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

---

[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.

---

[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

---

[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.

[12] FTC Press Release, “Sears Settles FTC Charges Regarding Tracking Software,” June

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).

[15] Jayne O'Donnell, "Are Retailers Going Too Far Tracking Our Web Habits?," USA

[18] 15 U.S.C. § 45(m).
See e.g.,

Statement was careful to highlight that not all omissions are deceptive, even if providing

[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.[31]

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 cont0.0000 TD(nil)Tj12.7

---

[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

---

[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 a

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

Thank you for your time and attention.