you sign  
22 up for it. I don't think we want to start -- if you want  
23 to look to new rule making for Internet, that's fine.  
24 But if you're looking to try and set the current rule  
25 into a modern day, this medium, context, I don't think

1           you add different disclosures.

2                     You have the situation set up. By the way, I'm  
3           Jerry Cerasale, DMA. I'm sorry I didn't say that. It's  
4           set up. You tell people what it is and how you're going  
5           to be notified. And then I'm submitting. So I've done  
6           it, so that's in a sense the contract and agreement that  
7           you have.

8                     And I don't think that's any different from an  
9           negative option here. I don't think you want to -- I  
10          think we're going beyond things of what you set this up  
11          for if you're looking to set new requirements on any kind  
12          of rule.

13                    MS. HRDY: And I don't think we are. I think  
14          we're just trying -- I think the purpose of these case  
15          studies is to sort of set it up for what Mary is going to  
16          talk about. It's just to find out what is the consensus  
17          about generally -- what is the general usage right now of  
18          e-mail. What's reasonable and what's actually going on  
19          right now.

20                    That's really the purpose of our discussion.  
21          Elissa -- well, Jeff and then Elissa.

22                    MR. RICHARDS: Real quickly. Jeff Richards.  
23          The why not that we just talked about for a second is  
24          because -- you know, I'm concerned that the initial  
25          transactions with consumers and providers is really clear

1 and that all parties understand it and do it.

2 But once that is set up, I might have 20 or 50  
3 transactions going on a month myself as I move into an  
4 Internet life. You know, when I was growing up we had  
5 milk delivered three mornings a week to our front door.  
6 Isn't that remarkable? And that was not -- that was  
7 something that gosh, we didn't really want to fool around  
8 with that. You know, we were grateful that it came  
9 regularly without change and without requiring consent  
10 every other morning.

11 **(Laughter.)**

12 MR. RICHARDS: And I think in the future what we  
13 want to do is have this clear relationship and then make  
14 use of the technology to keep it simple, and ask people  
15 in a bewildering way to have to constantly reaffirm their  
16 relationships, when they're not yet demanding to do so.  
17 They'll tell us if they want us to require that.

18 MS. HRDY: Okay. Elissa and then Kaye.

19 MS. MYERS: I'm in complete agreement with what  
20 Jeff has said and what Jerry said. But, Jerry, I don't  
21 know how I feel about this. You raised -- you caused a  
22 thought to pop in my mind, which I have to revisit and  
23 think about.

24 I remember about a year ago I had a computer  
25 account set up at home -- an Internet account set up at

1 home -- and I have a lap top, and I just kind of stopped  
2 checking the Internet account at home. And my daughter  
3 signed me up for this month -- this daily quilters  
4 newsletter. Why she thought I would want a quilters  
5 newsletter, I have no idea.

6 (Laughter.)

7 MS. MYERS: But there it was. And I finally  
8 remembered after a couple of months to go check my  
9 account. And my mailbox -- in between a few dedicated  
10 messages, my mailbox was full of incredibly copious,  
11 lengthy messages from these quilters.

12 And the question that Jerry raised that I  
13 thought was interesting, I'm in complete agreement on the  
14 notification. But the product could actually be  
15 delivered with the negative option out. For example, the  
16 book of the month club could deliver the book of the  
17 month to you, and there it would be online for ever and  
18 ever.

19 And I don't know how I feel about that. I think  
20 it does raise another set of questions to be thought  
21 about.

22 MS. HRDY: Okay. Kaye?

23 MS. CALDWELL: Kaye Caldwell with CommerceNet.  
24 I would be considered -- getting back to something you  
25 said a little earlier -- if you were going to try to make

1 different rules for one kind of communication to the  
2 other. And just to use this example, as a consumer that  
3 occasionally participates in these negative option  
4 arrangements, it would be very confusing to me to try to  
5 remember, okay, I got this in the mail, so I don't have  
6 to do anything. But I got this one in e-mail, so I do  
7 have to do something.

8 I think that would just get very confusing.

9 MS. HRDY: Okay. Phillip?

10 MR. MCKEE: I just wanted to assure Jerry that I  
11 was in no way, shape or form suggesting that the FTC  
12 abandon negative option entirely for the Internet and  
13 force a positive option. But it would be a nice practice  
14 on the part of some businesses.

15 I know that I was in a negative option situation  
16 once, and I have to admit, I kind of would have enjoyed  
17 having the ability of simply telling them send this,  
18 instead of constantly having to say don't send this.

19 Not necessarily forcing a company, but if it  
20 were -- since it's not so burdensome, it would be nice to  
21 just sometimes have that option as a business model.

22 MS. KOLISH: Jerry, isn't it true that some  
23 negative option clubs are actually moving to a positive  
24 option basis for people who are away a lot. The negative  
25 option people are working on it?

1 MR. CERASALE: They're working on it, you know,  
2 as part of trying to keep customers. That's right.  
3 Trying to meet the needs of the customers is something  
4 that they're doing. That's true.

5 MS. KOLISH: So you may get your wish, Phillip.

6 MS. HRDY: Dan, did you have a comment?

7 MR. JAFFE: Just a short one, which is while  
8 your example is one that I think would rightfully worry  
9 all of us, I think the same problem would come with mail.  
10 It's just not clear to me that one is going to get you  
11 more on notice than the other.

12 Lots of stuff comes pouring into people's --  
13 through people's mailboxes. Often it gets circular  
14 filed. So I think this is as good and there is no reason  
15 to distinguish the two.

16 MS. CALDWELL: I agree, Dan.

17 MR. JAFFE: And that you do have some advantages  
18 with record keeping, that you know that someone actually  
19 received it.

20 MS. CALDWELL: I agree.

21 MS. ENGLE: So no one is concerned about --  
22 because an issue had been raised, well, it's customary  
23 for consumers to check their mailboxes. I mean, that's  
24 pretty frequently or every day that the mail comes.

25 And you had talked about, well, what if, you

1 know, there is an account that you're no longer using, or  
2 you change your e-mail address and maybe you don't get  
3 it, but people don't seem to be too concerned about that  
4 as a barrier to the Commission -- to the consumer  
5 receiving the notice?

6 Teresa?

7 MS. JENNINGS: Teresa Jennings with the Direct  
8 Selling Association. Somehow you are still paying for  
9 it. You're getting your credit card receipt or some  
10 monies are being taken from you. So even if you have two  
11 e-mail accounts -- you know, three somewhere -- and you  
12 start seeing these bills that gosh, I haven't used that  
13 in a while, there is still a means to figure it out, just  
14 as there would be if the product was being delivered to  
15 you through another means.

16 MS. ENGLE: Okay. Kevin?

17 MR. ELSE: Just, you know, as Jerry said, if the  
18 contract is clear up front, we're going to send your  
19 notices to the e-mail address you give us. Now, that's  
20 maybe adequate disclosure. If a customer moves to  
21 another e-mail address, change the address and notify the  
22 company.

23 MS. ENGLE: Right.

24 MR. ELSE: It's very similar to off line.

25 MS. ENGLE: But some people seem to think that

1 in the case of a negative option plan it was important  
2 for the company to get the -- to inform the consumer and  
3 get their consent to receiving these monthly notices by  
4 e-mail, versus the one time Quick DDRIP situation where  
5 if you give your e-mail address, no notification or  
6 consent was necessary.

7 We wanted to use the negative option rule and  
8 the situation that was set out with the Bouquet of the  
9 Month ad for a further discussion of some of the other  
10 requirements in the negative option rule.

11 And you can see up there on the slide that the  
12 negative option rule provides that it is an unfair,  
13 deceptive act or practice for the seller to refuse to  
14 credit a consumer if the seller has received, quote,  
15 written notice of cancellation of membership by  
16 identifying the subscriber prior to the return date for  
17 the shipment, and also to fail to terminate a membership  
18 promptly upon written request.

19 And we just wanted to explore whether anyone  
20 thinks there is any reason why this written notice could  
21 not also be done through e-mail?

22 Teresa?

23 MS. JENNINGS: Teresa Jennings with the Direct  
24 Selling Association. You all might recall earlier today  
25 when I described the requirement that the direct selling

1 industry has with a cooling off notice that must be on  
2 all of our sales receipts.

3 We have a conference once a year where we  
4 grapple with the issues that our companies are dealing  
5 with. And this year we had a panel on the Internet.  
6 Some of our distributors may set up a web site, where  
7 along with making face to face interactions with  
8 consumers, those consumers could, after having bought  
9 from them once face to face, go to the distributor's web  
10 site and order their product directly, have it shipped  
11 directly from the company, and still have the same  
12 product that was originally offered to them in a face to  
13 face means.

14 Our companies are trying to understand whether  
15 the receipt that is given to the customer after going  
16 online must be identical to the one that is given after a  
17 face to face transaction. And we're just beginning to  
18 try to figure out what that means for our industry.

19 But what the summation of a lot of discussion  
20 was at this meeting, is that notice is notice. And if  
21 you inform people at the time they're making their  
22 purchase how you can cancel it, that should be  
23 sufficient.

24 MS. ENGLE: Kevin Else?

25 MR. ELSE: Kevin Else, QVC. I'm not really

1 speaking for QVC at this point, but just -- I have to  
2 qualify that, because we don't do anything like this. I  
3 have no idea what we would be doing.

4 But it occurs to me that if you're signing up  
5 for a particular service, and you're doing it in writing  
6 or through an e-mail, and then the company then requires  
7 you to do some entirely other -- you know, to make a  
8 telephone call in order to shut the service off and they  
9 don't give you the option to e-mail back to shut it off,  
10 that's a problem.

11 MS. ENGLE: Not without precedent.

12 MR. ELSE: I know, it's not. No, it's not.

13 MS. ENGLE: Phillip?

14 MR. MCKEE: It just seems quite simple to me  
15 that if an e-mail is sufficient for the business to put  
16 the consumer on notice of some aspect or change in the  
17 shipping arrangements or the like, that it should also be  
18 sufficient for the consumer to be able to put the  
19 business on notice of the desire to close the account.

20 MS. ENGLE: Okay. Jerry?

21 MR. CERASALE: I agree with Phillip a hundred --  
22 I agree with Phillip a hundred percent on that. If it's  
23 good enough that I can make the order and so forth and  
24 give you notice through the e-mail, the response back  
25 from the consumer to the company, the company should be

1 required to accept the e-mail notification back to the  
2 company.

3 MS. ENGLE: Does it make a difference if the  
4 consumer signed up on paper?

5 MR. CERASALE: That potentially could. I think  
6 that could make a difference in the sense of is the  
7 company set to work with this customer on paper or on the  
8 web. I mean, that looks -- internally they may have some  
9 different process. I don't know about that. I mean, I  
10 think you have to look at that case by case, but I don't  
11 know if you force a company that way.

12 I think that the key is don't distinguish  
13 between -- don't discriminate against any particular  
14 medium. If the consumer -- everything the consumer did  
15 was on electronic to sign up, the notices back from the  
16 company were electronic, then the consumer should have  
17 the right to put any other notice back to the company  
18 electronically.

19 But if it initially came up through mail, you  
20 can create a problem on the company side if you switched  
21 to allow them to go to e-mail. I think. That doesn't  
22 mean the company can't accept that, but I don't think you  
23 should require them to accept that.

24 MS. ENGLE: Okay. Any other comments on this  
25 issue?

1 MS. TORTORICE: Mary? Mary Tortorice, National  
2 Retail Federation. And I would agree with Jerry that you  
3 can't mandate that if a business has entered into a  
4 relationship with a consumer either through the mail or  
5 through the phone that the business then accept the  
6 consumer to respond through e-mail.

7 Because there would be a number of businesses  
8 that just don't have that capability. They may have  
9 different business units separate, and it could very well  
10 be that the e-mails would never get to the appropriate  
11 business unit.

12 MS. ENGLE: Just because they have an e-mail  
13 address doesn't mean it's okay for consumers to notify  
14 them through that?

15 MS. TORTORICE: Yes.

16 MS. ENGLE: Okay. Anybody else? Okay. Then we  
17 wanted to move onto an example of a different rule in the  
18 use of the term written, and that rule would be the  
19 appliance labelling rule. That's my favorite -- my  
20 personal favorite. I still have it, I think, on my air  
21 conditioning thing that's been outside for ten years.  
22 But those yellow and black energy guides, for those of  
23 you who don't know what the appliance labelling refers  
24 to.

25 The appliance -- well, first of all, it does

1        seem that there is general agreement that when a rule or  
2        guide refers to the term in writing, there is no inherent  
3        reason why we just can't go and apply that to writings on  
4        the Internet as opposed to on paper. Right? Okay.

5                And the appliance labelling rule specifically  
6        says that it is unfair or deceptive to make any  
7        representation in writing, including a representation on  
8        a label or in any broadcast advertisement, with respect  
9        to energy used or efficiency of certain products, unless  
10       the product has been tested in accordance with the rule.

11               Neither the rule nor the enabling statute  
12       defines in writing, and we're just wanting to know if  
13       there is any reason why in this context we shouldn't just  
14       assume that this requirement would also apply to  
15       representations made in advertising on the Internet.

16               Kaye?

17               MS. CALDWELL: Kaye Caldwell with CommerceNet.  
18       I don't know if this is the appropriate point to bring  
19       this up, but it may be the best point that we'll get.

20               **(Laughter.)**

21               MS. CALDWELL: I understand that the FTC  
22       generally does not use -- does not have requirements that  
23       notices or particular things be communicated to the  
24       consumer in specific sizes of type.

25               But I would like to encourage you that if there

1 are any of those particular requirements anywhere, that  
2 you will have a problem there, because I don't think that  
3 you can adequately ensure that something that you design  
4 in 12 point type as a seller will end up being viewed in  
5 12 point type as a consumer.

6 So I would encourage you to make sure that those  
7 kinds of requirements just don't exist anywhere any more,  
8 and if you could possibly encourage the states to get rid  
9 of them, too.

10 **(Laughter.)**

11 MS. ENGLE: We had some discussion about that  
12 issue this morning, how difficult or impossible it is to  
13 transfer a point size requirement to the Internet.

14 Phil?

15 MR. MCKEE: To give an example of how the actual  
16 appliance labelling can be done -- I guess you're going  
17 to tell by this statement that I am the quintessential  
18 online shopper. I was researching some information to  
19 buy a replacement washer/dryer stacking unit for my  
20 condominium. And I went looking around, and I was  
21 looking at these units online to check on prices and to  
22 see how they compared with the local dealers that I could  
23 simply purchase from and have them delivered through as  
24 well.

25 And one of the sites that I went to online

1           actually had this little graphic on their screen, which  
2           you could tell was a very, very miniaturized version of  
3           the label, and it said below it, click here to enlarge.  
4           I clicked on it. All of a sudden my entire browser was  
5           filled with a huge version of the label that I could very  
6           easily scroll through and look.

7                         It's quite possible to provide this information,  
8           to do so easily, and at the same time to engender a lot  
9           of consumer loyalty, because I, as a consumer, feel that  
10          the site is trying to be helpful to me.

11                        MS. ENGLE: Um-hum.

12                        MR. MCKEE: And I did buy it.

13                        **(Laughter.)**

14                        MS. ENGLE: Okay. Kevin?

15                        MR. DUKE: Kevin Duke, America Online. I guess  
16          the difficulty here is figuring out whether the Internet  
17          advertisement is in writing. You know, there seems to be  
18          a consensus that e-mails are the sort of electronic  
19          records that people intend to be writing to meet the  
20          requirement.

21                        This rule, you know, is a little bit tricky,  
22          because it says in writing or any broadcast, which was  
23          probably for the time when the rule was written. So that  
24          should cover all advertising. I guess the more difficult  
25          question would be is it if it applied to any

1 representation in writing. The question is, is text on a  
2 computer screen paramount to writing.

3 MS. ENGLE: Right.

4 MR. DUKE: Or is it now like text on a  
5 television screen.

6 MS. ENGLE: That's a question.

7 MR. DUKE: And I don't know the answer.

8 **(Laughter.)**

9 MR. DUKE: That's a hard question.

10 MS. ENGLE: Carla?

11 MS. MICHELOTTI: Carla Michelotti, representing  
12 the American Advertising Federation. I think we're all  
13 being very quiet, Mary, at this point, because I think  
14 there would be consensus that -- I think there would be  
15 consensus that in writing could be easily transferable to  
16 an Internet advertising textual use.

17 MS. ENGLE: Bill?

18 MR. MACLEOD: Well, we ought to have a little  
19 controversy here.

20 **(Laughter.)**

21 MS. ENGLE: We can count on you.

22 MR. MACLEOD: This is an example of where the  
23 nature of a web site might call into question the  
24 applicability of this rule. Is the web site being an  
25 advertisement where this writing is taking place, and are

1       you simply engaging in some debate about the proper level  
2       or the proper method of measuring energy efficiency.

3               And if you are not careful in confining the  
4       regulation in connection with a commercial transaction,  
5       then you will have a problem, and a web site doesn't  
6       always define itself that way.

7               MS. ENGLE: Yeah. I mean, I think that would --  
8       that's an underlying assumption that this is actually an  
9       advertisement. It's a commercial speech. It's trying to  
10      get consumers -- to influence consumers to buy or  
11      purchase, not, you know, an energy efficiency group  
12      comparing energy efficiency of different appliances.

13              Or I know there can be harder cases, but I think  
14      we're just talking about something that's pretty clearly  
15      an advertisement.

16              MS. KOLISH: And right below this screen there  
17      would be an order now the stackable dishwasher unit.

18              **(Laughter.)**

19              MS. ENGLE: Moving on to the -- oh, I'm sorry,  
20      Phillip.

21              MR. MCKEE: Well, no. I was just going to say  
22      to go back to my stackable washer. When I was at the  
23      dealers, they have the energy unit posted on the front of  
24      thing, right when I was sitting there at the web site.  
25      If they hadn't taken the extra step of scanning in the

1 energy use certificate, I could have very easily ordered  
2 it without ever seeing it. But they didn't make the  
3 effort to show it to me, since I do not have the physical  
4 unit sitting in front of me, as I would at a regular  
5 store.

6 MS. ENGLE: Okay. Moving on to the next slide,  
7 the appliance labelling rule also requires that certain  
8 disclosures be made in catalogs. And the rule defines  
9 them as printed material which contains the terms of  
10 sale, retail price and instructions for ordering, from  
11 which a retail consumer can order a covered product.

12 So here we have the use of the word printed --  
13 printed material. And we were just wondering if there  
14 was any issue about assuming that an Internet site  
15 contained this information and a consumer could order,  
16 that it shouldn't be considered a catalog for purposes of  
17 the rule.

18 MS. FOX: Jean Ann Fox. This seems like a no  
19 brainer.

20 **(Laughter.)**

21 MS. FOX: It's just an online catalog.

22 MS. ENGLE: Good. We saved the easiest stuff  
23 for later in the day, now that everyone is tired.

24 **(Laughter.)**

25 MS. ENGLE: Okay. Did someone have their hand

1 up? Jeff, did you?

2 MR. RICHARDS: Briefly, and this is probably my  
3 fatigue speaking. Sorry. Jeff Richards. On the face of  
4 it, of course this makes sense. But I caution us again  
5 that a catalog may be a new kind of compilation brought  
6 together on the fly to meet my -- me, the consumer -- my  
7 particular conditions at that particular moment, and that  
8 we're again, I think, thinking of a catalog in a static  
9 sense with static warnings that can be predicted.

10 And what we really need to do here is understand  
11 how consumers themselves in fact will need to pull  
12 together information that is current as of the moment  
13 that they asked for it, and swiftly uses its currency  
14 thereafter. And that's my caution.

15 MS. ENGLE: Carla?

16 MS. MICHELOTTI: You know, all these rules --  
17 the FTC rules and guidelines of advertising are things  
18 that we read and we apply, but they're all tactics. And  
19 they're specific tactics to accomplish a goal. And if we  
20 think about the overall goal with the rules of whether in  
21 this case a consumer has a right to know certain energy  
22 information before they're buying the appliance, that's  
23 the goal.

24 And the way that -- the defined way in which the  
25 tactic has prescribed that goal to be reached may be

1 modified because of the medium. Here I think it's -- you  
2 know, in what my limited mind right now sees as the  
3 Internet, I think it's pretty clear, but tomorrow I don't  
4 know, you know, and maybe it's going to have the computer  
5 talking to me or something. You know, it's not going to  
6 be printed at all. Who knows what's going to happen.

7 MR. RICHARDS: Give an example of what you're  
8 saying.

9 MS. MICHELOTTI: But it's a goal. Do you  
10 understand my point, a goal versus a tactic? I mean,  
11 these are tactics, but the goal is whether there is  
12 appliance energy information made available to consumers.

13 MR. RICHARDS: I just moved into a new home with  
14 a heat pump, so clearly I was interested in this  
15 information. But it turns out that on the web -- right  
16 now the rule, of course, originally assumes showroom and  
17 static media and so forth.

18 But in fact on the worldwide web what I was able  
19 to do -- and actually maybe automobiles are even a better  
20 example. Instead of getting even a pop up of a label,  
21 the same one that I had seen in the showroom, is suddenly  
22 a comparison chart that shows competitors side by side  
23 with actual rankings and ratings, including this rule.

24 So what I'm saying, this is my kind of example  
25 to your point. Let's be really careful, in fact, that

1 we're not holding back the next evolution of comparative  
2 information by insisting on the literal application of  
3 what we got today.

4 MS. ENGLE: Okay. Are there any other -- oh,  
5 I'm sorry. Kaye?

6 MS. CALDWELL: Kaye Caldwell with Commerce Net.  
7 I would just caution you that this is an example where  
8 the definition of catalog makes it very clear that in  
9 this case it would work, because of the additional  
10 conditions you have for it to be a catalog in this  
11 particular example.

12 I'm a little concerned that there might be other  
13 areas where the word printed is used, but it's not quite  
14 so clear that it would work so well. So I think you do  
15 have to be careful and look at what happens in each  
16 particular situation where you do use that word,  
17 unfortunately.

18 MS. ENGLE: Okay. Well, were there any other  
19 concerns or points people wanted to raise about the  
20 application of the terms written, writing, printing and  
21 so forth as they are used in our rules and guides to  
22 advertising on the Internet?

23 It seems a little bit easier than the clear and  
24 conspicuous issue, fortunately.

25 **(Laughter.)**

1 MS. ENGLE: And we will keep in mind, of course,  
2 the points that have been raised about the need to, you  
3 know, maintain flexibility and be open to changes in  
4 technology. And hopefully this workshop is really one  
5 example of how, you know, we are trying to do that and  
6 not just be an old mind set.

7 MR. DUKE: I have a question.

8 MS. ENGLE: Sure, Kevin.

9 MR. DUKE: Maybe Kevin Else can answer it. Does  
10 this rule apply to, you know, a television commercial  
11 from which it advertises the terms of sale, the retail  
12 price, instructions for ordering and gives an 800 number  
13 from which the consumer can order? Does this rule apply?

14 MS. ENGLE: I'm sorry. Would we interpret a TV  
15 ad as printed material?

16 FEMALE SPEAKER: That's broadcast.

17 MS. ENGLE: I don't think so.

18 MR. DUKE: Well, I mean, from the point that,  
19 you know, the rest of the stuff in the definition of  
20 printed material sort of leads us to the conclusion that  
21 an Internet ad is closer to the printed material than  
22 not. You can have all these other elements, you know, in  
23 an infomercial or just a regular television commercial,  
24 yet because it's clearly not printed material, the rule  
25 wouldn't apply.

1                   Now, as technology evolves, you can have  
2                   streaming technology and somebody clicks on a web site  
3                   and they are presented with what is in essence a video  
4                   television commercial, and maybe the rule shouldn't  
5                   apply. You know, it points up the difficulty of hard and  
6                   fast rules to a single medium.

7                   MS. ENGLE: Yeah. Well, one thing is, we often  
8                   make a distinction between printed ads and TV ads,  
9                   because it's much harder to make disclosures in TV ads.  
10                  The cost is much higher. You don't generally have the  
11                  time now. An infomercial might be different. And I  
12                  think probably when we wrote the rule we never imagined  
13                  someone selling a refrigerator through an infomercial.

14                  So what I hear you suggesting is maybe we need  
15                  to amend our rule to make it apply to infomercials in  
16                  this way.

17                  **(Laughter.)**

18                  MS. ENGLE: Phillip?

19                  MR. MCKEE: Something I knew that I would want  
20                  to say at some point over the course of the day, and  
21                  Kevin has provided a perfect opportunity for it. And I  
22                  don't want this to sound like I'm just looking for an  
23                  excuse for a more wonderful breakfast at the expense of  
24                  the Grocery Manufacturers of America and our other hosts.

25                  But because the information and the technology

1 is changing so rapidly, as has been said many time, this  
2 is the kind of situation where we would want to come back  
3 to the table. Frequently, not constantly. But on a  
4 regular basis, so that as technology changes, the FTC can  
5 hear the views of industry and regulators and consumer  
6 groups on these new circumstances affect the rules.

7 And it's something where we all, I think in the  
8 back of our heads, have kept in our mind that anything  
9 that was said today is really not going to apply  
10 tomorrow. But it's a wonderful thing that the FTC has at  
11 least allowed us a chance to express these views and  
12 hopefully we 're have more opportunities again in the  
13 future on this topic.

14 MS. HRDY: Well, Laura has just told me she  
15 would really like to do this all over again.

16 **(Laughter.)**

17 MS. ENGLE: Yes, is it Ron?

18 MR. GOLDBRENNER: Yes.

19 MS. ENGLE: Yes.

20 MR. GOLDBRENNER: I wasn't scheduled to say  
21 anything here, but --

22 **(Laughter.)**

23 FEMALE SPEAKER: Go ahead.

24 MR. GOLDBRENNER: I wanted to thank the FTC for  
25 doing a really terrific job in approaching the whole

1 issue of Internet advertising and commerce. I think the  
2 mix of enforcement of browsing the Internet for various  
3 ne'er do wells, of taking enforcement actions on a large  
4 scale against a group of them, of having these kind of  
5 workshops to consider regulations, guides, enforcement  
6 policies, etc., to learn about how the Internet works,  
7 etc., is absolutely the best way of dealing with this  
8 situation that I've seen.

9 And the agency, I think, is doing a terrific job  
10 of taking the initiative, but also being very cautious  
11 with the new medium. And I want to thank you for the  
12 opportunity, because not only is this a good idea, but  
13 you executed it so well. We had to do our homework, and  
14 when we showed up, you gave everybody a really fair and  
15 honest hearing. And we appreciate it very much.

16 MALE SPEAKER: Here, here.

17 **(Applause.)**

18 MS. KOLISH: Well, that seems like a good place  
19 to end.

20 **(Laughter.)**

21 MS. KOLISH: Let's end on a high note. I think  
22 Jodie wanted to make a few closing remarks.

23 MS. BERNSTEIN: I did, but I'm not sure that I  
24 can exceed what Ron already said about us. And I won't  
25 try to. I did want to thank all of you for both doing

1 your homework, coming with us today and spending the  
2 entire day with really open and honest discussions.  
3 Because our principal purpose here for us is to educate  
4 ourselves, and to see to it that we do remain current.

5 Phillip, I had written down also, will they come  
6 back again. Because despite the fact that I expect all  
7 these people down here will probably resign if I told  
8 them they had to do this again, I think that our -- the  
9 Bureau's, anyway -- way of proceeding regularly is to  
10 continue to have this kind of dialogue with the people at  
11 this time and others who have been so generous with their  
12 time. We will continue to do that as we can.

13 I do think that there were a couple of things  
14 more that I wanted to say. First of all, I think there  
15 was an admission today -- and I've been saving this one  
16 up. I heard Jerry Cerasale, on behalf of DMA --

17 **(Laughter.)**

18 MS. BERNSTEIN: -- say that his --

19 **(Laughter.)**

20 MS. BERNSTEIN: Here's what I heard Jerry say.  
21 That the fact that DMA's contribution was listed above  
22 the GMA's meant it was clearer and more conspicuous.

23 **(Laughter.)**

24 MS. BERNSTEIN: Well, hey, you know, we'll just  
25 apply that across the board. That's an admission. And

1 I've ruled out telling you about my first and maybe only  
2 foray onto the net to attempt to buy a year's supply of  
3 panty hose.

4 (Laughter.)

5 MS. BERNSTEIN: Because the reason I was buying  
6 a year's supply was the offer was so terrific that the  
7 more I bought, the cheaper it got, and I expected that a  
8 year or two they would be free.

9 (Laughter.)

10 MS. BERNSTEIN: That didn't turn out to be the  
11 case. And if I could have figured out how to say, how  
12 soon, buddy, would you like this site to be banned by the  
13 FTC, I would have done it. But I couldn't figure out how  
14 to do it.

15 (Laughter.)

16 MS. BERNSTEIN: So I'm going to stay with the  
17 net a little time longer so that I can figure all those  
18 things out. In the meantime, again, my thanks to you and  
19 to our wonderful staff that's done this.

20 We're going to keep this record open until the  
21 1st of July. We would like to encourage your comments --  
22 follow up comments -- as much as possible, and among  
23 those comments for any of you who have ideas for either  
24 stimulating research or undertaking research on what the  
25 theme of this has been, as none of us know enough about

1 what a consumer's behavior is like in this new medium.

2 We would certainly be grateful for that if there  
3 is existing research. There are also academics who, of  
4 course, are salving to have somebody sponsor research,  
5 who would love to hear about it. That's probably longer  
6 term, but to the extent that we are all learning, I think  
7 that would be a very valuable thing to do.

8 We are keeping a transcript. It will be  
9 available. And in terms of what we will do in the end, I  
10 think in all likelihood it will not -- certainly will not  
11 be a set of new rules or guides. To the extent that we  
12 can continue what we have committed to in the past, and  
13 that is, performance standards and not design standards.  
14 I heard that all day long. And I think the Commission  
15 has had a history of doing that, both in guidance and in  
16 rules and in case law as well. I am confident that we  
17 will continue that process.

18 The creativity that comes from the commercial  
19 sector in advertising and in promotion is something that  
20 we cherish. We know that the creativity is a way to  
21 communicate with consumers. And there is one consensus  
22 here today that we all believe in, and that is, the  
23 consumer really is sovereign here, and the kind of  
24 information that the consumer wants, needs and has  
25 expectations for, is what we're all after.

1                   So, again, our thanks. I am going to release  
2                   you now from your purgatory of having to work with us all  
3                   day. Again, our thanks. And I'll give you a round of  
4                   applause, if we may, for your contributions today.

5                   **(Applause.)**

6                   **(Whereupon, the foregoing workshop was concluded**  
7                   **at 5:03 p.m.)**

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## 1                   C E R T I F I C A T I O N   O F   R E P O R T E R

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3           DOCKET/FILE NUMBER:   P974102  4           CASE TITLE:         Internet Legal Issues Task Force  5           DATE:               May 14, 1999  

6           I HEREBY CERTIFY that the transcript contained  
7           herein is a full and accurate transcript of the notes  
8           taken by me at the hearing on the above cause before the  
9           FEDERAL TRADE COMMISSION to the best of my knowledge and  
10          belief.

11

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DATED:

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SONIA GONZALEZ

16

17

## C E R T I F I C A T I O N   O F   P R O O F R E A D E R

18

19          I HEREBY CERTIFY that I proofread the transcript for  
20          accuracy in spelling, hyphenation, punctuation and  
21          format.

22

23

24

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JACKY KARNCHANAPHATI

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