

Dissenting Statement of Commissioner J. Thomas Rosch

Facing Facts: Best Practices for Common Uses of Facial Recognition Technologies

October 22, 2012

I respectfully dissent from the issuance of the Staff Report entitled, “Facing Facts: Best Practices for Common Uses of Facial Recognition Technologies” (“Report” or “Staff Report”). Although I appreciate Staff’s efforts to examine the issues surrounding the development and use of facial recognition technology, I believe the Report goes too far, too soon. My reasoning is threefold.

First, I object to the recommendations made in the Staff Report to the extent that they are rooted in Staff’s insistence that the “unfairness” prong, rather than the “deception” prong, of the consumer protection portion of Section 5 of the Federal Trade Commission Act, should govern practices relating to facial recognition technology. Section 5(n) limits our unfairness authority to an act or practice that “causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition.”¹ As I have pointed out before, the Commission represented in its 1980 and 1982 Statements to Congress that it will generally enforce the consumer protection “unfairness” prong of Section 5 only where there is alleged tangible injury, not simply “[e]motional impact and other more subjective types of harm.”² The Staff Report on Facial Recognition Technology does not – at least to my satisfaction – provide a description of such “substantial injury.” Although the Commission’s Policy Statement on Unfairness states

-
1. Federal Trade Commission Act Amendments of 1994, Pub. L. No. 103-312.
 2. See Letter from the FTC to Hon. Wendell Ford and Hon. John Danforth, Committee on Commerce, Science and Transportation, United States Senate, Commission Statement of Policy on the Scope of Consumer Unfairness Jurisdiction (Dec. 17, 1980), reprinted in *International Harvester Co.*, 104 F.T.C. 949, 1073 (1984) (“FTC Policy Statement on Unfairness”) available at <http://www.ftc.gov/bcp/policystmt/ad-unfair.htm>; Letter from the FTC to Hon. Bob Packwood and Hon. Bob Kasten, Committee on Commerce, Science and Transportation, United States Senate, reprinted in *FTC Antitrust & Trade Reg. Rep. (BNA)* 1055, at 568-570 (“Packwood-Kasten letter”); and 15 U.S.C. § 45(n), which codified the FTC’s modern approach. Commission letter to Senators Packwood and Kastes reaffirming Statement (Mar. 5, 1982).

that “safety risks” may support a finding of unfairness,³ there is nothing in the Staff Report that indicates that facial recognition technology is so advanced as to cause safety risks that amount to tangible injury. To the extent that Staff identifies misuses of facial recognition technology, the consumer protection “deception” prong of Section 5 – which embraces both misrepresentations and deceptive omissions – will be a more than adequate basis upon which to bring law enforcement actions.

Second, along similar lines, I disagree with the adoption of “best practices” on the ground that facial recognition *may* be misused. There is nothing to establish that this misconduct has occurred or even that it is likely to occur in the near future. It is at least premature for anyone, much less the Commission, to suggest to businesses that they should adopt as “best practices” safeguards that may be costly and inefficient against misconduct that may never occur.

Third, I disagree with the notion that companies should be required to “provide consumers with choices” whenever facial recognition is used and is “not consistent with the context of a transaction or a consumer’s relationship with a business.”⁴ As I noted when the Commission used the same ill-defined language in its March 2012 Privacy Report, that would import an “opt-in” requirement in a broad swath of contexts.⁵ In addition, as I have also pointed out before, it is difficult, if not impossible, to reliably determine “consumers’ expectations” in any particular circumstance.⁶

In summary, I do not believe that such far-reaching conclusions and recommendations can be justified at this time. There is no support at all in the Staff Report for them, much less the kind of rigorous cost-benefit analysis that should be conducted before the Commission embraces such recommendations. Nor can they be justified on the ground that technological change will occur so rapidly with respect to facial recognition technology that the Commission cannot

3. See *supra* n.2, FTC Policy Statement on Unfairness at 3; *International Harvester Co.*, 104 F.T.C. at 1073.

4. Report at 2.

5. See Dissenting Statement of Commissioner J. Thomas Rosch, Issuance of Federal Trade Commission Report, *Protecting Consumer Privacy in an Era of Rapid Change: Recommendations for Businesses and Policymakers* (March 26, 2012), available at <http://ftc.gov/speeches/rosch/120326privacyreport.pdf>.

6. *Id.*

adequately keep up with it when, and if, a consumer's data security is compromised or facial recognition technology is used to build a consumer profile. On the contrary, the Commission has shown that it can and will act promptly to protect consumers when that occurs.