Comment on Proposed Consent Order
***Nomi Technologies Inc*., File No. 132-3251**

James C. Cooper
George Mason University School of Law

May 26, 2015

In *Nomi Technologies, Inc*, the Commission found reason to believe that Nomi's express promise in its privacy statement that it allowed consumer "to opt out of Nomi's service . . . at any retailer using Nomi's technology" was deceptive because it in fact did not provide an opt-out mechanism at its clients' retail locations.[1] Nomi does provide a global opt-out on its Web site.[2] Further, the Commission found reason to believe that Nomi breached an implied claim "that retailers using Nomi's service would notify consumers that the service was in use."[3] The allegations in the Commission's complaint ultimately rest on the assumption that but for the failure of Nomi (or its retailer clients) to provide in-store notice of, and opt-out opportunities from, Nomi's tracking of consumers' media access control ("MAC") addresses, consumers would have taken action to avoid this tracking.

Nomi raises two important issues concerning the Commission's use of its deception authority to police statements contained in privacy policies. First, in light of the different contexts in which companies make marketing claims versus statements in privacy policies, the Commission should not be able to presume the materiality of promises made in privacy policies. Second, the Commission lacks empirical evidence to suggest that had consumers actually received notice and an opportunity to opt-out from Nomi's tracking, they would have. Further even if the Commission were to find sufficient reason to believe that Nomi's breached promises were material, given the lack of consumer harm and the potential chilling effect on innovation from a 20-year order, accepting Nomi's consent is not in the public interest.

From the outset, it is important to note that nothing in this comment is meant to suggest that companies that deceive consumers should not be held to account for their actions. At the same time, however, it is important to remember that over thirty years ago, the Commission in its Policy Statement on Deception ("PSD") made

---

[1] In the Matter of Nomi Technologies., Inc., File No. 132-3251, Analysis to Aid Public Comment at 2. For consent orders, the Commission needs to find "reason to believe" that there has been a violation of the FTC Act and that accepting the consent order is "in the public interest." 15 U.S.C. § 45(b).
[2] Nomi Analysis to Aid Public Comment at 2.
[3] Statement of Chairwoman Ramirez, Commissioner Brill, and Commissioner McSweeny, In the Matter of Nomi Technologies, Inc., at 1 (April 23, 2015) (hereinafter "Majority Statement"), at https://www.ftc.gov/system/files/documents/public_statements/638351/150423nomicommissionstatement.pdf.

the decision to limit its deception jurisdiction to statements that are "material."[4] The harm-based approach embodied by the PSD (and the Commission's Policy Statement on Unfairness)[5] has helped lead the FTC from an agency on the brink of extinction to a world-class consumer protection agency.[6] But if the PSD's vitality is to remain, its strictures must continue to have meaning. Accordingly, I respectfully urge the Commission to not accept the proposed consent order with Nomi.

I. Materiality in Deception

Section 5 of the FTC Act broadly prohibits "unfair and deceptive acts and practices."[7] In 1984, the Commission issued the PSD, which clarified "the manner in which the Commission will enforce its deception mandate."[8] For a representation to be deceptive under Section 5 of the FTC Act, the Commission must find that it is likely to mislead consumers "acting reasonably in the circumstances," and that it is "material."[9] Materiality in this context means that the representation "is likely to affect the consumer's conduct or decision with regard to the product or service."[10] In this manner, the concept of materiality acts as an indirect harm requirement—when a false statement is material, it can be assumed to cause harm because it triggered a consumer purchase that otherwise would not have happened.[11] The Commission can presume materiality for express claims, claims involving health and safety, or claims pertaining to the "central characteristic" of the product or service.[12]

---

[4] FTC Policy Statement on Deception, appended to *In re* Cliffdale Assoc., Inc., 103 F.T.C. 110, 175–183 (1984) ("PSD"), *available at* http://www.ftc.gov/bcp/policystmt/ad-decept.htm.

[5] *See* FTC Policy Statement on Unfairness, appended to *In re* International Harvester Co., 104 F.T.C. 949 (1984), *available at* http://www.ftc.gov/bcp/policystmt/ad-unfair.htm. Congress eventually codified the Unfairness Policy Statement with the 1994 FTC Reauthorization Act.

[6] *See* James C. Cooper, *Forward*, in James Campbell Cooper ed., THE REGULATORY REVOLUTION AT THE FTC: A THIRTY-YEAR PERSPECTIVE ON COMPETITION AND CONSUMER PROTECTION at *x* (Oxford University Press 2013)

[7] 15 USC § 45(a).

[8] PSD at 1.

[9] PSD at 2.

[10] *Id*.

[11] If the unfairness test under Section 5 lays out a quasi-negligence standard (liability only when costs are greater than the benefits), then deception test is one of strict liability for materially false claims, under the assumption that false claims are never beneficial. *See* J. Howard Beales III, Director of Bureau of Consumer Protection, *The FTC's Use of Unfairness Authority: Its Rise, Fall, and Resurrection*, Remarks at The Marketing & Public Policy Conference (May 30, 2003) ("deception analysis essentially creates a shortcut, assuming that, when a material falsehood exists, the practice would not pass the full benefit/cost analysis of unfairness, because there are rarely, if ever, countervailing benefits to deception"), *at* https://www.ftc.gov/public-statements/2003/05/ftcs-use-unfairness-authority-its-rise-fall-and-resurrection. This is analogous to the distinction between rule of reason and *per se* rules of liability in antitrust. A rule of reason inquiry requires an explicit showing of actual or likely harm, whereas harm is assumed to be greater than benefits from the categories of per se illegal conduct, such as naked agreements to fix prices or allocate markets. *See* Thomas G. Krattenmaker, *Per se Violations in Antitrust Law: Confusing Offenses with Defenses*, 77 GEO. L J. 165 (1988).

[12] PSD at 7.

The Commission will also presume materiality when the seller intended to make an implied claim.[13]

II. Statements in Privacy Policies Should Not be Presumed Material

The Commission found reason to believe that the express and implied claims at issue in Nomi's privacy policy were material. As discussed below in more detail, the practical reality of privacy policies, however, should prevent the Commission relying on the materiality presumption for such claims.

First, it is well known that the most consumers either do not bother to read privacy policies, or if they do, they do not understand them, as they are often written in dense legalize.[14] Indeed, as some researchers have shown, the time commitment required to read and understand all the privacy policies consumers are likely to encounter renders this task virtually impossible.[15] These realities raise a threshold question of whether representations in a document that most consumers neither read nor understand should ever be presumed material?

Second, because firms do not use privacy policies to attract consumers, they cannot be presumed to be material. In the PSD, the Commission correctly relied on the Supreme Court's observation that "we may assume that the willingness of a business to promote its product reflects a belief that consumers are interested in the advertising" to presume that express claims are material.[16] This presumption makes sense in the context of advertisements, but does not translate well to privacy policies. Unlike advertisements, privacy policies are not designed by marketers to attract consumers, but rather often are drafted by attorneys and included on Web sites to comply with state laws or industry self-regulatory regimes.[17] Further undercutting the notion that statements in the privacy policy were designed with the intent to attract consumers—and hence should be presumed material—is the fact that Nomi's privacy policy is not even directed at Nomi's customers—retailers that purchase Nomi's Listen system and analytic services. Clearly, Nomi did not design its privacy policy to lure consumers to its Web site, or to purchase its services.

---

[13] *Id*.

[14] *See*, e.g., Daniel J. Solove & Woodrow Hartzog, *The FTC and the New Common Law of Privacy*, 114 COLUM. L. REV. 583, 667 (2013).

[15] *See* Aleecia M. MacDonald & Lorrie Faith Cranor, *The Cost of Reading Privacy Policies*, I/S: A JOURNAL OF LAW & POLICY FOR THE INFORMATION SOCIETY (2008), *at* http://lorrie.cranor.org/pubs/readingPolicyCost-authorDraft.pdf.

[16] PSD at 7 (quoting *Central Hudson Gas & Electric Co. v. PSC*, 447 U.S. 557, 567 (1980)). *See also Novartis Corp*., 1999 FTC Lexis 63, at *29 (1999) (noting that "an advertiser's intent to make a claim generally implies that the advertiser believes that the claim is important to consumers.").

[17] *See*, *e.g*., California Online Consumer Protection Act, Cal. Bus. & Prof. Code §§ 22575 et seq.; *TRUSTe, Best Practice: Your Web Site's Privacy Statement*, *at* https://www.truste.com/resources/privacy-best-practices/#statement.

In sum, there are strong reasons grounded in the practical differences between marketing claims and privacy policies that should prevent the Commission from presuming that promises made in privacy policies are material to consumers' choices. Thus, the Commission should be required either to show that the claims in the specific privacy policy in question were material to those who bothered to read it, or to provide a sound empirical basis to support the general notion that consumers make marketplace decisions based on representations in privacy policies.

III. Lack of Sufficient Empirical Evidence on Consumers' Value of Privacy

The Commission found Nomi's privacy policy made an implied claim that consumers would be given notice when a retail location was employing Nomi's tracking technology.[18] Although the Commission can presume the materiality of an express claim, it must demonstrate with extrinsic evidence that the defendant intended to make an implied claim to enjoy the materiality presumption.[19] Otherwise, the Commission must prove materiality. Because there is no indication that the Commission adduced proof of Nomi's intent to make this implied claim of notice, there must be sufficient evidence to support a reason to believe that some non-trivial number of consumers were likely to alter their behavior—for example, by opting out of Nomi's tracking, switching off their smartphones at Nomi's clients' locations, or denying Nomi's clients their custom—if they had knowledge of collection of encrypted MAC identifiers from their mobile devices.

In their statement, the Majority cites to a survey of 1,042 consumers from a software and customer analytics firm,[20] and workshop testimony concerning consumers' attitudes toward data on location history.[21] This evidence is insufficient to support a reason to believe that Nomi's failure to provide notice of tracking was material. First, neither of these surveys concerned the type of information involved in *Nomi*—the collection of hashed MAC addresses used to track movement within a single store.[22] Second, and more fundamentally, surveys of general consumer attitudes toward certain privacy-related scenarios are no substitute for analysis of actual consumer behavior in the face of marketplace choices.

This shortcoming highlights a larger problem with the general lack of empirical foundation for the FTC's privacy enforcement program: it threatens to

---

[18] Majority Statement at 1.
[19] *See* DPS at 7; *Novartis*, 1999 FTC LEXIS at *30 ("In the context of implied claims . . ., extrinsic evidence is required to establish intent to make the claim.").
[20] Opinion Lab describes itself as ""a high-growth SaaS provider of continuous listening solutions that drive smarter, real-time business action." (http://www.opinionlab.com/).
[21] *See* Majority Statement, at 3 n.8.
[22] The majority also relies on a blog posting from a lawyer and Ph.D. candidate in computer science at Stanford for the proposition that Nomi's hash encryption can easily be reversed. *See* id. at 1, n.1 (citing Jonathan Mayer, *Questionable Crypto in Retail Analytics*).

undermine the harm requirement that defines the FTC consumer protection enforcement authority. Absent the objective yardstick of harm (either directly in unfairness, or indirectly through materiality), the FTC is left to import its own subjective judgments of which business practices are too unsavory to survive scrutiny under the FTC Act, which fosters uncertainty and deters beneficial practices. A rigorous empirical understanding of how consumers react when faced with choices to reveal personal information is needed to help the Commission better understand not only when promises in privacy policies are likely to be material, but also when data collection practices are likely to be unfair. To date, however, the Commission largely has supported its privacy agenda with citations to workshop testimony and to third-party surveys on consumer attitudes toward privacy in different contexts.[23] With a bureau of nearly 100 Ph.D. economists at its disposal, the Commission can do better.

IV. Accepting the *Nomi* Consent Order is not in the Public Interest

Even assuming that the Commission has sufficient reason to believe that Nomi's express and implied claims were material, accepting the consent order is not in the public interest. Although deception does not require a finding of harm, it is simply not in the public interest to subject an innovative firm to an invasive twenty-year order for an oversight that harmed no one.[24] Not only will this action hobble Nomi's ability to compete, but it threatens to chill innovation more generally in fields that deal with consumer data.

V. Conclusion

In an effort to focus its consumer protection jurisdiction on practices that harm consumers, over thirty years ago the Commission decided to limit its deception enforcement authority to breaches of material promises. Because privacy policies are so fundamentally different from advertising, absent empirical evidence, the Commission should not be able to presume that statements in privacy policies are material. To do otherwise is to risk converting deception into a strict liability offense, in which misstatements that have no impact on consumers result in twenty-year orders. Agencies are confined to act within the power granted them by Congress. When the boundaries of permissible action become blurry, agencies can

---

[23] *See* Joshua D. Wright, *How to Regulate the Internet of Things Without Harming its Future: Some Do's and Don'ts* (May 21, 2015), *at* https://www.ftc.gov/public-statements/2015/05/how-regulate-internet-things-without-harming-its-future-some-dos-donts.

[24] As Commissioner Ohlhausen notes in her dissent, at the time covered by the complaint, most of Nomi's retail customers were trialing Nomi's product in a few stores. *See* Dissenting Statement of Commissioner Maureen K. Ohlhausen, In the Matter of Nomi Technologies, Inc. (April 23, 2015), *at* https://www.ftc.gov/system/files/documents/public_statements/638361/150423nomiohlhausenstatement.pdf.

import their own subjective notions of what is allowed under the statute they administer, and the rule of law is diminished.