

**Before the
FEDERAL TRADE COMMISSION
Washington, D.C.**

In the Matter of)
)
Preliminary FTC Staff Report: Protecting)
Consumer Privacy in an Era of Rapid Change)
)
A Proposed Framework For)
Businesses And Policymakers)
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**COMMENTS OF
THE UNITED STATES TELECOM ASSOCIATION**

The United States Telecom Association (USTelecom)¹ is pleased to submit these comments in the above referenced proceeding. The Federal Trade Commission (“FTC” or “Commission”) seeks comment on its Preliminary Staff Report and Proposed Framework for Businesses and Policymakers (Report).² The Commission issued its Report to “inform policymakers, including Congress, as they develop solutions, policies, and potential laws governing privacy,” as well as to “guide and motivate industry as it develops more robust and effective best practices and self-regulatory guidelines.”³

USTelecom is encouraged both by the Commission’s recognition of substantial consumer benefits stemming from the use of consumer data, as well as its recognition of the important role of self-regulatory initiatives. As the Commission begins identifying potential solutions and

¹ USTelecom is the nation’s leading trade association representing communications service providers and suppliers for the telecom industry. USTelecom’s carrier members provide a full array of voice, data, and video services across a wide range of communications platforms.

² Preliminary FTC Staff Report, *Protecting Consumer Privacy in an Era of Rapid Change, A Proposed Framework For Businesses And Policymakers*, December, 2010 (Report).

³ Report, p. i.

policies to address privacy-related issues, USTelecom encourages it to incorporate two guiding principles during its deliberative process.

First, any privacy framework recommended by the Commission should embrace competitive neutrality. An approach that acknowledges the competitive realities of today's digital marketplace will better protect consumer privacy while also ensuring continued innovation. Second, the Commission should encourage more centralized federal oversight of privacy issues. The regulatory environment surrounding privacy in today's digital marketplace is extremely complex with multiple government authorities at the federal and state levels. The Commission should propose a framework that addresses consumer privacy issues consistently across various platforms.

I. INTRODUCTION

Today's digital environment has evolved into a dynamic, vibrant and powerful medium whereby consumers have immediate access to a broad range of content and services across multiple platforms. Everything from movies and music to financial and health services are increasingly accessed by consumers – anytime and anywhere – through various broadband-enabled platforms and devices.

Broadband and information and communications technologies have fostered vigorous competition within and across traditional industry segments. This vigorous competition is occurring throughout the digital economy over broadband networks, via consumer electronic devices and from broadband edge providers. For example, voice competition now comes from facilities-based wireless providers, Voice over Internet Protocol (VoIP) over cable, and various “over-the-top” VoIP providers (*e.g.*, Vonage and Skype).

In broadband access, chip makers are actively investing in alternative platforms, such as Intel's investment in WiFi and WiMAX wireless broadband. Competition among applications has also flourished. Social networking has exploded in recent years and Facebook has supplanted MySpace as the market leader in less than a couple of years. In about a decade, Google has become the leading Internet search provider and moved into the online advertising, operating system, browser, cloud computing, email, mapping, book publishing, video delivery, social networking, voice service, and smart phone markets segments, among others. And in the video marketplace, Netflix is responsible for driving about 20% of peak downstream last-mile Internet traffic.⁴

In recent years, consumers of all ages have been communicating and accessing a broad range of content and services throughout this digital ecosystem at an increasing rate. In a recent study of baby boomer activity, the Pew Internet & American Life Project (Pew) found that boomers' use of the Internet increased from 40% to 74% between 2000 and 2008, and their broadband use in the home went from less than 5% to more than 60% of survey respondents during that same time period.⁵ According to a similar Pew survey, teens are even more engaged in consuming various forms of available content. In January 2009, Pew found that 93% of teens

⁴ Todd Spangler, Multichannel News, *Netflix Accounts For 20% Of Peak U.S. Internet Bandwidth: Study*, October 20, 2010 (available at: http://www.multichannel.com/article/458744-Netflix_Accounts_For_20_Of_Peak_U_S_Internet_Bandwidth_Study.php?rssid=20212) (visited February 16, 2011).

⁵ Pew Internet Study, *Baby Boomers in the digital age*, January 2009 (available at: <http://www.pewinternet.org/Presentations/2009/Baby-Boomers-and-the-internet.aspx>) (visited February 16, 2011).

use the Internet, 87% use e-mail, 60% have a desktop or laptop computer, 97% play video or consumer games and more than 75% own a cell phone.⁶

As these findings illustrate, American consumers are readily embracing this robust digital marketplace through all manner of broadband-enabled platforms, devices and services. Much of this change can be attributed to the separation of infrastructure from the services they were traditionally associated with. In the early 1990s, when some of the statutes referenced by the Commission in the FTC Report were enacted,⁷ typical services were available through traditional platforms: broadcast programming was on the television; music was on the radio; movies were on cable; broadband Internet was in its early stages of deployment; and if a consumer needed a loan, they went to the bank.

Today, the convergence of services across diverse platforms is widespread and growing. Traditional network operators – cable and telephone companies – now offer voice, video and broadband services. And while telephone companies are still investing heavily to compete in the provision of voice and video services, they are aggressively competing with non-infrastructure based providers of often identical services. Infrastructure-based companies compete for the same voice customers with non-infrastructure based edge providers like Skype and Vonage. Premium video content, once the sole domain of large cable companies, can now be accessed over handheld devices, gaming systems and laptop computers through alternate providers. And established brick and mortar stores selling traditional services – from bank loans to real estate – are now facing fierce competition from online retailers.

⁶ Pew Internet Study, *Teens and the Internet*, January 2009 (available at: <http://www.pewinternet.org/Presentations/2009/Teens-and-the-internet.aspx>) (visited February 16, 2011).

⁷ *Report*, pp. 3 - 5.

Despite the dramatic changes in our nation's economy, particularly with respect to digital commerce, some continue to believe that regulation should be based on industries and discrete services, as opposed to practices surrounding the use of personal information and data. From a consumer policy perspective, this is indefensible as it denies consumers the benefits of a level competitive playing field, and fails to effectively address legitimate privacy concerns.

II. ANY PRIVACY FRAMEWORK SHOULD EMBRACE COMPETITIVE NEUTRALITY.

The Commission must address the realities of today's dynamic digital economy if it is to establish a viable privacy framework. Any privacy framework based on static or legacy industry roles or fixed market segments will become immediately irrelevant in today's rapidly changing technological marketplace. USTelecom therefore believes that the cornerstone of any Commission privacy framework should be competitive neutrality.

As demonstrated above, there are no longer meaningful distinctions between services offered today and their traditional delivery mechanisms. In light of this marketplace reality, it would make no sense to create a privacy framework based on such distinctions. Today's digital environment is far more complex, dynamic and powerful, with consumers having immediate access to a broad range of content across multiple platforms and providers. A Commission framework that is competitively neutral – focusing on privacy practices, as opposed to specific industry segments – is better suited to more effectively addressing and protecting consumers' privacy interests. Such a technologically neutral approach also avoids arbitrarily favoring certain business models over others.

Unfortunately, inconsistent privacy requirements already exist. A commenter in the recent proceeding on privacy issues at the National Telecommunications and Information Administration noted the disparity between certain privacy obligations for providers of video

services.⁸ Under the existing privacy framework for cable providers, substantial privacy obligations are placed on “cable operators” under the Communications Act.⁹ Moreover, failure by a cable operator to adhere to the statute’s requirements can result in it being subjected to private rights of action, punitive damages and attorneys’ fees.

Conversely, consumers who receive similar programming content from entities that are not defined as “cable operators” do not receive the same privacy protections, even where the same data is collected. So, for example, while a local cable company must adhere to these significant privacy obligations, a non-infrastructure based company that delivers similar content over that local cable company’s broadband platform is under no such obligation.

Such existing asymmetrical privacy requirements should be eliminated, and the FTC should ensure that any future privacy framework does not create new ones. For example, different entities engaged in various forms of advertising should not be subject to different types of notice, consent or other obligations, depending upon the type of technologies they employ. Such an arbitrary and unbalanced approach to privacy could chill innovation and hinder the development and deployment of new business models that could benefit consumers, content providers, and advertisers. A uniformly applied privacy framework is essential to a fair, efficient and well-functioning marketplace. Moreover, such a balanced approach is better suited to ensure the protection of consumers’ privacy interests.

Problems resulting from an unbalanced approach can be seen in the treatment of customer proprietary network information (CPNI) by the Federal Communications Commission

⁸ See, Comments of Verizon, Verizon Wireless, National Telecommunications and Information Administration, *Information Privacy and Innovation in the Internet*, Docket # 101214614-0614-01, p. 8 (January 28, 2011).

⁹ 47 U.S.C. § 551.

(FCC).¹⁰ Both Congress and the FCC impose requirements on telephone companies and interconnected VoIP providers about how they can use this personal information and what they must do to protect it from disclosure. These obligations, however, do *not* apply to *non*-interconnected VoIP providers. Such an arbitrary and unbalanced approach to privacy makes little sense from a consumer protection perspective and creates a tremendous imbalance in the competitive marketplace.

A level playing field is essential to preserving the dynamism that has brought us the innovation apparent in today's digital economy. Rather than issuing blanket prohibitions focusing on discrete industries or legacy regulatory categories that new technologies have rendered obsolete, the Commission should encourage that any privacy framework be built on flexible standards focused on preserving consumer choice and competition, not on protecting particular business models or preserving outdated distinctions.

III. A UNIFIED NATIONAL PRIVACY FRAMEWORK WILL GREATLY BENEFIT CONSUMERS AND COMMERCE.

If the Commission wisely concludes that a competitively neutral privacy framework is the optimal approach, the next logical step is to pursue a more centralized federal oversight effort of privacy issues. Inconsistencies among different jurisdictions' regulations or requirements or different agencies' enforcement activities could introduce uncertainty into business planning, entail undue costs, and discourage innovation while creating confusion for consumers.

Any framework promoted by the Commission will join an already complex web of privacy regulation, statutory requirements and self-regulatory programs that addresses various

¹⁰ CPNI includes certain personal information that carriers have about their customers as a result of their business relationship (*e.g.*, phone numbers called; the frequency, duration, and timing of such calls).

aspects of privacy. As the Commission notes in the FTC Report, it currently retains substantial federal authority under various privacy related statutes.¹¹ In addition to the FTC, however, there are numerous other privacy-specific federal and state obligations that impose obligations on business entities. There are also several sectoral laws that impose certain obligations on specific types of industries, including banks and financial institutions, healthcare providers and communications services. Finally, businesses in today's digital marketplace face additional legal obligations from state statutes and enforcement mechanisms governing their operations.

The significant challenge for any business operating within this environment of extensive legal complexity is ensuring compliance with all their legal obligations simultaneously. And while it is challenging for companies to operate within such a complex legal environment, it is questionable whether such complexity benefits consumers and achieves the desired regulatory objective. Indeed, President Obama recently emphasized in Executive Order Number 13,563,¹² that a policy standard works best when it is based on "a reasoned determination that its benefits justify its costs (recognizing that some benefits and costs are difficult to quantify)" and when they "impose the least burden on society, consistent with obtaining regulatory objectives, taking into account, among other things, and to the extent practicable, the costs of cumulative regulations."¹³ The Commission should take this guidance to heart as it begins creating a meaningful privacy framework.

USTelecom therefore recommends that the Commission promote a centralized national framework that protects consumer privacy interests while allowing entities that serve these

¹¹ *Report*, pp. 3 - 4.

¹² Executive Order No. 13,563 of January 18, 2011.

¹³ Executive Order §1(b).

consumers to focus on a single, consistent set of obligations. The Commission should also ensure consistent and even enforcement with respect to relevant privacy practices. Such an approach will reduce the legal complexity in the digital marketplace, while simultaneously ensuring greater protection of consumer privacy interests.

IV. CONCLUSION

As a result of the dramatic changes in today's digital marketplace, USTelecom believes that any privacy framework recommended by the Commission should embrace competitive neutrality. A uniformly applied privacy framework that acknowledges the competitive realities of today's digital marketplace is essential to a fair, efficient and well-functioning marketplace and will better protect consumer privacy while also ensuring continued innovation. USTelecom also recommends that the Commission promote a unified national framework that protects consumer privacy interests while allowing entities that serve these consumers to focus on a single, consistent set of obligations.

Respectfully submitted,

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