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**Prepared Remarks of
Federal Trade Commissioner
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“Tech Platforms, Content Creators, and Immunity”

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Thank you for inviting me to discuss the blurry line between tech and media. As always, these remarks are my own and do not necessarily reflect the views of the Commission or any other Commissioner.

The exchange of information is the lifeblood of a democratic society and a vibrant economy. The founders of our country knew this when they named Benjamin Franklin as the first Postmaster General nearly two-and-a-half centuries ago.

Our postal system was created to allow Americans to freely transmit letters, periodicals, and other content to other citizens, providing a critical piece of infrastructure for our infant country. The importance of free exchange of communications through a neutral delivery platform has not diminished. Of course, the reality is that we now communicate primarily through more modern means.

Tech convergence – “the merging of distinct technologies, industries, or devices into a unified whole” – is a competition concern. Over the past decade, we have watched the decentralized internet converge under a handful of corporate umbrellas. A dearth of competition can often lead to fewer choices and worse treatment for individuals and businesses, along with more market power for incumbents. Outsized power in the tech market has invited scrutiny about a panoply of problems, from mass surveillance to digital redlining to the decline of journalism.

These market changes have important implications under the law. Our understanding of legal distinctions should be informed by current market practices and structures. Should companies that once acted neutrally be able to claim special benefits when their business models fundamentally change?

To tackle this question, first, I will highlight the special treatment that the government grants to neutral delivery platforms that move information from point A to point B without interference or invasion.

Second, I will discuss how today's technology has evolved and converged beyond our traditional conceptions of platforms and content creators.

Third, I will describe the FTC's experience in navigating this convergence in the Commission's amendments to rules under the Children's Online Privacy Protection Act that were finalized in 2012.

Finally, I will lay out some of the questions we must confront about this convergence and whether antitrust law is equipped to deal with anticompetitive practices in the tech marketplace.

Neutral Delivery Platforms?

Like the chartering of the post office, Congress wanted to ensure that there were routes that communications could freely flow through. These routes wouldn't be drawn through roads and rail; they would rely on telecommunications and technology. The Communications Act of 1934 provided the roadmap for the role and responsibilities for those engaged in information transmission.

At the time, telegraph companies were transmitting more and more information for individuals and businesses alike. Content creators using these transmission services were subject to various laws governing content. For example, they would be subject to laws against defamation and libel.

But, would the telegraph company be implicated if a person sending media was violating the law? This was tested in the years following the passage of the Communications Act. In *O'Brien v. Western Union Telegraph Company*, the Court ruled in 1940 that the telegraph company could be held liable for the transmission of a defamatory message only if the company knew that the message was spurious or that the sender was acting in bad faith. Passive, speedy transmission would not confer liability. This allowed these companies to focus on creating the best, most efficient delivery system possible as this would remove any liability concerns over content.

After telegraph companies, telephone companies would enjoy similar treatment, since, again, they were simply making sure that information was transmitted. They were the facilitator, not the speaker.

If we fast-forward fifty years, we encounter a blurrier line between facilitation and speech involving some of the first online services that were adopted by American consumers, CompuServe and Prodigy. In two separate cases, courts opined on whether CompuServe and Prodigy were liable for content. In the *CompuServe* case, the court ruled that the online service was merely a facilitator and should not be liable for defamation. In the *Prodigy* case, the online service was held liable for ensuring that its promises of being a "family-friendly" network because of its content moderation practices.

This brings us to the debate on Section 230 the Communications Decency Act, a law that was put in place when the internet was still in its infancy. At the time, internet service providers couldn't

deny anyone access and couldn't decide what content was communicated. In this environment, early internet platforms were neutral, decentralized, and user-controlled. This was – and continues to be – an ideal market structure for encouraging competition, innovation, and free expression. The law rightfully sought to maintain this structure by removing the legal liability that might incentivize service providers and platforms to censor content.

I support Section 230. It seeks to foster an environment where information and ideas can flourish. If a company is just helping move information from point A to point B, that company is just like the mail carrier or the telegraph company. That makes sense.

Converging into Content Creator

But the tech market has dramatically shifted in the decades since this law was enacted. On the regulatory front, internet service providers are not regulated as common carriers and have vertically integrated with content companies. And tech platforms have also gone through a fundamental transformation.

Companies once competed by offering neutral tools – technology used to share, view, and participate with user-generated content. To attract a community, these companies created user-centric features that allowed people to curate their own content, and privately communicate what and to whom they wanted.

In this decentralized, competitive environment, ads were placed contextually and connected to content and its likely audience. This is the kind of traditional advertising that we are used to in other spaces – like clothing ads in *Vogue* magazine, laundry detergent ads during daytime television, and baby product ads on a parenting blog. Contextual ads are one way that tech firms can operate a more neutral platform where users are anonymous and connect with content based on interests and interactions with each other.

Just to be clear, by neutral, I don't mean free from bias or inclusive of all perspectives. The substance and popularity of content on a neutral platform reflects the community of users choosing to participate. Nor am I suggesting that neutrality prevents platforms from conducting good-faith community moderation for user content and behavior. The neutrality that I am referring to is operating without interference or distortion by the platforms' business incentives.

Behavioral advertising technologies undermine this neutrality by monetizing user activity and information. In doing so, they radically alter the relationship between platform, user, and content. Under the behavioral advertising model, companies don't place ads by targeting content; they place ads by targeting people. This is a system where you are the product for sale to advertisers. If a company decides to target you, their ads can stalk you across the internet regardless of whether their product is connected to your behavior or interests. Online ad networks are so far-reaching that they can make sure you see the same ads whether you are watching a Sesame Street video or shopping for shoes.

By converging with and into behavioral advertisers, tech companies transformed their platforms into pay-to-play enterprises. Far from being a neutral or passive conduit, these platforms are now

actively shaping and profiting from user communications. Gone are the incentives to attract a community by offering privacy, control, and other user-centric benefits. In their place are incentives to not only track user activity, but also generate high user activity by promoting clickbait over content shared organically by other users.

Merging into “a unified whole” with ad networks created the financial incentives to go on spending sprees to buy up others with valuable data. This data enhanced the value of the individual digital dossiers that fuel behavioral advertising. Digital dossiers are proprietary and populated by a secret, unknown, and increasingly expansive universe of activity tracked by tech firms. By combining histories of what we search and view, where we have been, who we have been with, and thousands of other data points, these digital dossiers map our life and mind. In assembling and selling all of our personal information, companies are creating a new kind of content – a detailed profile of a one-person demographic.

Indeed, the industry has invested significant resources into surveillance technology to support behavioral advertising’s seemingly unquenchable thirst for personal information. This technology can also be used to monitor and classify a broad range of content and activity, from active communication like social media posts to passive information like location. They rely on algorithms and artificial intelligence to monitor and censor content in order to generate attention, data, and advertising clicks.

In this new online market, content’s value is derived from having intimate knowledge of its specific viewers. The theory is that the more platforms know about users, the easier it is to predict what content they will want to see – and deliver it to them. But when that prediction is used to promote certain content to users, at what point does it become a self-fulfilling prophesy? When does the content stop reflecting users’ organic preferences and start shaping them?

I would argue that once platforms started prioritizing their paid predictions, the content became more a reflection of advertisers targeting users, than users’ own preferences. I would also note that behavioral advertising isn’t the only market structure or practice changing platform incentives towards content. Mergers and acquisitions, profit-sharing agreements, service-provider relationships, market challenges by content competitors, and other financial factors have the potential to fundamentally impact the platform business model.

Dealing with Double Agents

So what are these companies? Are they platforms or content producers? The Communications Decency Act creates a clear distinction between platform and content. But up until now, tech companies haven’t been forced to apply that distinction to their converged business.

In fact, platform companies are clearly trying to use the legal uncertainty around convergence to their advantage. In one instance, a dominant tech platform reportedly claimed in a legal filing that, as a publisher of data, it has the discretion to withhold access to its data as a right of free speech. In making this claim, the company identified itself with traditional media saying, “A newspaper has a publisher function whether they are doing it on their website, in a printed copy or through the news alerts.” However, the firm also claimed immunity under Section 230.

Some have argued that firms that fundamentally shape user interactions are ineligible for these broad immunities. For example, noted Communications Decency Act scholar Olivier Sylvain argues that “intermediaries today do much more than passively distribute user content or facilitate user interactions. Many of them elicit, algorithmically sort, and repurpose the user content and data they collect. The most powerful services also leverage their market position to trade this information in ancillary or secondary markets.”

The FTC confronted this “double agent” problem when updating rules pursuant to the Children’s Online Privacy Protection Act, or COPPA. COPPA places obligations on “operators” of online services that collect personal information from children. The children’s privacy law was enacted 20 years ago, prior to the proliferation of apps, mobile devices, and mass surveillance by private sector firms.

During his time as Chairman of the FTC, Jon Leibowitz said, “Let’s be honest: some companies, especially some ad networks, have an insatiable desire to collect information, even from kids.” Again, these ad networks, which are often vertically integrated into tech platforms and drive core revenue, shape the incentives and business model in today’s tech industry.

In the 2012 amendments to the COPPA rule, the Commission made clear that child-directed sites that integrate ad networks are subject to the law’s requirements. After all, the content provider is financially benefitting from data collection on children, so it cannot outsource liability. But more importantly, companies are also liable if their ad networks have knowledge that they are collecting personal information on child-directed sites.

The Commission rightly decided that if it did not clarify that both content providers and tech platform ad networks are liable, everyone could evade the will of Congress to safeguard children’s privacy.

Is Antitrust Up to the Task?

In industries that are largely unregulated, antitrust laws are in place to safeguard competition. We should all be asking whether tech convergence is choking off competition in markets where platform and content intersect. Technology platforms achieved massive scale by offering “free” tools and promising to serve as a neutral host of ideas. Then they used that scale, and the data it provided, to expand their empires to other parts of the internet.

Over a decade ago, Commissioner Pamela Jones Harbour prophetically noted in a dissent that the merger between Google and DoubleClick “has the potential to profoundly alter the 21st century Internet-based economy – in ways we can imagine, and in ways we cannot.” As more firms purchased ad networks, media companies, book publishers, music and audio services, and countless other content producers, antitrust agencies stayed mostly silent.

So it’s not surprising that many are asking if our traditional approach to antitrust is really up to the task of being an effective competition cop in the tech market.

I want to conclude by offering a more narrow set of observations to consider. We face a serious dilemma when it comes to the convergence of media and tech. The deployment of online behavioral advertising distorts the incentives of technology companies that might ordinarily be seen as neutral intermediaries. In particular, the share of ad spend captured by news outlets has declined rapidly, despite generating significant readership.

One answer to this problem could lie in our current laws and their application. When companies converge or consolidate out of the legal distinctions that govern them, we should not jump to the conclusion that the law needs to change. For example, in applying Section 230, I think we should consider whether immunity is conferred only to those companies that truly serve as mere conduits of communication. As the FTC made clear through COPPA, a company engaged in or benefitting from behavioral advertising is not acting as a passive conduit. For companies that have converged away from neutrality, we need to consider whether they have lost Section 230 immunity unless or until their business is structured to simply serve content rather than select it. Thank you.

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