



# Federal Trade Commission

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## **“A VIEW FROM THE FTC: NEW TRENDS IN MARKETING AND PROMOTION AND NEW CHALLENGES IN ENFORCEMENT”**

**Remarks by J. Thomas Rosch<sup>1</sup>  
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**before**

**The 28<sup>th</sup> Annual Promotion Marketing Law Conference  
Chicago, Illinois  
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Good afternoon. I am delighted to be here with you today to offer some views on new issues in advertising, marketing and promotion, and on how the Federal Trade Commission might respond to this constantly changing landscape. This conference and its focus on the future of advertising and marketing holds special interest to me, because as many of you may know, I served as the FTC’s Director of Consumer Protection from 1973 to 1975. My experience in that capacity, and my more recent position as Commissioner, have helped shape my perspectives regarding the interplay between marketing and advertising and technology and globalization. Furthermore, this conference comes at an opportune time – last month in Washington, D.C., the FTC held a series of hearings on the future of technology and the corresponding consumer

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<sup>1</sup> The views expressed herein are my own, and do not necessarily represent the views of the Federal Trade Commission or any other individual Commissioner. I would like to express my appreciation to Beth Delaney and Serena Viswanathan for their invaluable contribution to this speech.

protection implications. The hearings highlighted a host of interesting issues, and I also would like to share some thoughts on the topics that I think are most pertinent to the industry.

I have been back at the Commission for just about a year now. One thing that strikes me is that even though so much has changed since I was here thirty years ago, in some ways, the core of the FTC's enforcement program looks remarkably similar to the way it did when I was here last. During the early 1970s, one of our top priorities was to target national advertising that we thought was either false or unsubstantiated. The respondents were both major advertisers and their advertising agencies. The remedies we sought were "all product" orders that would serve as a basis for civil penalties if the respondent ever engaged in false or unsubstantiated advertising in the future.

Our thinking in bringing these cases was twofold. First, these were high profile cases that communicated the message that the cops were on the beat. Second, an "all products" order was a broad order that put a large multi-product organization under threat of civil penalties if it were to violate the order. The case the Commission brought against General Electric based on its claims respecting the "reliability" of its color television sets – a challenge that resulted in an "all products" consent decree – was illustrative of these cases.<sup>2</sup>

Nowadays, there is a twist on what it means to be a "national advertising" case. We

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<sup>2</sup> *In the Matter of General Electric Company*, 89 F.T.C. 209 (Apr. 7, 1977). *See also ITT Continental Baking Co. v. F.T.C.*, 532 F.2d 207 (2d Cir. 1976).

don't merely look at products that show up during prime-time advertising on broadcast television. The advent of advertising on the Internet has changed the terrain. Cases that are "national" in scope now include sellers using websites that anyone in the country can access. For example, just last month the Commission settled a case with Sunny Health Nutrition Technology and Products – the marketer of dietary supplement products that purported to enhance height and treat osteoporosis.<sup>3</sup> The defendants promoted their products in both English and Spanish on their website and through other Internet advertising, as well as through radio and magazine advertising. In addition to paying consumer redress for the particular products at issue, the defendants also are prohibited from making false, deceptive or unsubstantiated claims about "any covered product."

Another consistent "core" area of enforcement includes rulemaking and rule enforcement. The Commission was involved in extensive rulemaking during the 1970s – issuing and enforcing rules regulating the funeral industry, sales of used automobiles, octane ratings postings, mail orders, and unsolicited credit cards, to name a few.

As many of you are aware, the Commission currently has a very robust rule enforcement program, including rules such as Do Not Call,<sup>4</sup> CAN SPAM,<sup>5</sup> and the Children's Online Privacy

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<sup>3</sup> *Federal Trade Commission v. Sunny Health Nutrition Technology & Products, Inc.*, CIV No.: 8:06-CV-2193-T-24EAJ, (issued Nov. 28, 2006), available at [www.ftc.gov/os/caselist/0623007/finalorderpermanentinjunction.pdf](http://www.ftc.gov/os/caselist/0623007/finalorderpermanentinjunction.pdf).

<sup>4</sup> 16 C.F.R. Part 310 (2006).

<sup>5</sup> 16 C.F.R. Part 316 (2006).

Protection.<sup>6</sup> For example, the Commission recently agreed to a \$1 million settlement with the operators of the Xanga social networking website.<sup>7</sup> That case alleged violations of the COPPA Rule, including the collection of personal information from children under the age of 13 without the requisite parental consent. This monetary settlement was twice as large as any previous COPPA civil penalty amount.

However, one of the major differences between rulemaking now and rulemaking then is that in recent efforts, the FTC has focused almost entirely on Congressionally-mandated rulemaking, rather than the self-driven rulemaking of the 1970s. As a side note, it is interesting to recognize that the genesis of most of the Congressionally-mandated rules I just mentioned was concern about consumer privacy – a concern driven, at least in part, by the development of new technologies and their applications. In the 1970s, the motivation for rulemaking was more focused on regulating specific industry advertising and/or marketing practices.

One last point about similarities between the enforcement priorities of the 70s and the present. Back then, as now, we were concerned about issues related to advertising and children's welfare. There was a concern about the large amount of television advertising directed to young children in general, and the possible adverse health effects of advertising sugared products to young children in particular. Through an extensive rulemaking proceeding spanning several

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<sup>6</sup> 16 C.F.R. Part 312 (2006).

<sup>7</sup> *United States v. Xanga.com, Inc.*, CIV No.: 06-CIV-6853(SHS), (Sept. 7, 2006), available at [www.ftc.gov/os/caselist/0623073/xangacomplaint\\_image.pdf](http://www.ftc.gov/os/caselist/0623073/xangacomplaint_image.pdf).

years, the Commission explored attempting to restrict the marketing of sugary foods to children, but ultimately terminated the rulemaking in 1981, in part because although the record showed some cause for concern, there did not appear to be a way to develop workable rules to address these concerns.

As many of you know, our interest in exploring methods to better protect children has not waned. By way of recent example, in July 2005, the FTC and the Department of Health and Human Services sponsored a workshop to examine various perspectives on marketing, self-regulation, and childhood obesity, bringing together representatives from the food industry, medical experts, consumer advocates, advertising specialists and other key experts for an open discussion on industry self-regulation concerning the marketing of food and beverages to children, as well as initiatives to educate children and parents about nutrition.<sup>8</sup> This workshop culminated in a report released in May 2006, which recommended concrete steps that industry could take to change its marketing and other practices to make progress against childhood obesity.<sup>9</sup> The FTC is committed to closely monitoring industry progress in implementing the recommendations set forth in the report. In addition, the agency also is conducting a study on the

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<sup>8</sup> See Press Release, “*FTC, HHS Announce Workshop on Childhood Obesity*,” (May 11, 2005), available at [www.ftc.gov/opa/2005/05/childobese.htm](http://www.ftc.gov/opa/2005/05/childobese.htm).

<sup>9</sup> See “*Perspectives on Marketing, Self-Regulation and Childhood Obesity*,” A Report on a Joint Workshop of the Federal Trade Commission & the Department of Health & Human Services, (Apr. 2006) available at [www.ftc.gov/os/2006/05/PerspectivesOnMarketingSelf-Regulation&ChildhoodObesityFTCandHHSReportonJointWorkshop.pdf](http://www.ftc.gov/os/2006/05/PerspectivesOnMarketingSelf-Regulation&ChildhoodObesityFTCandHHSReportonJointWorkshop.pdf).

nature and extent of food marketing techniques directed at children and adolescents.<sup>10</sup>

So, how are things different than they were thirty-five years ago, when I first started at the FTC? I think the answer has to be the development of technology and the impact that it has had on consumers. Broadband and high speed internet access are a major mechanism for communication and the distribution of content. One development that has really changed the face of the way some of us experience life today, is the extent to which the average person can now create and share content by using technologies such as the computer, telephone and internet. Things like chat rooms, message boards, blogs and social networking sites have impacted the way that people communicate with each other. Broadband and high speed internet access now allow people to share digital photographs, music and video – to an extent and in ways that were almost unimaginable 10 or 15 years ago.

We have also seen the deployment of Voice Over Internet Protocol or “VoIP,” and the dramatic popularity of the video and audio sharing capabilities of websites such as YouTube and My Space. Hand in hand with this technology is wireless communication -- consumers have the benefit of being able to communicate and connect without having to be physically “plugged in.”

Other technologies, such as Radio Frequency Identification or “RFID,” also offer a broad scope of consumer and business convenience and benefits, such as payment processes, inventory tracking systems, and identification mechanisms. The “Tech-Ade” hearings highlighted some of

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<sup>10</sup> See 71 Fed. Reg. 10535 (Mar. 1, 2006) and 71 Fed. Reg. 62109 (Oct. 23, 2006).

the truly amazing and beneficial ways that this technology can be deployed – from the convenience of inventorying the contents of one’s refrigerator to the possibility of facilitating the independence of the elderly population in their homes.

In 1995, after hosting the first set of hearings on the New High-Tech Global Marketplace, the Commission successfully predicted many changes that technology would foster – things such as the unlimited amount of information that would be available to consumers; the development of a global marketplace; and dramatically improved shopping convenience.<sup>11</sup> Notably, the report from the 1995 hearings recognized that the “flood of information available to consumers is arguably the most dramatic development in the marketplace of the 90s.”<sup>12</sup>

As we have learned, however, these technological innovations also may come with a price tag. For example, spam, spyware, and data security vulnerabilities – things that have had a dramatic effect on consumers and their welfare – come hand in hand with the development of new technologies. Many of you may be aware of the new technology that is being developed for things such as “no-swipe” credit cards. The convenience offered by such products is exciting – however, recent news reports indicate that these products may pose potential security and privacy vulnerabilities unless card companies and vendors are diligent in taking precautionary measures

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<sup>11</sup> Federal Trade Commission Staff Report, “*Anticipating the 21st Century: Consumer Protection Policy in the New High-Tech, Global Marketplace*,” (May 1996) available at [www.ftc.gov/opp/hitech/global.htm](http://www.ftc.gov/opp/hitech/global.htm).

<sup>12</sup> *Id.* at 1.

to keep this financial information secure.<sup>13</sup>

This new technology also has spawned vehicles for offering content supported by Internet advertising. There is nothing new about the concept of free content paid for by advertising. That was – and still is – the norm for content delivered by over-the-air broadcasters, including the three major networks. However, implementation of this business model in the Internet environment involves some new problems. For example, a television viewer can simply terminate an over-the-air broadcast commercial simply by switching channels. Advertising appearing during a computer user’s Internet surfing, by contrast, may be much more difficult to avoid or terminate, especially if it is the result of adware or malware embedded in the computer’s operating system by an unscrupulous affiliate. The Commission’s recent order in Zango is designed to cope with these problems.<sup>14</sup>

Another issue – which has emerged and re-emerged over the last several years – is online tracking and profiling. As one recent news article pointed out, while sophisticated promotional marketing has been possible for years, it is becoming more widely available, with some estimating that up to half of online retailers use it.<sup>15</sup> This article discusses in depth the ways that

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<sup>13</sup> John Schwartz, “*Researchers See Privacy Pitfalls in No-Swipe Credit Cards,*” New York Times, October 23, 2006.

<sup>14</sup> *In the Matter of Zango, Inc.*, FTC File No. 052 3130 (Nov. 3, 2006), available at [www.ftc.gov/os/caselist/0523130/0523130agree061103.pdf](http://www.ftc.gov/os/caselist/0523130/0523130agree061103.pdf).

<sup>15</sup> Jessica E. Vascellaro, “*Online Retailers Are Watching You,*” Wall Street Journal, November 28, 2006.

such promotional targeting may benefit a customer and streamline the shopping process – consumers may receive offers based on previous viewing habits; the website may give them a “free shipping” deal if they have never visited the website before; or the website may be able to suggest particular shopping selections based upon information they site has collected about the shopper. The article also points out that websites can use this information to a consumers’ detriment as well – for example, by only offering free shipping or special offers to first-time visitors and not to repeat customers. Even further out on this spectrum, during the recent “Tech-Ade” hearings, one panelist noted that websites and others could collect information about consumer “vulnerabilities” and use such information to get the upper hand in a transaction with the consumer. Along with the other insights provided at the hearings, these are all issues that the Commission is seriously examining.

What does the advent of new technology mean for the FTC’s mission to protect consumers? On one hand, many of the consumer protection issues remain the same, no matter what the technology – basic fraud and deception; privacy and data security; the importance of informed consumer choice; and child safety. These are issues with which we are currently grappling and have grappled with in the past.

In many instances, our “traditional” methods of addressing consumer protection issues such as these will continue to serve consumers well. For example, law enforcement and regulation are important tools that we will continue to use in our fight against deceptive and unfair practices that have emerged from consumers’ use of new and emerging technology.

Examples of this include our recent cases against purveyors of spyware and spam. As new consumer protection issues evolve, these tools will remain crucial to our consumer protection mission.

Correspondingly, education will remain an important component in the future of consumer protection. The FTC has had much success with its consumer and business education initiatives – for example, recently publishing safety tips for parents and children on hot topics such as social networking sites, online gambling, and peer-to-peer file sharing. Our efforts extend to informing and educating policymakers and legislators – the FTC has been and will continue to be active in providing advocacy letters, reports and Congressional testimony on emerging technology and its effects. By way of example, in addition to the Obesity Workshop and Report I mentioned earlier, FTC staff recently issued a report on the municipal provision of wireless internet.

However, the development and deployment of new technologies poses new challenges for the FTC. For example, monitoring advertising and marketing is a bread-and-butter investigatory technique used by FTC staff. In a growing media universe, this becomes a daunting task. Gone are the days when staff reviewed only television commercials and print advertising. Today, advertising shows up in all different types of avenues – on websites and through pop-up ads, on cell phones screens, in email and text messages, or through specially targeted ads that only reach a specific audience. In addition to all these new outlets, there are also new “types” of advertising and marketing – things like “buzz” and “viral” marketing, where the consumer is the one who

passes on the commercial message to other consumers.

Another ongoing challenge will be the increasing participation of children and “tweens” in the marketplace. Children today have an array of electronic devices and access to technology with which their parents may be quite unfamiliar. This gap will only continue to widen. The FTC needs to continue to study and develop the best ways to protect consumers such as these.

Of course, children aren’t the only vulnerable audience. Consumers and businesses that are unfamiliar with new technologies may need special attention. For example, there is a growing problem with unsophisticated sellers and business entities who fail to properly safeguard consumer information. In recent cases brought by the Commission, we saw failures on the part of businesses to use the most appropriate security settings to protect their wireless networks, or to take appropriate measures to protect themselves against common hacking techniques. The FTC may need to explore whether specially targeted rulemaking would encourage these businesses to get up to speed on these security issues.

The globalization of the marketplace also continues to pose an ongoing challenge in the consumer protection arena. Using Internet and long-distance technology, unscrupulous businesses can strike quickly on a global scale, victimize thousands of consumers, and disappear without a trace – along with their ill-gotten gains. Deceptive spammers can easily hide their identities, forge the electronic path of their email messages, and send messages from anywhere in the world to anyone in the world. The average consumer is often completely unaware of these

techniques and their repercussions. I am happy to report that last week, both the House and Senate passed the US Safe Web Act – legislation that will allow the agency to address the challenges posed by the globalization of fraudulent, deceptive and unfair practices.

Finally, the importance of the role of the private sector in this environment must be emphasized. The use of new technologies in advertising and marketing can offer much to both the consumer and the seller. However, if not implemented correctly or responsibly, these innovations can cause great harm to consumers. The importance of self-regulation and corporate responsibility can not be overstated. Often, the companies, retailers and advertising agencies deploying new technologies are in the best position to implement best practices at the outset – before any harm has been caused to consumers. In addition, private sector companies sometimes are uniquely situated to best protect and educate consumers about potential harms and risks related to emerging technologies that they use. There are many upsides to taking the high road – increased consumer trust and confidence, improved brand building, an efficient marketplace – not to mention the absence of an FTC enforcement action.

To wrap up, I would like to challenge you – through self-regulation and corporate responsibility – to be a vanguard in protecting consumers and maximizing the benefits to consumers.

Thank you very much for your attention.