



Federal Trade Commission

The Federal Trade Commission in the Online World: Promoting Competition and Protecting Consumers

1

¹The views expressed herein are my own and do not necessarily represent the views of the Federal Trade Commission or any other individual Commissioner.

and prices and to purchase products and services from all over the country or even the world without leaving home. The expanded choices and increased information that the Internet offers have intensified competition in a number of markets, all of which benefits consumers. Retail book stores and music sellers must compete with on-line sellers; wine shops now must compete with wine sellers throughout the country; traditional real estate agents face competition from online agents and even home sellers themselves, thanks to the Internet; and virtually all sellers of retail goods must compete with the market for used goods, as consumers now can buy from and sell to one another with ease.

The Federal Trade Commission's job is to protect this vital competition, by rooting out anticompetitive business conduct; by "outing" anticompetitive government policies and practices; by ensuring that consumers are receiving accurate market information; and by ensuring that consumers' own personal information is protected from unauthorized access in the marketplace. We do this through, first and foremost, law enforcement. But we also advocate for sound federal and state policies that do not inhibit competition and the free workings of the market; educate consumers and businesses about marketplace issues and laws; and conduct research to inform our own work, as well as that of other policymakers.

Our work in the Internet marketplace has included: filing nearly 90 cases against 240 individuals and companies who bombarded consumers with endless spam, most of it fraudulent;

reasonable security measures to protect sensitive customer information or that made deceptive security claims.²

Government policies, too, can restrict or distort competition in ways that harm the market and consumers, and, indeed, government-imposed restrictions are among the most durable and effective restraints on competition. Take, for example, Internet wine sales, a growing and potentially important alternative to the traditional tightly-regulated, three-tiered system of producers, licensed wholesalers, and retailers. Many states still ban or severely restrict the direct shipment of wine to consumers. As part of its ongoing program to identify regulatory barriers to competition that harm consumers, the FTC staff took an in-depth look at the effect of online wine sales and concluded that states could significantly enhance consumer welfare by allowing the direct shipment of wine as a purchase option. In doing so, FTC staff rebutted state claims that their laws advanced legitimate purposes, such as shielding minors from ordering wine online.³ Last year, the Supreme Court in *Granholm v. Heald*⁴ cited the FTC report when it

²New technologies have globalized the marketplace and created enormous benefits for consumers and competition. But the global electronic marketplace also has led to a dramatic increase in cross-border fraud. In June 2005, the FTC submitted a report to Congress recommending the enactment of the US SAFE WEB Act. This legislation would give the FTC access to a broader range of investigative sources about Internet and other cross-border fraud. In addition, the US SAFE WEB Act would enable the FTC to share key information with foreign law enforcers, thereby helping them to take action against cross-border fraud that harms U.S. consumers, including modem hijacking scams, Internet auction fraud, deceptive spam and spyware, and identity theft. The Senate passed this critical legislation last March.

³This summer, Teenage Research Unlimited (“TRU”) issued the results of a survey it conducted of 1,001 people aged 14-20 during early 2006, in which two percent of the respondents reported having purchased alcohol online. See Teenage Research Unlimited, *Research Findings: Underage Alcohol Access & Consumption: Internet, Phone, and Mail* 16 (Summer 2006) (sponsored by wholesalers), at <http://www.wswa.org/public/media/tru-research/TRUSurvey080206.pdf>. The TRU survey does

not distinguish among different types of alcohol, so it is unclear how many of the respondents' purchases were of wine versus beer or hard liquor. However, because the TRU survey reports that hard liquor and beer are the types of alcohol most frequently consumed by minors, it is reasonable to assume that online purchases of wine comprise only a fraction of the respondents' purchases. *See id.* at 18. Further, the TRU survey does not indicate whether the availability of wine online has increased underage consumption above levels that otherwise would exist. FTC

before the Senate Judiciary Committee,⁶

v. FCC, 525 F.2d 630, 640-42 (D.C. Cir. 1976) (“*NARUC I*”); *Nat’l Ass’n of Regulatory Util. Comm’rs v. FCC*, 533 F.2d 601, 608-09 (D.C. Cir. 1976) (“*NARUC II*”); *FTC v. Verity Int’l, Ltd.*, 443 F.3d 48, 57-58 (2d Cir. 2006). However, an entity is treated as a common carrier under the Communications Act only with respect to services it provides on a common carrier basis. *NARUC I*; *NARUC II*; see also 47 U.S.C. §§ 153(43), (44), (46) (“A telecommunications carrier shall be treated as a common carrier under this chapter only to the extent that it is engaged in providing telecommunications services. . . .”). The Communications Act specifically distinguishes between “telecommunications services,” which are services provided on a common carrier basis, and “information services,” which are not. To the extent an entity provides non-common carrier services such as “information services,” the provision of those services is subject to the FTC Act’s prohibitions against engaging in deceptive or unfair practices and unfair methods of competition. See *FTC v. Verity Int’l Ltd.*, 194 F. Supp. 2d 270, 274-77 (S.D.N.Y. 2002) (order denying defendants’ motion for judgment on the pleadings and granting plaintiff’s motion to extend preliminary injunction), *aff’d*, 335 F. Supp. 2d 479, 494 (S.D.N.Y. 2004), *aff’d in part, rev’d in part*, 443 F.3d 48 (2d Cir. 2006).

⁶See Prepared Statement of the Federal Trade Commission on FTC Jurisdiction over Broadband Internet Access Services, Presented by Commissioner William E. Kovacic before the Committee on the Judiciary, United States Senate (June 14, 2006), available at <http://www.ftc.gov/opa/2006/06/broadband.htm>.

⁷During its two most recent reauthorization hearings before Congress, the FTC proposed eliminating the gap in its jurisdiction created by the telecommunications common carrier exemption, because the exemption is outdated and an obstacle to good policymaking. As illustrated by the broadband Internet access marketplace, technological advances have blurred the traditional boundaries among telecommunications, entertainment, and high technology. As these areas continue to converge, the common carrier exemption is likely to frustrate the FTC's ability to stop deceptive and unfair acts and practices and unfair methods of competition with respect to interconnected communications, information, and entertainment services. For example, providers routinely offer bundles of telecommunications and non-telecommunications services, such as bundling phone service with internet access through DSL. The FTC has authority over the DSL service offered by the provider but attempting to assert jurisdiction over only the DSL portion of the package of phone and internet access services may be difficult. Even if the FTC were to undertake such an action – which would require enormous resources just to parse the jurisdictional complications – it would fail to address the entire problem.

Enforcement difficulties posed by the common carrier exemption are not speculative. A recent decision of the Second Circuit, *FTC v. Verity Int'l Ltd.*, 335 F. Supp. 2d 479 (S.D.N.Y. 2004), *aff'd in part, rev'd in part*, 443 F.3d 48 (2d Cir. 2006), offers an example of how some defendants attempt to thwart FTC enforcement actions by asserting that the common carrier exemption precludes FTC action. In that case, the defendants had orchestrated a scheme known as “modem hijacking,” in which they disconnected consumers' computers from their regular ISPs and reconnected their modems to a Madagascar phone number for purposes of providing online entertainment. The line subscriber of the modem phone line was then charged \$4 to \$8 per minute for the length of the connection. AT&T and Sprint carried the calls that connected the consumers' computers to the defendants' servers. Based on the common carrier exemption in the FTC Act, the defendants argued that because AT&T and Sprint carried the calls, the entertainment service for which consumers were billed was outside the FTC's jurisdiction. v5 TD0.e*{the coant

Wireline Broadband Internet Access Order,⁹ in which the agency reclassified wireline broadband Internet access service by facilities-based carriers as an information, rather than a telecommunications, service.¹⁰

Now, you might fairly ask, why does this matter and is it a good thing? Or does FTC jurisdiction provide just another layer of government bureaucracy to the Internet access context? The FTC is primarily a law enforcement agency and exercises its jurisdiction mainly by conducting investigations and bringing law enforcement actions. This means that the FTC does not exercise “regulatory” jurisdiction in the sense of economic regulation or industry management. The FTC, along with the Department of Justice Antitrust Division (“DOJ”), has the responsibility to ensure that consumers are protected not *from* markets but *through* markets unburdened by anticompetitive conduct.¹¹ This work is vital to the well-being of the American people. Over the past few decades, the United States has substantially deregulated critical industries, including transportation, telecommunication, and energy, to the substantial benefit of

⁹*Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, Report and Order and Notice of Proposed Rulemaking*, 20 F.C.C.R. 14853 (2005) (*Wireline Broadband Internet Access Order* or *Order*), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-05-150A1.pdf. A consolidated appeal of the *Order* is pending in the Third Circuit. *Time Warner v. FCC*, No. 05-4769 (3d Cir. filed Oct. 26, 2005).

¹⁰The *Wireline Broadband Internet Access Order* permits facilities-based wireline carriers to elect to provide transmission for wireline broadband service on a common carrier basis. The common carrier exemption in the FTC Act may, therefore, preclude FTC jurisdiction over transmission services that a facilities-based wireline carrier elects to provide on a common carrier basis pursuant to the *Order*.

¹¹The Department of Justice (DOJ) shares antitrust authority with the FTC regarding most sectors of the economy. The two antitrust agencies have long-standing coordination procedures that allow them to avoid inconsistent or duplicative efforts.

¹²See, e.g., *In re America Online, Inc. & CompuServe Interactive Servs., Inc.*, FTC Docket No. C-4105 (Jan. 28, 2005).

in matters involving access to content via broadband and other Internet access services. For example, the Commission's complaint in *AOL/Time Warner* alleged that the merger would harm competition and injure consumers in several markets, including the market for broadband Internet access, and the market for residential broadband Internet transport services (*i.e.*, "last mile" access).¹⁵ To preserve competition that the merger allegedly would have diminished, the FTC required nondiscriminatory access to the components of the Time Warner system necessary for other firms to compete on an even basis.¹⁶

The FTC has addressed issues of Internet access in a number of other merger investigations, as well as related issues that often arise in horizontal mergers of cable TV systems and vertical mergers of cable TV companies and content providers. For example, the FTC recently investigated the acquisition by Comcast and Time Warner of the cable assets of Adelphia Communications, and a related transaction in which Comcast and Time Warner exchanged various cable systems. The FTC examined the likely effects of the transactions on access to and pricing of content. A majority of the Commission concluded that the acquisitions were unlikely to foreclose competitor cable systems in any market or to result in increased prices for Time Warner or Comcast content, and we therefore closed the investigation.¹⁷

¹⁵*In re America Online, Inc. & Time Warner Inc.*, FTC Docket No. C-3989 (Dec. 14, 2000) (complaint), available at <http://www.ftc.gov/os/2000/12/aolcomplaint.pdf>.

¹⁶*Id.* (Apr. 12, 2001) (consent order), available at <http://www.ftc.gov/os/2001/04/aoltwdo.pdf>.

¹⁷*See* Statement of Chairman Majoras, Commissioner Kovacic, and Commissioner Rosch Concerning the Closing of the Investigation Into Transactions Involving Comcast, Time Warner Cable, and Adelphia Communications (Jan. 31, 2006) (FTC File No. 051 0151); *see also* Statement of Commissioners Jon Leibowitz and Pamela Jones Harbour (Concurring in Part, Dissenting in Part) Time Warner/Comcast/Adelphia (Jan. 31, 2006) (FTC File No. 051 0151).

Both statements are available at <http://www.ftc.gov/opa/2006/01/fyi0609.htm>. *See also In re*

English and in Spanish¹⁹ – on specific topics, such as phishing, spyware, online shopping, and peer-to-peer file-sharing. Finally, the website provides information about where to get help, ensuring that consumers know that they are not alone as they travel through cyberspace.

III. Policymaking and the Future of the Internet

In all of this work, the worst mistake we can make is to assume that we know it all. Accordingly, at the FTC, we consistently inform our enforcement efforts through robust research and information gathering. Currently, for exaynenpubPol 2 hearingwitrch

¹⁹See <http://AlertaEnLinea.gov>.

²⁰Information about the Section 2 hearings is available at <http://www.ftc.gov/os/sectiontwohearings/index.htm>.

trends, applications, products, services, and issues over the next ten years.²¹ We have named these hearings “Protecting Consumers in the Next Tech-Ade”, and in the preliminary agenda we are releasing today on our website, www.ftc.gov, you can get a sense of the exciting issues we will be exploring, ranging from the future of the Internet to new payment systems. What is the impact for consumers of living in an instant information culture? What does user-generated content mean for marketers? In the next decade, will consumers be able to pay for their groceries by using their phones?

The hearings will be held at George Washington University's Lisner Auditorium – a venue that provides room for all to attend, engage, and learn along with us. Throughout the fall, we will feature live chat, blogs, and other opportunities on the FTC website to learn about and prepare for the hearings. And if you cannot make it to Lisner, the hearings will be webcast. So

²¹Information about the Tech-Ade hearings is available at <http://www.ftc.gov/bcp/workshops/techade/index.html>.

education initiatives.

Thus far, members of the task force have been drafting an issues paper to educate the Commission about municipalities offering wireless Internet services. The paper, which we expect to release this Fall, will summarize our learning regarding municipal provision of wireless Internet access and provide perspectives on the competition issues that policymakers may encounter when considering this issue.

B. “Network Neutrality”

I also have asked the Internet Access Task Force to address what is likely the most hotly-debated issue in communications, so-called “network neutrality.” There are reports that the respective factions in this debate have spent more than \$50 million on direct lobbying and advertising.²² “Network neutrality” has been variously defined and may mean different things to different people. On one level, it appears to mean that Internet users should have the freedom to access and use it as they choose, without any restriction by network providers. On another but related level, it means, at a minimum, the right of content providers to unfettered access to the many privately owned networks that comprise the Internet and may also mean that all data transmissions are assigned equal priority as they are passed along from network to network in cyberspace.

Fear of restrictions or discrimination in access has led proponents of “net neutrality” to seek legislation that would, for example, prohibit broadband providers from discriminating against any person’s ability to use a service to access or provide lawful content, from refusing to

²²See, e.g., Drew Clark, *Tangled Net*, NAT’L L.J., July 8, 2006, at 29.

interconnect facilities with another service provider on reasonable and non-discriminatory terms, or from charging a fee for prioritizing transmission of particular types of data. Opposing such measures are major telecommunications firms, among others.

The proposals address concerns, first, that a firm controlling both broadband transmission facilities and Internet access may discriminate against nonproprietary ISPs or unaffiliated providers of applications or content for competitive advantage. Such discrimination might take the form of hampered or blocked transmission aimed at gaining an advantage over competitors in either the horizontal ISP market or the complementary markets for applications and content. In addition, the proposals apparently are designed to address a concern that network operators will charge providers of applications or content for network access, particularly access to higher-speed “lanes” on the Internet. One fear, apparently, is that larger, established firms will be able to pay for prioritized transport, while small, developing firms may not, leading to diminished innovation in applications and content. Implicit in this fear is the assumption that the creation of such fast lanes necessarily will hamper the remainder of the available “lanes” on the Internet.

The FTC’s Internet Access Task Force is looking carefully at the issues raised by calls for network neutrality laws, and I look forward to reviewing their findings. In the first instance, however, I urge caution in proceeding on this issue. I start by admitting my surprise at how quickly so many of our nation’s successful firms have jumped in to urge the government to regulate. I rarely meet a person in business who does not profess support for a free market, who does not long for the government to keep its nose out of the business. But nonetheless, when fear of marketplace disadvantage arises, there is a tendency to quickly turn to government to

²³*See, e.g.*, Letter from FTC Staff to Fla. State Senator Paula Dockery (Apr. 10, 2006), *available at* <http://www.ftc.gov/os/2006/04/V060013FTCStaffCommentReFloridaSenateBill282.pdf> (involving wine direct shipping legislation); Lette

“perfect” world that is the product of governmental regulation.

Broad regulatory mandates that employ a “one size fits all” philosophy, without regard to

continue to compete for consumers' dollars by offering more choices, not fewer. We make a mistake when we think about market scenarios simply as dealings between and among companies; let us not forget who reigns supreme: the consumer.

The question, then, is whether we should give the market a chance to work before stepping in to regulate this still nascent, dynamic industry. What will drive important future decisions about innovation and investment? Who will pick the technological and marketplace winners and losers? Who will determine the most efficient, consumer-friendly broadband platform among DSL, cable modem, fiber-to-the-home, satellite, third-generation mobile wireless, Wi-max, broadband over power lines, or any others that are or will be in the works? How will we address how best to accommodate network congestion caused by increasing utilization of bandwidth-intensive applications and content, such as HDTV, VoIP, and interactive video games? What will drive competition among broadband providers to differentiate themselves in terms of the quality of service, pricing options, and integrated applications and content that they make available to consumers? The important question is whether the market – or the government – will work most effectively to produce outcomes favorable to consumers.

Some might point out, correctly, that not every broadband market in the U.S. is benefitting from vigorous competition. Without question, we should examine markets that lack competition and determine the reason for such market conditions. Are there technical or cost-based issues specific to such markets? Is there insufficient demand to justify a buildout in those areas? Are there unnecessary regulatory barriers to entry or expansion, particularly at the local

level?²⁶ Whatever the answers to these questions, we need to consider whether a broad, nationwide net neutrality law is the best answer to a lack of robust competition in discrete local broadband markets.

4. Existing Agency Oversight

Finally, we should not forget that we already have in place an existing law enforcement and regulatory structure. Before adding to it, we should determine that the current scheme is insufficient to address potential issues as they may arise in this area. Three federal agencies, including the FTC, the DOJ, and the FCC, play a role in protecting competition in this market.

In dealing with the challenges of modern technology, some have been tempted to throw out tried-and-true laws and policies. While enforcing laws in these new markets presents new challenges, most of the fundamental principles of antitrust law and economics that we have applied for years are equally relevant to even the newest industries. Because our analysis, if done properly, is highly fact-intensive, the unique qualities of any product market can be taken into account. Further, competition's role in spurring innovation – that is, in maintaining dynamic efficiency – has secured a central position in antitrust analysis, leading us to take a broader focus that incorporates issues of innovation and progress over time. Whether we are looking at supermarkets or semiconductors, the Commission applies a consistent – dare I say, neutral – analytical framework for antitrust enforcement and consumer protection. The FTC has

²⁶See U.S. GOV'T ACCOUNTABILITY OFFICE, BROADBAND DEPLOYMENT IS EXTENSIVE THROUGHOUT THE UNITED STATES, BUT IT IS DIFFICULT TO ASSESS THE EXTENT OF DEPLOYMENT GAPS IN RURAL AREAS 18-28 (2006), available at <http://www.gao.gov/cgi-bin/getrpt?GAO-06-426> (identifying various cost, demand, technical, and regulatory factors impacting deployment of broadband infrastructure).

