ASSOCIATION OF NATIONAL ADVERTISERS
ADVERTISING LAW & PUBLIC POLICY CONFERENCE
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Remarks of Commissioner Terrell McSweeny[1]

Thank you, Dan Jaffe, for that kind introduction, and thanks very much to you and the ANA for inviting me to be here today.

I am the newest Commissioner at the FTC – I'm just finishing up my first year on the job. I'm pleased to have spent much of my first year helping the Commission celebrate its 100th anniversary.

As you can imagine, we've spent some time reflecting on how the FTC's dual mission of protection consumers and competition has evolved. The FTC Act, of course, gives the agency a clear but flexible mandate – to protect consumers from unfair and deceptive acts and practices. One of the defining features of the modern FTC has been its ability to adapt to our dynamic economy – for instance, protecting consumers not just in the world of brick and mortar transactions, but also as they purchase goods and services online.

Even though technology and business models continue to change, the principles that underlie FTC enforcement priorities are constant. They are that consumers should have truthful and adequate information to make informed decisions, and that they should be protected from harmful practices that they cannot reasonably avoid.

Today I'm going to talk about how the FTC's work continues to apply these core ideas to protect consumers in our social-networked, always-connected, and on-demand world.

I realize that capturing consumers' attention in our increasingly interconnected lives poses new challenges – and requires innovative solutions. But it is important to remember – and recent FTC cases involving advertising in non-traditional contexts underscore this – that it remains the case that advertisers are required to disclose material connections with endorsers, and that advertisements disguised to look like objective third-party content may be deceptive. This principle holds true on Twitter, third-party review sites, and The Dr. Oz Show.

For example, a few months ago, the Commission took action against both Sony and its advertising agency, Deutsch LA, in relation to the advertising campaign for Sony's handheld gaming console, the PS Vita. Among other things, we alleged that Deutsch sent a company-wide email asking employees to help "generate buzz" around the launch of the device by tweeting about the PS Vita and using the hashtag #GAMECHANGER. Multiple agency employees followed the instructions and sent out positive tweets about the product.

[1] The views expressed in this speech are my own and do not necessarily reflect those of the Commission or any other Commissioner.

There's nothing wrong with an advertising agency singing a product's praises – after all, that's exactly what they are hired to do. But the problem here was that the Deutsch employees sent tweets from their personal Twitter accounts, without making any disclosure that they were employed by the agency hired to promote the PS Vita console. Consumers who saw the #GAMECHANGER tweets would have believed that they were the views of ordinary, unbiased purchasers, and that was deceptive.

Another recent FTC case involved the use of review sites. While the Commission has previously taken action against advertisers who used endorsements and testimonials from consumers who received compensation for their reviews, the case against AmeriFreight is the first time the Commission has challenged the practice of a marketer deceptively failing to disclose that it gave cash discounts to consumers who provided reviews on third-party review sites.

AmeriFreight is an automobile shipment broker that arranges the shipment of cars through third-party carriers. The Commission alleged that the company provided up-front discounts of $50 to consumers who promised to write an online review of the company's services. Consumers could also win an additional $100 prize for the "Best Monthly Review Award."

At the same time, AmeriFreight touted the fact that it had "more highly ranked ratings and reviews than any other company in the automobile transportation business," without disclosing that their reviews were written by consumers who had received cash discounts. The FTC challenged this practice as deceptive.

I also want to mention the FTC's case against Lindsey Duncan, a dietary supplement marketer who appeared on The Dr. Oz Show to promote green coffee bean weight-loss supplements. The Commission unanimously voted to approve a complaint against Duncan for making false and unsubstantiated weight-loss claims. A majority of the Commission found that Duncan's statements on the television show were commercial speech that was subject to the FTC Act – part of a deliberate, thoughtful marketing strategy meant to promote the specific supplement that he was selling, despite the fact that he did not mention it by name on the show.

Among other things, the complaint charged Duncan with failing to disclose his financial interest in green coffee bean products both to The Dr. Oz Show and to consumers who visited the product websites, which featured his testimonials.

Other recent actions involving health claims in a non-traditional context are the two cases the Commission recently brought against developers of mobile apps that purportedly analyzed moles and skin lesions to assess melanoma risk. Users of these apps were instructed to take a picture of a mole using their smartphones and input additional information, and the apps would then supposedly calculate the user's melanoma risk and help detect skin cancer in its early stages. The Commission alleged that the developers did not have adequate substantiation to support claims that the apps could accurately analyze moles or increase the chances of early melanoma detection.

While the Commission recognizes the enormous potential benefit that health-related apps may provide to consumers, the same advertising rules of the road apply in the mobile context as to any other media – advertisers must have competent and reliable scientific evidence to support health claims, especially claims related to diseases or serious medical conditions.

The application by the Commission of the "competent and reliable scientific evidence" standard to evaluate health-related claims is nothing new – and this year the D.C. Circuit affirmed the application of that standard in the POM Wonderful case.

The FTC challenged disease prevention and treatment claims for POM Wonderful pomegranate juice and supplements related to heart disease, erectile dysfunction, and prostate cancer. After a full administrative trial, the Commission determined that POM's claims were not supported by competent and reliable scientific evidence, which, on the specific facts of the case, meant well-designed human clinical trials – a position that the D.C. Circuit upheld. The appeals court also supported an order requiring human clinical testing for future disease claims.

As these cases demonstrate, the FTC has been an active enforcer on the advertising front.

I'd be remiss if I didn't commend the ANA's continuing efforts to promote responsible marketing through its support of the self-regulatory programs of the Advertising Self-Regulatory Council and the Council of Better Business Bureaus. Self-regulatory programs – for national advertising, children's advertising, direct response advertising, and online behavioral advertising – can serve a critical function in policing the marketplace and are an important complement to the FTC's law enforcement work.

I think they underscore the fact that though we may, from time to time, disagree on policy, fundamentally we share the value of protecting consumer trust. And trust is a key value in the ongoing debate about the best approaches to protecting consumer privacy and data security.

Consumer trust is eroded when companies make promises about privacy or security that they don't keep, or when firms fail to maintain reasonable security procedures, thereby putting consumer data at risk. The FTC has played a vital role in protecting consumer privacy and data security, bringing scores of cases in the last decade and updating the rules implementing the Children's Online Privacy Protection Act.

But consumer concern over crimes like identity theft remains high; it continues to be the FTC's number one consumer complaint – not surprising after a year of high profile breaches – and people continue to weigh privacy and security against the benefits of adopting new connected devices.

We are at the cusp of a rapid expansion of our connectedness – with an estimated 25 billion connected devices by the end of this year, and 50 billion by 2020 – which is why I support stronger protections for consumers, particularly for their security.

I am hopeful that Congress will enact comprehensive data security and breach notification legislation this year. Current draft legislation includes important improvements – like setting a requirement to implement reasonable data security standards, expanding the

Commission's authority over non-profits and common carriers, and granting the Commission the ability to seek civil penalties.

In my view, there are ways it could be stronger – for example, broadening the definition of personal information to include geolocation and health information, and achieving the appropriate balance on when breach notification requirements are triggered.

I want to emphasize that FTC data security enforcement is grounded in the concept of reasonable security – not perfect security. I am pleased that the FTC plans to continue to engage through our start-with-security initiative in a dialogue around the country with small and large businesses about the best practices when it comes to security.

I recognize that not everyone may share my view about the proper role of the FTC in protecting consumer privacy and data security. But what I want to emphasize is that the FTC is committed to working with Congress, industry, and other stakeholders to continually examine privacy and security issues and develop pragmatic approaches that will best protect consumers. That's not just lip service; the FTC does respond to concerns raised in the marketplace.

I will conclude my remarks today by pointing out a recent FTC case that arose after concerns were raised about privateering activities by patent assertion entities.

The FTC recently finalized a settlement with MPHJ, a patent assertion entity, and its law firm. This case marks the first time the Commission has used its Section 5 deception authority against a patent assertion entity ("PAE"). MPHJ and its law firm sent thousands of letters to small businesses accusing them of infringing patents relating to networked scanning systems – basically scanning documents and sending them electronically – something most of us do daily. The respondents demanded licensing payments of $1,000 or $1,200 per employee and represented that many other companies had paid the fees, even though that was not actually true. They also threatened to initiate legal action, even though they were not prepared to file lawsuits.

Invoking basic deception principles, the FTC alleged that MPHJ and its law firm misrepresented that substantial numbers of businesses had paid to license MPHJ's patents, and that they would initiate legal action against companies that did not respond to their demand letters.

The FTC's enforcement action is an important step in curtailing abusive practices by PAEs, but there are broader issues that remain and should be addressed through legislative patent reform. That's why the Commission is also undertaking a study of PAEs. The FTC has issued compulsory process to obtain information from approximately 25 PAEs. We are using this study to better understand how PAEs may impact innovation and competition. It will take the Commission some time to analyze all of the information it gathers in the course of the study – so, in the meantime, I hope that efforts at patent reform continue.

In closing, I want to emphasize how much the FTC values the input of stakeholders. While we formally convene industry and consumer advocates at our workshops and roundtables, I encourage you to participate in upcoming workshops, such as the November workshop exploring the benefits and privacy implications of cross-device tracking.

I also find informal engagement to be tremendously valuable. We are better law enforcers and policymakers when we understand how your business models work, what is feasible for you, and at what cost.

With that, I'm happy to take some questions.