

Appendix III: Separate Statement of Commissioner J. Thomas Rosch

December 7, 2012

Today, I vote in favor of the staff report entitled “Mobile Apps for Kids: Disclosures Still Not Making the Grade.” As I have stated before, I strongly support informed consumer choice – requiring clear, complete, and accurate notices about the handling of personal information and allowing consumers to be fully informed about the consequences of the choices they make.¹ Like staff, I am troubled that there has been little or no apparent change by the mobile app industry in the months since staff’s prior report highlighted the lack of information available to parents.² The mobile apps industry can, and should, do a better job of promoting informed consumer choice.

However, I write separately to reiterate my belief that any enforcement efforts in this area should be based up the “deception” prong, rather than the “unfairness” prong, of Section 5. In particular, any allegation that an industry member has failed to disclose material information about their information collection practices should be framed as either a deceptive representation, a deceptive half-truth, or a deceptive omission. This approach would not only offer more certainty in the privacy area, it would also be in alignment with the promises the Commission has made to Congress in terms of pursuing “unfairness.”³ Even in cases where it could be argued that a deceptive omission would not offer “perfect” certainty, I think that pursuing a case under a deceptive omission theory less uncertain than the unfairness route. Furthermore, in many cases the omission will be in the form of a “half-truth,” and the circumstances will be quite clear that additional disclosure was necessary in order to avoid deception.

1. Indeed, as I have said previously, I consider the Commission’s insistence that such notices be given to be our most significant contribution to consumer protection. *See, e.g.,* J. Thomas Rosch, Comm’r, Fed. Trade Comm’n, *The Evolution of “Privacy Policy” at the Federal Trade Commission: Is It Really Necessary*, Remarks at the Mentor Group (Sept. 14, 2012), available at <http://www.ftc.gov/speeches/rosch/120914TheMentorGroupBostonParisFrance.pdf>; J. Thomas Rosch, Comm’r, Fed. Trade Comm’n, *Information and Privacy: In Search of a Data-Driven Policy*, Remarks at the Technology Policy Institute Aspen Forum (Aug. 22, 2011), available at <http://www.ftc.gov/speeches/rosch/110822aspeninfospeech.pdf>.
2. Fed. Trade Comm’n, FTC Staff Report, *Mobile Apps for Kids: Current Privacy Disclosures are Disappointing* (Feb. 2012), available at http://www.ftc.gov/os/2012/02/120216mobile_apps_kids.pdf.
3. *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 (Mar. 5, 1982), reprinted in FTC Antitrust & Trade Reg. Rep. (BNA) 1055, at 568-570 (“Packwood-Kasten Letter”); 15 U.S.C. § 45(n) (codifying the FTC’s modern approach).