



UNITED STATES OF AMERICA
Federal Trade Commission

Keynote of Commissioner Noah Joshua Phillips¹

**The FTC and the Digital Marketplace: Highlights from the Last Year
ANA/BAA Marketing Law Conference**

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Thank you very much for that kind introduction and the warm welcome.

Since four new Commissioners, myself included, arrived at the Federal Trade Commission in May 2018, consumer protection cases involving marketing, advertising, and privacy law have presented some of the most interesting and challenging issues we face. Technology is changing how we learn and communicate, and new platforms are allowing less traditional communicators as well as novel types of messaging. I am pleased to be here today to highlight how the FTC is navigating this evolving terrain.

The FTC has a long tradition of maintaining a competitive marketplace for both consumers and businesses. In 1914, President Woodrow Wilson signed the Federal Trade Commission Act into law, creating the FTC, which then absorbed its predecessor organization, the Bureau of Corporations – which had been housed within the Department of Commerce and Labor – in 1915. The FTC's original

¹ The remarks I give today are my own and do not necessarily reflect the views of the Federal Trade Commission or any of my fellow Commissioners.

purpose was to prevent unfair methods of competition in commerce as part of the battle to “bust the trusts”, that is, antitrust law. Recognizing that unfair and deceptive practices also can distort a competitive marketplace, in 1938 Congress amended the FTC Act and granted the FTC authority to stop “unfair or deceptive acts or practices in or affecting commerce”. In a nutshell, the FTC’s vision is a vibrant economy characterized by vigorous competition and consumer access to accurate information.²

I would like to spend my time today speaking about the importance of both of these components – vigorous competition in the U.S. technology markets and consumer access to accurate information in the digital age.

With respect to competition in the tech market, this is a particularly thought-provoking time at the FTC. Shortly after the new commissioners arrived, Chairman Simons announced a series of public hearings that would consider, among other things, whether evolving new technologies might require adjustments to competition and consumer protection enforcement law, priorities, and policy.³ The FTC requested public input on topics such as: competition and consumer protection issues in communication, information, and media technology networks; and the intersection between privacy, big data, and competition. And as you may be aware, in February 2019, the Commission announced the creation of a task force – now called the Technology Enforcement Division – dedicated to monitoring competition

² Federal Trade Commission, Strategic Plan for Fiscal Years 2018 to 2022, Feb. 12, 2018, https://www.ftc.gov/system/files/documents/reports/2018-2022-strategic-plan/ftc_fy18-22_strategic_plan.pdf.

³ FTC Press Release, *FTC Announces Hearings on Competition and Consumer Protection in the 21st Century*, June 20, 2018, <https://www.ftc.gov/news-events/press-releases/2018/06/ftc-announces-hearings-competition-consumer-protection-21st>.

in U.S. technology markets, investigating any potential anticompetitive conduct in those markets, and taking enforcement actions when warranted.⁴

The Commission recognizes the critical importance of competition in the technology sector. Evolving technologies, automation, and intellectual property issues, however, can increase the complexity of antitrust investigations and litigation. We strive to improve the agency's understanding of various practices and developments in the marketplace by conducting public hearings, conferences, and workshops that bring together interested parties and conducting economic research on these issues. I would like to urge all of you to participate in this process and to come to us with information about the competitive landscape. If you see problems, bring them to us. Competition is a topic of great interest to me, and should be to all of you as well.

Consumer access to accurate information in the marketplace – both digital and otherwise -- is important for a number of reasons. First, free markets rely upon effective competition, which in turn is grounded upon the merits and value of competing products and services. An essential element of effective competition is the availability of information that consumers can use to evaluate competing products to make the best possible choices. Second, competition in the marketplace can be distorted when consumers do not receive accurate and material information, resulting in diminished comparison shopping, unwarranted competitive parity, or

⁴ FTC Press Release, *FTC's Bureau of Competition Launches Task Force to Monitor Technology Markets*, Feb. 26, 2019, <https://www.ftc.gov/news-events/press-releases/2019/02/ftcs-bureau-competition-launches-task-force-monitor-technology>.

even advantage for inferior products.⁵ Without accurate and material information, competition and consumers are harmed.

On the competition side, the FTC examines advertising markets to ensure that they are robust and well-functioning. For example, in a recent administrative action, the FTC alleged that 1-800 Contacts, the largest online retailer of contact lenses, unlawfully orchestrated a web of anticompetitive agreements with rival online contact lens sellers that suppressed competition in certain online search advertising auctions and restricted truthful and non-misleading internet advertising to consumers.⁶ Although I dissented because I did not agree with a number of aspects of the decision, including the analytical approach taken by the majority, I believe that scrutinizing online markets for anticompetitive manipulation of consumer information is very important.⁷

On the consumer protection side, the FTC actively polices the marketplace to promote the dissemination of accurate information. On one hand, we enforce statutes and rules that require the disclosure of information, such as the Franchise Rule, the R-Value Rule for Home Insulation Products and the Energy Labeling Rule. On the other, we monitor the marketplace and bring enforcement actions against individuals and companies that are providing misleading or deceptive information to consumers.

⁵ See Statement of Basis and Purpose, Labeling and Advertising of Home Insulation, 44 Fed. Reg. 50218, 50223 (Aug. 27, 1979).

⁶ FTC Press Release, *FTC Commissioners Find that 1-800 Contacts Unlawfully Harmed Competition in Online Search Advertising Auctions, Restricting the Availability of Truthful Advertising to Consumers*, Nov. 14, 2018, <https://www.ftc.gov/news-events/press-releases/2018/11/ftc-commissioners-find-1-800-contacts-unlawfully-harmed>.

⁷ Commissioner Noah Joshua Phillips, Dissenting Statement in the Matter of 1-800 Contacts, Inc., [Redacted Public Version], Nov. 14, 2018, <https://www.ftc.gov/public-statements/2018/11/dissenting-statement-commissioner-noah-joshua-phillips-redacted-public>.

At the Commission, we are applying this long-standing enforcement policy in a variety of new venues and to a new set of actors. One area is fake online reviews. This past February, the FTC brought its first case challenging fake paid reviews on an independent retail website, alleging that Cure Encapsulations, a dietary supplement marketer, and its owner paid a third-party website to write and post fake reviews on Amazon.com. The complaint alleged that the defendants hired amazonverifiedreviews.com and instructed them to obtain reviews to attain an average rating of 4.3 out of 5 stars in order to have sales and to, “Please make my product ... stay a five star”.⁸

In another recent high-profile case, the FTC charged cosmetics firm Sunday Riley Modern Skincare, LLC and its CEO, Sunday Riley, with misleading consumers by posting fake reviews of the company’s products on Sephora.com. The FTC complaint alleged that, between November 2015 and August 2017, Sunday Riley Skincare managers, including Ms. Riley herself, posted reviews of their branded products on the Sephora site using fake accounts created to hide their identity, and requested that other Sunday Riley Skincare employees do the same. The complaint further alleged that, after Sephora removed fake employee-written reviews, Sunday Riley Skincare employees suspected this was because Sephora recognized the reviews as coming from their IP addresses. Sunday Riley Skincare then obtained, according to one of the company’s managers, “an Express VPN account [to] . . . allow us to hide our IP address and location when we write

⁸ FTC Press Release, *FTC Brings First Case Challenging Fake Paid Reviews on an Independent Retail Website*, Feb. 26, 2019, <https://www.ftc.gov/news-events/press-releases/2019/02/ftc-brings-first-case-challenging-fake-paid-reviews-independent>.

reviews”. A VPN (virtual private network) lets users access the internet privately, by using separate servers to hide their online activity.⁹

Another set of defendants took their deception to another level. Using websites such as TwitterBoost.co, BuyView.co, and BuyPlays.co, Devumi LLC and its owner and CEO sold fake indicators of social media influence, including fake followers, subscribers, views, and likes to users of social media platforms. The FTC complaint alleged that defendants sold fake Twitter followers to actors, athletes, musicians, writers, and others who wanted to increase their appeal as online influencers. They also sold fake Twitter followers to motivational speakers, law firm partners, investment professionals, and others who wanted to boost their credibility to potential clients. Clients for faked LinkedIn followers included marketing, advertising, and public relations firms; companies offering computer software solutions; banking, investment, and other financial services firms; human resources firms; and others. Devumi also allegedly had more than 4,000 sales of fake YouTube subscribers and over 32,000 sales of fake YouTube views to its clients, including musicians who wanted to increase the apparent popularity of their songs.¹⁰

Posting deceptive or inaccurate information online, or engaging in other deceptive conduct like selling fake followers, distorts the online marketplace,

⁹ FTC Press Release, *Devumi, Owner and CEO Settle FTC Charges They Sold Fake Indicators of Social Media Influence; Cosmetics Firm Sunday Riley, CEO Settle FTC Charges That Employees Posted Fake Online Reviews at CEO's Direction*, Oct. 21, 2019, <https://www.ftc.gov/news-events/press-releases/2019/10/devumi-owner-ceo-settle-ftc-charges-they-sold-fake-indicators>.

¹⁰ FTC Press Release, *Devumi, Owner and CEO Settle FTC Charges They Sold Fake Indicators of Social Media Influence; Cosmetics Firm Sunday Riley, CEO Settle FTC Charges That Employees Posted Fake Online Reviews at CEO's Direction*, Oct. 21, 2019, <https://www.ftc.gov/news-events/press-releases/2019/10/devumi-owner-ceo-settle-ftc-charges-they-sold-fake-indicators>.

preventing consumers from making informed purchasing decisions and creating an uneven playing field for those that follow the rules.

And the converse is true as well. When companies prevent consumers from posting accurate reviews of products and services, this decreased flow of truthful information harms both consumers and competition. The FTC first waded into this territory in 2015 when we brought an action against weight-loss supplement marketer Roca Labs Nutraceutical and its principals. The defendants represented their products as safe and effective alternatives to gastric bypass surgery. They also claimed that users could lose as much as 21 pounds in one month, and that users have a 90 percent success rate in achieving substantial weight loss. Defendants apparently didn't want real life experiences with the product to dispel this fantasy. Among other charges, the FTC's complaint alleged that through contract provisions and other intimidating behavior, the defendants' attempts to prohibit purchasers from speaking or publishing truthful or non-defamatory negative comments or reviews was unfair.

This practice caught the attention of Congress, and in 2016, the Consumer Review Fairness Act was enacted. The CRFA generally makes certain form contract provisions invalid. Form contracts between sellers and individual consumers cannot prohibit or restrict individuals from reviewing sellers' goods, services, or conduct; impose penalties or fees on individuals for such reviews; or require individuals to transfer intellectual property rights in such reviews.¹¹

¹¹ Consumer Review Fairness Act, 15 U.S.C. § 45b.

The FTC's first CRFA case took on a particularly egregious scheme run by Sellers Playbook, a get rich quick business opportunity based in Minnesota. The FTC, along with and the Minnesota Attorney General's Office, alleged that Sellers Playbook lured consumers into buying its expensive "system" by claiming that purchasers were likely to earn thousands of dollars per month selling products on Amazon. The company used false and unsubstantiated claims, such as make "\$20,000 a month" and "Potential Net Profit: \$1,287,463.38". Few, if any, consumers achieved these results, and most lost money. To make matters even worse, the defendants also allegedly violated the CRFA by using form contracts that improperly sought to restrict their victims' right to review the products and services they purchased.¹² I also want to give a shout out to the Utah Division of Consumer Protection, the U.S. Marshals Service for the District of Minnesota, Amazon.com, Inc., the Better Business Bureau of Minnesota and North Dakota, and the Electronic Retailing Self-Regulation Program for their indispensable assistance. Sometimes it takes a village.

Consumers' unfettered ability to provide truthful reviews and information is crucial to a well-functioning marketplace and the FTC is committed to halting violations of the CRFA. This past spring, we brought five administrative cases exclusively enforcing the CRFA, alleging that these defendants illegally used non-disparagement provisions in consumer form contracts in the course of selling their

¹² FTC Press Release, *FTC and State of Minnesota Halt Sellers Playbook's Get Rich Scheme*, Aug. 6, 2018, <https://www.ftc.gov/news-events/press-releases/2018/08/ftc-state-minnesota-halt-sellers-playbooks-get-rich-scheme>.

products and services.¹³ The defendants included a Pennsylvania-based HVAC and electrical provider, a Massachusetts-based flooring firm, a Nevada-based horseback trail riding operation, a Florida-based vacation rental company, and Maryland-based residential property management company.

The law enforcement work I have described, and indeed the enactment of the CRFA itself, illustrates the important role of the digital marketplace as a conduit for information. The ubiquity of smartphones and other personal computing devices has only made communication and information flow easier and more efficient than ever. Whether you are a Fortune 500 company or a start-up with a brand new innovation, the Internet is a crucial component for sales and marketing. And, while consumers may still learn about or get a recommendation for a product or service from a neighbor or family member, it is probably much more likely that they discover and investigate that product or service while they are surfing the Internet.

I know that I am preaching to the choir. This conference is ample evidence of the impact and importance of the digital marketplace, digital advertising, and the power of communication. We all recognize that as technology continues to develop, now unimaginable products and services will emerge. So what does that mean for us going forward?

First, the digital marketplace facilitates an exchange of information that benefits both providers and consumers. I think it behooves everyone in this room to

¹³ FTC Press Release, *FTC Announces First Actions Exclusively Enforcing the Consumer Review Fairness Act*, May 8, 2019, <https://www.ftc.gov/news-events/press-releases/2019/05/ftc-announces-first-actions-exclusively-enforcing-consumer-review>; FTC Press Release, *FTC Announces Two Actions Enforcing the Consumer Review Fairness Act*, June 3, 2019, <https://www.ftc.gov/news-events/press-releases/2019/06/ftc-announces-two-actions-enforcing-consumer-review-fairness-act>.

work on protecting the integrity of that information flow. There are a number of ways to do this. For advertisers and affiliated entities, adhering to the tenets of responsible corporate citizenship can go a long way. Not only does it enhance your reputation and protect your consumer relationships, it will keep you out of the crosshairs of agencies like the FTC. I commend those of you that have taken this to heart and recommend to others the value in this approach.

Second, the development of, and adherence to, industry best practices can lessen the possibility that legislators or regulators will feel the need to draft legislation or rules to reach the same results. Well-defined industry best practices can help companies avoid pitfalls that might result in law enforcement actions. Developing, implementing, and updating self-regulatory initiatives can protect and improve an industry's reputation and goodwill with consumers. When done properly, self-regulation can be pro-competitive – providing an even playing field for all industry participants.

However, self-regulation cannot work without your ongoing participation and cooperation. Utilizing experienced industry members to help develop best practices ensures that industry expertise, knowledge, and judgment is incorporated into the process. This can be especially beneficial when the business practices or technology involved is complex and industry members have the most expertise. I encourage you to consider ways that self-regulation can foster innovation and new products.

Finally – and we hear this all the time in other contexts – but I really believe it applies here: if you see something, say something. The FTC and other enforcers

rely on you in the trenches for information about deceptive and unfair acts or practices in the marketplace – or competition issues you see. Please reach out to us, whether it be a concern about competition, a troubling practice in which others are engaged, or information about trends and developments that would help inform the work of the FTC. As you may have noticed, we have several members of our FTC team presenting as panelists at the conference. That is a real indicator of our interest and commitment to these issues. We value your observations and feedback.

Thank you very much for your time today. I have enjoyed being here.