

**Before the
Federal Trade Commission
Washington, DC 20580**

In the matter of

Competition and Consumer Protection
in the 21st Century Hearings

Project Number P181201

COMMENTS OF PUBLIC KNOWLEDGE

Question 2: Competition and consumer protection issues in communication, information, and media technology networks. ¹

Consumer protection, fairness, and competition policy in today's digital economy require substantially stronger enforcement of antitrust law, more aggressive use of existing regulatory powers and new laws to fill in important policy gaps. Public Knowledge commends the FTC for launching this proceeding and a series of public hearings to examine competition and consumer protection in the 21st century, and today offers some initial observations and ideas to consider on the topics the Commission has identified as central to its inquiry. We will augment these ideas through our participation in Commission workshops and through follow up filings as the Commission refines the focus of its efforts.

The recent explosion in internet distribution of goods and services, growing dependence of democratic processes on nondiscriminatory and open digital communications platforms, and ongoing market dominance of entrenched media and communications companies makes it imperative for the FTC to become more vigilant and assertive to protect incipient and potential competition, to apply all qualitatively relevant elements to its consumer welfare analysis, and to update its consumer protection enforcement to reflect the complexities of the digital marketplace. As an expert agency with a specific mandate from Congress, it is also important for the FTC to inform lawmakers and

¹ Public Knowledge staff John Bergmayer, Allie Bohm, Ryan Clough, Harold Feld, Meredith Rose, Kory Gaines, Dylan Gilbert, and Gus Rossi contributed to the comments filed in this proceeding.

the public of market imperfections and problems it lacks the tools and resources to address and to propose policy adjustments that would more effectively address inequities in the oversight of today's economy.

Today, we are highlighting a number of the complexities and issues regarding application of FTC authority to the digital economy and the exploding internet economy in response to the Commission's request for comment. Rather than delineate precisely what deserves treatment under antitrust, consumer protection or some new legal authority, we instead highlight many of the problems that deserve careful attention, definition, further analysis and refinement before precise policy action should be considered. We offer this as a first step because we believe:

- the explosion of the digital market calls first for understanding precisely what is going wrong and therefore deserves fixing;
- identifying what are the best policy tools available to fix the problems;
- evaluating how best to apply existing policy tools; and
- proposing new policy tools to address problems that fall between the gaps under existing law.

This document contains our comments relating to competition and consumer protection issues in communication, information, and media technology networks..

We look forward to working with the FTC and all other stakeholders to flesh out the details of the concerns raised in our comments and propose meaningful policy adjustments and enforcement practices to help the Commission fully protect competition and consumers in the digital marketplace.

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The Commission has asked for input on consumer protection issues in communication, information, and media technology networks. A threshold issue is simply definitional. In some cases precise distinctions between content providers, online platforms, and so on may be irrelevant because certain consumer protections should apply universally. However in other cases the specific regulatory approach will depend on the type of service at issue, and in some cases on whether it has achieved a level of dominance that merits heightened attention. Most of the services discussed in these comments should

be fairly clear (e.g., broadband) but for the sake of clarity these comments will provide definitions when relevant, e.g., in the discussion of online platforms.

At the outset though Public Knowledge cautions against overly-broad market definitions that would conflate widely varying services. It may be that, with respect to privacy or protection against fraudulent billing that the same principles should apply to app stores and broadband providers. But that does not mean they fall under the same market for antitrust purposes. Similarly widely divergent offerings are classified as “information services” by the FCC currently, from home broadband, to any website, to hosting providers. Obviously this regulatory classification can have no bearing on antitrust. Even services that may seem similar in some respects on closer analysis show themselves to belong to different product markets. For example, home and mobile broadband are separate product markets and are not substitutes for each other, as customer behavior (people who can afford both, typically buy both), technological distinctions, and pricing demonstrate. Not all video providers are alike, either: Netflix and cable television are complementary, not competitive products. Regulatory distinctions may be relevant, as for example the case of local broadcasters, who have distinct legal privileges and duties demonstrates. Finally, in the media context the non-fungibility of much content complicates the analysis. Showtime and HBO may compete in the same product market, but HBO has Game of Thrones and Showtime does not. Thus, in the context of these comments that fact that different services may be conceptualized as “online platforms” or “content providers” should not be taken to mean that they compete in the same product market for antitrust purposes, nor that the presence of several such services means that no one of them could be “dominant” in a regulatory context.

Protections that should apply generally

Some kinds of consumer protection issues that pertain to communication, information, and media technology issues in fact pertain to all kinds of businesses. Some forms of consumer protection should simply be universal. For example, the FTC takes a

“dim view,”² of billing systems that mask the true source of charges or allow users to be charged without their authorization, and has applied this reasoning to modern technology platforms, such as app stores.³ The FTC should continue this kind of enforcement.

The FTC can apply this framework even to technology platforms that are seemingly free of charge, but that require consumers to provide user data as a condition of use. Especially to the extent that this data are collected without express user authorization or is non-transparent, or both, the FTC can take action against such requirements as deceptive and unfair trade practices.

The FTC of course is a leading agency with respect to the protection of consumer privacy generally.⁴ While Public Knowledge discusses privacy in more detail in other comments in this proceeding, in a consumer protection context the FTC should continue and amplify its existing privacy work, and, consistent with the statutory guidance that “[i]n determining whether an act or practice is unfair, the Commission may consider established public policies as evidence to be considered with all other evidence,”⁵ consider the extent to which specific statutes it enforces, such as Children’s Online Privacy Protection Act and the Fair Credit Reporting Act, can inform what behaviors are “unfair” even for those companies who are outside of their scope. For example it is the purpose of the Fair Credit Reporting Act to “require that consumer reporting agencies adopt reasonable procedures for meeting the needs of commerce for consumer credit, personnel, insurance, and other information in a manner which is fair and equitable to the consumer, with regard to the confidentiality, accuracy, relevancy, and proper utilization of such information[.]”⁶ A failure to comply with the general requirements of the FCRA with respect to consumer data that is

² See *FTC v. Verity Intern., Ltd.*, 443 F. 3d 48, 52 (2d. Cir. 2006).

³ See *FTC Approves Final Order in Case About Google Billing for Kids’ In-App Charges Without Parental Consent* (Sep. 5 2014), <https://www.ftc.gov/news-events/press-releases/2014/12/ftc-approves-final-order-case-about-google-billing-kids-app>.

⁴ See *Privacy & Data Security Update: 2017*, https://www.ftc.gov/system/files/documents/reports/privacy-data-security-update-2017-overview-commissions-enforcement-policy-initiatives-consumer/privacy_and_data_security_update_2017.pdf.

⁵ 15 U.S.C. §45(n)

⁶ 15 U.S.C. 1681(b).

outside of the FCRA's scope may shed light on whether a particular practice is unfair or deceptive.

The FTC should also use its authority to require that certain online platforms and content providers are accessible to those with disabilities. While the Americans with Disabilities Act applies according to its plain terms to any public accommodation,⁷ including websites, the DOJ's decision to reconsider "whether promulgating regulations about the accessibility of Web information and services is necessary and appropriate"⁸ may lead to fewer sites and services being accessible to all Americans. The FTC should therefore consider whether, if certain businesses fail to abide by certain widely-accepted accessibility standards, such as the Web Content Accessibility Guidelines 2.0,⁹ they are engaged in an unfair trade practice or otherwise violate the law.

Protections specific to broadband

To the extent that the current legal framework gives the FTC responsibility over broadband providers, it should protect the open internet vigorously. However this enforcement should take account of the facts of the broadband market and whether consumers have real choice. The FTC should not limit itself to enforcing the terms of service or commitments of broadband providers, if those terms reserve to broadband providers the right to behave anticompetitively or unfairly. In the broadband marketplace, any action that prevents or disadvantages a consumer from using the applications, services, or devices, or accessing the content of her choice should be unlawful. This includes not just blocking or degrading content, devices, applications, or services, but billing practices (such as uncompetitive zero-rating), network management, and interconnection practices that

⁷ See 42 U.S.C. § 12101

⁸ Nondiscrimination on the Basis of Disability; Notice of Withdrawal of Four Previously Announced Rulemaking Actions, <https://www.federalregister.gov/documents/2017/12/26/2017-27510/nondiscrimination-on-the-basis-of-disability-notice-of-withdrawal-of-four-previously-announced>.

⁹ See Web Content Accessibility Guidelines (WCAG) 2.0, <https://www.w3.org/TR/WCAG20>,

have a similar effect of giving some content, services, applications, or devices unjustifiable advantages over others.

The FTC could also examine whether broadband billing practices are unfair (e.g., in terms of hidden and misleading fees, mandatory equipment rentals, and so forth), or whether rates themselves are excessive, or quality too low, as the result of substantial market power in an infrastructure market with limited competition, high barriers to entry, and low marginal costs. In the absence of FCC oversight, it may be incumbent on the FTC to use its full statutory arsenal to ensure that customers do not get shortchanged compared to how they would fare in a more competitive environment.

Protections specific to online platforms

A “platform” is not merely any online service, but one that serves the particular role of bringing users together, either with each other, or with the providers of content, information, goods, or services. As Public Knowledge has explained elsewhere,¹⁰ for most policymaking purposes a platform (1) operates as a two-sided or multi-sided market; (2) is accessed via the internet; and (3) has at least one component that is an “open,” mass market service.¹¹

Additionally, Public Knowledge also largely believes that dominant platforms should be subject to heightened duties. This is not just because dominant firms are likely to better be able to comply with heightened duties, though this pragmatic concern is of course a factor. But it is primarily because, in the platform context in particular, dominant firms can cause harms to users and other interests that are not just greater in degree than those that non-dominant firms can cause, but different in kind. In particular being excluded from a dominant platform can have significant effects on a user, and misconduct that takes place on (or by) a dominant platform can rise to the level of a public policy concern.

¹⁰ Harold Feld, Platform Regulation Part II: Defining “Digital Platform,” Public Knowledge, <https://www.publicknowledge.org/news-blog/blogs/platform-regulation-part-ii-defining-digital-platform>.

¹¹ See also John Bergmayer, Even Under Kind Masters (2018), https://www.publicknowledge.org/assets/uploads/blog/Even_Under_Kind_Masters.pdf.

Market power is a component of dominance, but dominance takes into account a broader set of economic and non-economic factors. This is not a novel concept, of course. Various legal requirements are often limited to firms based on their number of employees, revenue, or other criteria. In a regulatory context, the FCC has traditionally distinguished¹² dominant vs. non-dominant telecommunications carriers by looking at market power as well as control of “bottleneck” facilities, and the Financial Stability Oversight Council’s analysis¹³ of whether a financial firm is systemically important takes into account not only the firm’s size but also its relationships with other financial firms and the broader economy.

From the perspective of the user of a platform, one way to gauge whether a platform is dominant is to look at the cost¹⁴—economic, social, or even cultural—of being excluded from it. This is necessarily a context-specific inquiry, but often the hardest question is not how to make the inquiry, but who can make it, and what are the effects of a determination that dominance does in fact exist. However in the FTC context, it seems like the agency can analyze the factors that contribute to dominance in various enforcement contexts. Items the FTC can consider include whether a dominant platform engages in an unfair trade practice if it does not offer various safeguards for its users, including:

Due process. As Public Knowledge has explained in a recent white paper,¹⁵ due process is an important way to protect individuals not only against arbitrary government action but against arbitrary action by private parties when the consequences of such an action may be severe. In this context due process includes ensuring that users can challenge actions that have been or are proposed to be taken against them, can appeal those decisions to a neutral decision maker, can see and challenge the evidence against

¹² Even Under Kind Masters 26-27.

¹³ Financial Stability Oversight Council , Designation of Systemically Important Financial Market Utilities
<https://www.treasury.gov/initiatives/fsoc/Documents/2012%20Appendix%20A%20Designation%20of%20Systemically%20Important%20Market%20Utilities.pdf>.

¹⁴ Harold Feld, Part III: Cost of Exclusion as a Proxy for Dominance in Digital Platform Regulation, Public Knowledge, <https://www.publicknowledge.org/news-blog/blogs/part-iii-cost-of-exclusion-as-a-proxy-for-dominance-in-digital-platform-reg>.

¹⁵ Even Under Kind Masters, *supra*.

them and introduce their own evidence, and receive written specific dispositions both of the actions to be taken against them as well as the result of any appeal.

Fair content moderation policies. While the FTC should be wary of calls for a government agency to set actual content moderation standards, dominant platforms should be able to explain and document what their policies are, so that users may have notice and predictability.

Data portability/export. While the ability of users to export data from one service either for their own archives or to import it into a competing service may not be the final answer in terms of promoting platform competition, such measures should be encouraged as a form of basic consumer protection, and in recognition of the fact that users should be able to control, access, and back up their own data and should not be “locked in” to services.

Take measures against disinformation and fraud. Platforms should ensure that their services are not abuse by bad actors who would use them to spread disinformation, commit fraud, or manipulate public discourse, including through the use of fraudulent or automated accounts (“bots”) that purport to be authentic users.

Prevent harassment of users. The design of some platforms unfortunately lends itself to campaigns of harassment or intimidation against some users. Platforms should take measures against this, including providing users with tools to limit this behavior and enforcing policies against abuse.¹⁶

Respectfully submitted,
Public Knowledge
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¹⁶ This is not designed to be an exhaustive list of all of the possible harms dominant platforms raise. For example, our colleagues at the Center on Privacy and Technology at Georgetown University Law Center observe that dominant platforms may support the dissemination of propaganda, misinformation, and disinformation; amplify hate speech; drive political polarization; undermine small and local retailers; stifle competition; and stockpile consumers’ personal information, inviting data breaches or abuse of data. See Center on Privacy & Technology et. al, Comment Letter on Competition and Consumer Protection in the 21st Century at 6-8 (Aug. 20, 2018). The FTC should use all of the tools in its toolbox to address these harms as well.