Federal Trade Commission

Some Reflections on the Future of the Internet:
Net Neutrality, Online Behavioral Advertising, and Health Information Technology

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I am pleased to be here today to discuss some of my thoughts on the future of the Internet. In particular, I will be touching upon the implications of net neutrality, online behavioral tracking and advertising, and health information technology.

I.

One of the principal policy issues in the U.S. respecting the future of the Internet is whether to require broadband Internet access service providers (such as Verizon, Comcast, and AT&T) to implement net neutrality – that is to say, providing data and content to Internet users without discriminating among providers of that data and content. And, if net neutrality is to be implemented, what are "reasonable management measures" that those access providers should be permitted to take? These policy issues are currently being handled primarily by our sister

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[1] These comments are my own, and do not necessarily reflect the views of the Commission or of any individual Commissioner. I would like to express my gratitude to Beth Delaney, my attorney advisor, for her contributions to this speech.

agency, the Federal Communications Commission. The Chairman of that agency, Julius Genachowski, has declared that net neutrality should be required, subject only to reasonable management measures to be defined.[2] This past Thursday, the FCC unanimously voted to move forward on a net neutrality rule-making process, which would examine six principles it proposes to codify that would apply to all platforms for broadband Internet access, including mobile wireless broadband.[3] The FCC's notice specifically recognized that different access platforms involve significantly different technologies, market structures, patterns of consumer usage, and regulatory history and seeks comment on how, in what time frames or phases, and to what extent the principles should apply to non-wireline forms of broadband Internet access, including mobile wireless.[4] Representative Rick Boucher, Chairman of the House Subcommittee on Communications, Technology, and the Internet, also has suggested that fourth generation wireless applications (for example, the WiMax application from Sprint and LTE (Long-Term Evolution) application from the other major carriers) are mature enough that these may be subject to the same net neutrality rule.[5] Notably, FCC Commissioner McDowell further recommends that in considering net neutrality rules, the FCC needs to weigh whether the rules

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[2] Julius Genachowski, "Preserving a Free and Open Internet: A Platform for Innovation, Opportunity, and Prosperity" Remarks Before the Brookings Institution (Sept. 21, 2009), *available at* http://www.fcc.gov/headlines.html (listed under "Chairman Genachowski Outlines Actions to Preserve the Free and Open Internet").

[3] Commissioners McDowell and Baker voted in favor of the proposal but dissented in part, noting that their votes are for a data-gathering process.

[4] *See* FCC Press Release, "Commission Seeks Public Input on Draft Rules To Preserve the Free and Open Internet," Oct. 22, 2009, *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-294159A1.pdf.

[5] *See* Kim Hart, *Rep. Boucher Praises FCC, Begins to Work on Net Neutrality Legislation*, The Hill, Sept. 29, 2009, at 4.

should apply more broadly, and include not only networks, but also applications.[6] I have little to add to those declarations except as follows.

First and foremost, I hope that in defining what are "reasonable management measures," the FCC will be mindful of the need to give access providers sufficient latitude to raise the capital needed to finance improvements and innovations to their infrastructures.

Second, as I have said in prior remarks, I don't think the antitrust laws (which we at the Federal Trade Commission and the Antitrust Division of the Justice Department jointly enforce), have much, if anything, to offer in these debates.[7]

Third, I am glad that the FCC, instead of the FTC, is handling this hot potato. The reason these issues are of such importance is that a healthy access provider infrastructure is of vital importance to the proper functioning of the Internet. The global economy cannot recover, much less prosper, without a proper functioning Internet because of its importance to consumers, and consumers are vital to economic recovery and prosperity.

II.

A policy issue of secondary, but real importance, is whether and to what extent the undisclosed "tracking" of consumers' activities on the Internet can or should be prohibited. Since 1995, the FTC has sought to understand the online marketplace and the privacy issues it

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[6] Statement of Commissioner Robert M. McDowell, "In the Matter of Preserving the Open Internet," GN Docket No. 09-191; Broadband Industry Practices, WC Docket No. 07-52, Oct. 22, 2009, *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-09-93A4.pdf.

[7] *See*, J. Thomas Rosch, "Broadband Access Policy: The Role of Antitrust," Speech Presented at the Broadband Policy Summit IV: Navigating the Digital Revolution, Washington, D.C. (June 13, 2008), *available at* http://www.ftc.gov/speeches/rosch/080613broadbandaccess.pdf.

raises for consumer. As such, it is an issue that falls squarely within the realm of our consumer protection mission.

To begin with, let me explain how I view what some describe as "online behavioral advertising" and others describe as "tracking consumers' online behavior." The FTC has defined "online behavioral advertising" as the tracking of a consumer's online activities – including the searches the consumer has conducted, the web pages visited, and the content viewed – in order to deliver advertising tailored to the consumer's interests.[8]

As you can imagine, this is a major incentive for Internet advertising. Specifically, one of the most appealing aspects to an advertiser (or its advertising agency) about advertising on the Internet, as opposed to advertising in a newspaper or on radio or television, is the potential to target consumers that have shown an interest in topics related to the advertiser's products.

The threshold issues presented by this kind of "behavioral tracking" are threefold. The first is whether any deceptive representations have been made about the behavioral tracking.[9] The second is how that behavioral tracking is done. The third, and I think most vexing, is whether and when to permit behavioral tracking when no deceptive representations are made and the means of doing it are not surreptitious.

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[8] *See* FTC Staff Report, *Self-Regulatory Principles for Online Behavioral Advertising*, Feb. 2009, *available at* www.ftc.gov/os/2009/02/P085400behavadreport.pdf.

[9] "Most deception involves written or oral misrepresentations, or omissions of material information. Deception may also occur in other forms of conduct associated with a sales transaction. The entire advertisement, transaction or course of dealing will be considered. The issue is whether the act or practice is likely to mislead, rather than whether it causes actual deceptions." *See* FTC Policy Statement on Deception, appended to *Cliffdale Associates, Inc.*, 103 F.T.C. 110, 174 (1984).

Let me begin by describing the FTC's organic statute, which is Section 5 of the FTC Act. Section 5 prohibits deceptive or unfair acts of practices.[10] A threshold issue therefore is whether any deceptive representations have been made. It may seem like this is a simple issue, whether the representation relates to the fact of the behavioral tracking itself, or to some attribute of a product or service. But sometimes it isn't a simple issue. That is because the FTC has long held that disclosures must be "clear and conspicuous," and what is "clear and conspicuous" (or to put it differently, "transparent"), especially where the medium is a moving target like the Internet, can be hard to determine.[11] To compound the problem, lawyers frequently draft the disclosures, resulting in legalese that is incomprehensible to consumers. Finally, disclosures are sometimes buried in a privacy policy statement or some other obscure location. In short, even an accurate representation that a consumer's behavior will or will not be tracked may become hopelessly muddled or opaque to most consumers.

The second issue is how the online behavioral tracking is done. I draw a firm distinction between online behavioral tracking that is done through the use of websites and cookies as compared to the use of "spyware," where tracking software is unknowingly loaded onto the consumer's computer. The surreptitious installation of spyware on a consumer's computer is an unfair practice in my judgment, not only because it is contrary to most consumers' expectations about the sanctity of their computers, but also because spyware may adversely affect the

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[10] 15 U.S.C. § 45(a).

[11] The FTC publication, "Dot Com Disclosures: Information About Online Advertising," for example, offers specific advice on how to make clear and conspicuous disclosures when advertising on the Internet. *See* Federal Trade Commission, "Dot Com Disclosures: Information About Online Advertising," *available at* www.ftc.gov/bcp/edu/pubs/business/ecommerce/bus41.pdf.

computer's performance, and it typically costs a substantial amount of time and money to remove these programs.

The use of spyware, as well as the "clear and conspicuous" disclosure issue, were presented in the recent *Sears* case brought by the FTC.[12] There, Sears tracked consumer behavior by installing software on the consumer's computer. However, unlike a case involving the secret installation of spyware, Sears touted the installation of its software as helpful to consumers, and also offered to pay a nominal sum for that installation. The Commission felt Sears did not "clearly and conspicuously" disclose the fact that tracking software was being installed or how it would operate, both because the disclosures were buried in the licensing agreement and other obscure places and because Sears did not adequately describe how the software would operate. The result was a complaint charging deceptive conduct, and Sears entered into a consent decree to settle these charges.

The *Sears* consent decree has been described as breaking new ground respecting an advertiser's obligations to disclose behavioral tracking. One media source noted that "the allegations don't seem quite as bad as in some of the more notorious spyware/adware complaints" and that "the complaint seems to be based solely on alleged deficiencies in the notices sent to consumers."[13] In my mind, however, I don't see this case as "ground breaking." Absent any disclosure by Sears that this was being done, it would have been a straightforward "spyware" case, probably grounded in an unfairness theory. Here, the FTC charged deception

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[12] FTC Press Release, "Sears Settles FTC Charges Regarding Tracking Software," June 4, 2009, *available at* www.ftc.gov/opa/2009/06/sears.shtm.

[13] Wendy Davis, "FTC, Sears Settle Complaint About Web Tracking Software," MediaPost, June 4, 2009, *available at* www.mediapost.com/publications/?fa=Articles.showArticle&art_aid=107366.

because the disclosures were inadequate. To my way of thinking, this case simply stands for the proposition that if an advertiser is going to track consumer behavior by installing software (whether it be called adware, spyware or something else), it had darn well better insure that it makes disclosures beforehand that are clear and conspicuous, and thereby allow the consumer to vote with his or her feet on whether he or she is willing to permit the installation. Arguably, this practice should require that the consumer "opt in" before the installation occurs.

What happens, though, when no representations are made about whether or not the consumer's behavior will be tracked, and illicit or surreptitious means – such as the unauthorized installation of spyware – are not used to do the tracking? For example, let's consider typical online behavioral advertising whereby the consumer's online activities are tracked and collected. In my mind, I draw a bright-line distinction between instances where the tracking involves the collection of so-called "personally identifiable information" or "PII," like a social security number, postal address, or a driver's license number, or other personal or financial information that can be linked to a specific individual, on the one hand, versus consumer information that is not linked to a specific individual, on the other hand.

Apart from the collection of PII, the tracking of consumer activities on the Internet raises a vexing policy issue. There are some in Washington who say that many consumers consider such "online behavioral tracking" an invasion of privacy (and, based on my conversations with Europeans, that is how a good many of them feel).[14] On the other hand, we are being told that

[14] *See, e.g.*, Turow et al., "Americans Reject Tailored Advertising," Sept. 2009, at 3, *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1478214 (even when told that the act of following them will take place anonymously, 68% of Americans surveyed "definitely" would not allow it, and 19% would "probably" not allow it).

many Americans don't care.[15] One viewpoint is that Internet users appreciate behavioral tracking because it can facilitate their shopping, or streamline their Internet experience.[16] Others claim that Internet users benefit indirectly from targeted advertising through its financing of free content (in much the same way that network television advertising helps finance free network television content).

I'm personally not sure I would conclude that behavioral tracking that collects nonsensitive information is necessarily deceptive or unfair within the meaning of Section 5, even if a particular consumer might find such practices disturbing or invasive. I realize that my ambivalence may be jarring to some, especially Europeans. I recall attending a dinner party several years ago with a French woman who could not believe that Americans would take such a cavalier attitude toward such "spying," as she put it. Indeed, my own friend and colleague, Commissioner Pam Harbour has raised privacy concerns about behavioral tracking in both her dissent to the Commission's explanation of its decision not to challenge Google's merger with Doubleclick[17] and in subsequent testimony in Strasbourg. So let me stress again that I am speaking only for myself in expressing this opinion.

However, there are also some hard legal issues that need to be resolved even if one thinks, as a policy matter, that undisclosed online behavioral tracking should be prohibited. The

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[15] Jayne O'Donnell, "Are Retailers Going Too Far Tracking Our Web Habits?," USA Today, Oct. 26, 2009, *available at* http://www.usatoday.com/tech/news/2009-10-25-retailers-tracking-web-behavior_N.htm.

[16] *But see* Turow et al., "Americans Reject Tailored Advertising," at 3 ("most adult Americans (66%) do not want marketers to tailor advertisements to their interests").

[17] Dissenting Statement of Commissioner Pamela Jones Harbour, *In the Matter of Google/Doubleclick*, F.T.C. File No. 071-0170, Dec. 20, 2007, *available at* www.ftc.gov/os/caselist/0710170/071220harbour.pdf.

relevant case law is built on the two separate prongs of Section 5 of the Federal Trade Commission Act that are pertinent to the consumer protection mission. One of those prongs prohibits deception. The other prohibits unfairness under certain circumstances that are defined by Section 5(m).[18] For the most part, older cases brought under a deception theory have been concerned with deceptive "half-truths," which occurred when the advertisers made an affirmative representation about a material aspect of the product or service, but did not disclose additional information that was necessary to avoid giving a misleading impression. Deceptive half-truths may occur in a variety of circumstances – for example, where the affirmative representation is unqualified or open-ended;[19] where the affirmative representation is a "dangling comparative" that does not disclose exactly with what the product or service is being compared;[20] or where the affirmative representation exaggerates a feature of the product without disclosing the limitation on its efficacy.[21]

In a 1983 Policy Statement on Deception, the Commission expressly treated as deceptive an omission "that is likely to mislead" a consumer, so long as the consumer was "acting reasonably in the circumstances," and the omission was "material."[22] The Deception Policy

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[18] 15 U.S.C. § 45(m).

[19] *See e.g.*, *J.B. Williams Co v. F.T.C.*, 381 F.2d 884 (6th Cir. 1967) (unqualified claim that Geritol was beneficial in cases of tiredness or loss of strength whereas that was true only when the consumer had an iron or vitamin deficiency).

[20] *See e.g.*, *Dolcin Corp. F.T.C.*, 219 F.2d 742 (D.C. Cir. 1954) (claiming that drug preparation was "economical" without saying compared to what).

[21] *See e.g*., *American Home Prods. Corp. v. F.T.C.*, 402 F.2d 232 (6th Cir. 1968) (highlighting the ingredient "Bio-Dyne in ads for Preparation H without disclosing that the ingredient had no therapeutic value).

[22] FTC Policy Statement on Deception, appended to *Cliffdale Associates, Inc.*, 103 F.T.C. 110, 175-76 (1984).

Statement was careful to highlight that not all omissions are deceptive, even if providing the omitted information would benefit consumers.[23] However, omissions are actionable as deception under Section 5 when the advertiser is silent "under circumstances that constitute an implied but false representation."[24] Thus, this aspect of the Deception Policy Statement made omissions actionable only when they constituted a false implied representation, as opposed to a deceptive express representation of the sort described above that would constitute a "half-truth." Put differently, the Deception Policy Statement did not make actionable as deception "pure omissions."[25] As explained in *International Harvester*, a "pure omission" arises when a seller has simply said nothing, in circumstances that do not give any particular meaning" to the silence.[26] No cases since the 1983 Deception Policy statement have treated pure omissions as deceptive under Section 5.

In 1980, the Commission also issued a Policy Statement on Unfairness.[27] In that Statement, the Commission described unfairness for consumer protection purposes to have three elements. First, the injury must be "substantial."[28] Second, the injury must not be outweighed by any offsetting consumer or competitive benefits that the practice also produces.[29] Third, the injury must be one that consumers could not reasonably avoid.[30] The Commission noted,

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[23] *Id*. at 175 n.4.

[24] *International Harvester Co.*, 104 F.T.C. 949, 1058 (1984).

[25] ABA Section of Antitrust Law, Antitrust Law Developments, 1017-18 (6th ed. 2007).

[26] 104 F.T.C. at 1059.

[27] FTC Policy Statement on Unfairness, appended to *International Harvester Co.*, 104 F.T.C. 949, 1070 (1984). *See also* 4 Trade Reg. Rep. (CCH) ¶ 13,203.

[28] 104 F.T.C. at 1073.

[29] *Id.*

[30] *Id.* at 1074.

however, that normally "emotional impact" would not constitute "substantial harm" under this formulation. [13]

Since issuing that Unfairness Statement in 1980, the Commission has treated pure omissions as "unfair" under Section 5 in several instances. The most notable case was arguably *International Harvester Company*,[32] where the Commission found it unfair for Harvester to fail to warn consumers of the possibility of its tractors "geysering" – forcibly ejecting hot fuel through the filter caps of its tractor gas tanks – would be actionable unfairness under Section 5. That failure to warn was a pure omission. While the conduct in *International Harvester* caused a very severe harm to a small number of people, the Commission also recognized that injury may be "substantial" if it does "a small harm to a large number of people or if it raises a significant risk of concrete harm."[33]

The second instance was *Orkin Exterminating Company*,[34] where the Commission found it unfair for Orkin to try to unilaterally change the terms of long-term, fixed annual fee contracts of over 200,000 consumer contracts. Arguably that was a pure omission case too if one focuses on what Orkin failed to disclose *ab initio*.

Finally, more recently the Commission said that it was unfair for CartManager International, an Internet company that provided shopping cart software to online merchants, to collect the personal information provided by consumers when they made their purchases and then to rent that personal information to third party marketers, contrary to the merchants' privacy

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[31] *Id.* at 1073 & n.16.

[32] 104 F.T.C. 949 (1984).

[33] *Id*. at 1064 & n.55.

[34] 108 F.T.C. 263 (1986), *aff'd*, 849 F.2d 1354 (11th Cir. 1988).

policies.[35] The personal information collected included the consumers' mailing addresses, telephone numbers, methods of payment, as well as their purchase history. Consumers were then subject to direct mail solicitations and telemarketing sales calls. The Commission considered that under those circumstances the undisclosed invasion of consumers' privacy interests was sufficient to satisfy the "substantial" consumer injury prong of the unfairness test.

Although at first blush it seems that the *CartManager* settlement would support treating a failure to warn consumers that their online activities will be tracked as an "unfair" practice under Section 5, Section 5(m) poses some formidable obstacles to doing so.[36] First, it is debatable whether a pure omission to disclose that consumers' online activities are being tracked and then used for targeted online advertising alone could be considered to be unfair. As described above in the *Cartmanager* case, the consumer information that was collected and sold included consumers' mailing addresses, telephone numbers, methods of payment, and purchase history. That information was then sold to third party marketers and consumers then were subjected to advertising in a completely different venue – direct mail solicitations as well as telemarketing sales calls. It is one thing to hold that secretly invading consumer's privacy interests by collecting, selling, disclosing and obtrusive use of certain personal information constitutes "substantial" consumer injury so as to support actionable "unfairness" under Section 5; it is another thing to hold that the undisclosed collection and use of that information in a much more limited context does so. That would be so even if the Commission had not declared in 1980 that

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[35] *See* FTC Press Release, Internet Service Provider Settles FTC Privacy Charges – Company Disclosed Personal Information of Nearly One Million Consumers, Mar. 10, 2005, *available at* http://www.ftc.gov/opa/2005/03/cartmanager.shtm.

[36] In 1994, Congress codified the Commission's 1980 Unfairness Statement in Section 5(m) of the FTC Act.

emotional distress would ordinarily not be considered "substantial injury."[37] That statement makes it harder to so hold even though that caveat was not included in Section 5(m).

Second, and arguably more significantly, it cannot be said that in all cases, the undisclosed collection and use of limited consumer behavioral data results in consumer injury that is not offset by the pro-consumer and pro-competitive benefits of the practice. To the contrary, as described above, there are some legitimate pro-consumer and pro-competitive benefits that result from the practice. Absent hard data weighing these benefits against the limited "invasion of privacy interests" involved, it would seem difficult to conclude that treating that practice as an actionable violation of the "unfairness" prong of Section 5 will pass muster under Section 5(m).

III.

Finally, we at the Federal Trade Commission have had a role to play in defining the rules that should be adopted for transmitting health information via the Internet. The stimulus package designated the Commission as one of the primary promulgators of rules in this respect, and the transmission of health care information is also a key matter of the current health care debate in the United States. On the one hand, it is argued that that is critical to implementing an efficient and cost-effective health care delivery system. On the other hand, concerns have been expressed that the transmission of health information via the Internet can compromise consumer interests by invading their privacy. The Commission must reconcile these two interests.

In sum, although the FCC will play a prominent role in determining how the Internet will be used in the United States, we at the FTC will play important roles too.

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[37] FTC Policy Statement on Unfairness, 104 F.T.C. at 1073 & n.16.

Thank you for your time and attention.