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The Federal Trade Commission and Regulating E-Commerce (Keynote Address)

Mozelle Thompson

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KEYNOTE ADDRESS:

THE FEDERAL TRADE COMMISSION AND REGULATING E-COMMERCE.

COMMISSIONER MOZELLE THOMPSON*

Thank you very much, Dean and Professor Sovern for inviting me. That was a very kind introduction and I want to thank everybody here at St. John's for their kind hospitality. As the Dean alluded to, I'm actually happy to be back here in New York. I consider New York my hometown and I am happy to participate in the program, which you have here today.

I found it interesting to reflect on the title of this program, which is Online Activities and their Impact on the Legal Profession. It presupposes that the online world has or will have a substantial influence on the legal profession, whereas many would contend that right now in our history, the most interesting issues we are confronting surround the question of how law and the legal profession will affect online activities. So it's actually the other way around.

The point is well illustrated by the two topics that the program

* Mozelle Thompson was sworn in as a Commissioner on the Federal Trade Commission on December 17, 1997.

organizers have chosen to focus on today, which is Cyber Ethics and COPPA.¹ In both cases, we are beginning to see more maturity in the Internet world where we are increasingly drawn back to basic principles about relationships between buyers and sellers, industry and consumers and indeed the government and the governed. And so everybody's looking at what are the ground rules.

More and more people are recognizing that the worldwide web is not the Wild, Wild West and that there is a place for the settled, the familiar, and the customary. So the challenge for all of us, especially for lawyers, is to determine how we apply well-understood principles to new markets and the new economy including the Internet. I can tell you a little about how the FTC has chosen to do that with regard to new economy issues and more specifically in the areas of privacy and consumer protection in e-commerce.² They are really excited about this.

Perhaps toward the end of my talk, I can touch on how these issues relate to the role of lawyers and their clients. By the way, some of those people used to work at dot coms. Now, at the outset, because I was a general counsel I actually say this with a straight face, I'm required to tell you that my comments are my own and not necessarily those of the Commission as a whole or other Commissioners. But they at least reflect one-fifth of the Commission.

Perhaps a good place to begin is to learn a little bit of something about the audience here. It always helps me when I

¹ Children's Online Privacy Protection Act, 15 USC §6501(2001). See Kenneth A. Michaels, *Young Lawyer's Journal: Internet Privacy Protection: Complying with COPPA*, 14 CHI. B. ASS'N. REC. 56, (2000) (describing situations in which Act would be in effect and suggesting close scrutiny on how Act's definitions are interpreted); see also Jennifer E. O'Brien, et al., *Privacy Compliance Symposium - State, National and International Requirements: European Union Privacy Directive: A Primer*, 72 PA. B. ASS'N. Q. 84, 91 (2001) (comparing types of sites and noting that even non 'children-oriented' sites must comply if operator is aware site may collect personal information on children using site).

² See Meeting Notice, Public Workshop: Emerging Issues for Competition Policy in the World of E-Commerce, 66 Fed. Reg. 17,177, 17,178 (Mar. 29, 2001) (announcing workshop to assess commerce issues arising out of business-to-business and business-to-consumer internet transactions); Meeting Notice, Public Workshop: Alternative Dispute Resolution for Consumer Transactions in the Borderless Online Market, 56 Fed. Reg. 7,831, 7,831 (Feb. 16, 2000) (focusing on ways to cultivate and maintain consumer confidence in alternative dispute resolution programs without negatively impacting business community); see also Steven A. Hetcher, *Norm Proselytizers Create a Privacy Entitlement in Cyberspace*, 16 BERKELEY TECH. L.J. 877, 927-928 (2001) (suggesting FTC's motive for increased regulation on privacy can be explained by 'public choice' theory in which agency is vying for position as top regulator of online activity).

go out to talk to people. How many of you are private attorneys advising clients about Internet matters? Don't be ashamed. How many are law students looking for a free meal right before finals? Okay. Anybody here from the press? Because they can leave. Okay. Do you think it would be helpful if I spent just a few minutes telling you about the Federal Trade Commission and what we do? Is that helpful to you? Because we're a small agency and there are those who love us.

Well, for those of you who do not know, we are a law enforcement agency that serves an important function in our free market economic system. We are an independent agency responsible for enforcing laws that ensure open competition in the marketplace and the protection of American consumers from unfair or deceptive trade practices.³ I am one of five commissioners and we have about 1,000 attorneys and economists who support us. And there are offices around the country including the Northeast region here in New York, and there are people here, you can raise your hands, from our office in Manhattan.

In reflecting on the role of the government in the Internet, we have to take a step back and look at the nature of the Internet itself. The Internet was actually a product of government investment and action, and the US government has always had a role in supporting and nurturing it. I am always surprised by the attitude of a lot of people in the technology sector who think that government has no role to play in the development of the Internet. Because notwithstanding those preconceptions, in the past there are those in the Internet industry who have acted as though the coming of the Internet in e-commerce was bigger than Prometheus giving fire to man.

With the dot com shakeout last year, we are presented with a somewhat different and more realistic picture. Rather than constituting one of life's essential elements, the Internet can instead be viewed as a vehicle for transforming relationships;

³ See 49 USCS § 10301 (2001); see also Morton Rosenberg, *Separation of Powers and the Executive Branch: The Reagan Era in Retrospect: Congress's Prerogative Over Agencies and Agency Decisionmakers: The Rise and Demise of the Reagan Administration's Theory of Unitary Executive*, 57 GEO. WASH. L. REV. 627, 657 (1989) (discussing evolution of FTC). But see Loren A. Smith, *Judicialization: The Twilight of Administrative Law*, 1985 DUKE L.J. 427, 444-445 (1985) (comparing conflicting views toward regulation and debating court control over regulatory issues).

because the Internet is an open network that provides easy access to information, it has the potential to make users smarter but not necessarily wiser, as not all of the available information on the Internet is good and having access does not ensure proper use.

But I think openness does facilitate a closeness between users that is based on a feeling of familiarity and that is unlimited by geography. So that draws together people to people and businesses to consumers and businesses to other businesses. In other words, you do not have to transact business with the shop down the block or even one in the same city or one in the same country.

So the Internet transforms the constrained buyer into one that can make more choices based upon better information wherever he or she might be, simply through the click of a mouse. That creates opportunities for buyers and sellers, but that also creates some other opportunities that are not quite as pleasant, including the great potential for loss of privacy.

Privacy and data protection are key elements that are necessary for realizing the opportunities presented by the new economy because they are more and more often viewed as proxies nowadays for consumer trust and confidence. In other words, if you are going to take advantage of me for my data, then you are going to treat me badly for any other reason that I interact with you on the Internet. So, what we have seen is that people are trying to get a balance.

Consumers do want to personalize relationships, consumers want to go to Amazon.com and receive book recommendations based upon their prior purchases. And many consumers also want to use a retail Web site that retains some of their credit information so they do not have to put in their credit data every single time they buy something.

But at the same time, they do not like the idea that their personal information, be it what books they've purchased or what they've looked at or even what sites they visit, is being sold to third parties without their permission. And there are numerous studies that confirm these concerns and we have also seen the very strong and negative reaction to such things as cookies, even though these are pretty good, Web bugs, and other technological innovations that follow a consumer around the Web without their

knowledge.⁴

Now, for all of you who think you do not need to worry about this consumer stuff because you are really a business junkie, it is important to recognize that these kinds of considerations are not limited to the business to consumer contexts.

Your anti-trust professor will tell you a little bit about this too, because there's a greater recognition that data today is a valuable commodity. Professor Sovern will tell you about last week's Trans Union opinion where the Court of Appeals in DC ruled against Trans Union selling mailing lists based on credit information that they gather on all of us.⁵ That court found that there is a substantial government interest in protecting privacy.⁶

In addition, companies have to be accountable to consumers and they also have to be accountable to their business partners about the information that they wind up collecting, so that it does not go to competitors and other places where it should not be. Indeed, the heart of any effective e-business strategy is the ability to protect confidential information from business partners. It is also critical in the business-to-business context as a way to avoid anti-trust issues like price fixing and collusion.⁷

⁴ See Major R. Ken Phippen, *Consumer Privacy on the Internet: It's "Surfer Beware,"* 47 A.F. L. REV. 125, 129 (1999) (describing cookies technology as "file left on computer's hard drive to track user's travels around particular web site," and explaining how this information can be catalogued to target consumer based on this information); see also Joel R. Reidenberg, *Cyberspace and Privacy: A New Legal Paradigm? Resolving Conflicting International Data Privacy Rules in Cyberspace*, 52 STAN. L. REV. 1315, 1357 (2000) (describing different requirements for registration of web tools and possible prevention mechanisms to protect personal information). But see John Schwartz, *Government is Wary of Tackling Online Privacy*, The New York Times, Sept 6, 2001 (noting effect of online privacy on politics).

⁵ Trans Union Corporation v. FTC, 267 F.3d 1138 (11th Cir. 2001), cert. denied, 122 S.Ct. 2386 (2002).

⁶ See *Id.*, at 1142-1143 (citing *Blount v. SEC*, 61 F. 3d 938, 946 (D.C. Cir 1995) to determine required level of scrutiny for violation of under inclusive statute); see also *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965) (stating right to privacy occurs because "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance." And differentiating 'sacred' right to a man's privacy as "not the breaking of his doors and the rummaging of his drawers, that constitutes the essences of the offence; but it is the invasion of his indefensible right of personal security, personal liberty and private property, where that right has never been forfeited by his conviction of some public offence . . ."); Susan Clement et al, *The Evolution of the Right to Privacy After Roe v. Wade*, 13 AM. J.L. & MED. 368, 394-395 (1987) (following progression of right to privacy and suggesting more thorough regulatory scheme for protecting privacy interests).

⁷ See *Report of the Antitrust Committee*, 22 ENERGY L. J. 143, 158 (2001) (summarizing October, 2000 report, *Entering the 21st Century: Competition Policy in the World of B2B Electronic Market Places* which described five necessary elements to determine if anticompetitive coordination has taken place. They are: 1) the structure of

That means the emergence and development in the growth of future commerce will turn in large part on how information is gathered by companies about everyone they do business with. The level of trust that businesses engender in their consumers and business partners will determine the level of success they experience. This bond is how e-business will include consumers in their value proposition. In other words, what is in it for me. And in some ways, isn't that what I talked about earlier? About what is familiar, and what is customary? About how we begin to look at some very basic principles and how they apply to this new era?

The government's role is really important here because the issue that we are more often confronted with is not whether basic principles of dealing apply, but how those fundamentals will apply in the new economy. In other words, we have to answer the question of whether we should take a more interactive and open approach to the roles of government industry and consumers. And for us at the FTC, that answer has been a resounding yes.

Yes, because the issues that we are dealing with in the e-economy has significant public policy implications that will set the course for how we view innovation, and modernizing relationships between buyers and sellers as well as businesses to businesses. So the challenge for us in government, and what makes it an interesting time to be there, is to recognize the features of the Internet and new technology and to understand that the choices we make through intervention, facilitation, and signaling the marketplace can carry significant consequences.

So what does that tell me for the three years that I have been at the Commission and working on these issues? Well, I have certain guiding principles. One of them is that we should approach these issues with a degree of balance and circumspection, because markets, especially high tech and

the market served by the B2B; 2) who is sharing information; 3) the type of information; 4) the information's age; and 5) ability to obtain information from sources other than B2B, and whether a less restrictive alternative is available); Mark S. Popofsky, *Charting Antitrust's New Frontier: B2B*, 9 GEO. MASON L. REV. 565, 586 (2001) (forecasting technology will only slightly change traditional antitrust law); William Kovacic, *Antitrust After Microsoft: Upgrading Public Competition Policy Institutions for the New Economy*, 32 UWLA L. REV. 51, 65 (2001) (noting expansion of technically savvy employees in non-technical positions in response to increased need for enforcement).

Internet markets, are fast moving and typically out-pace our government's analysis of public policy issues.

Second, is that we should also approach some of these questions with a degree of skepticism. So it is important, especially from a government perspective and we like to make rules, that's what we do, that we fight the urge to believe that any one group has all the answers. So if industry claims to know all the answers to online privacy, or government claims to have all the answers to open access to broadband, or consumer groups claim to have all the answers to the thorny issues of cross border jurisdiction, don't believe them. That leads to the next principle - Interactivity.

The best responses to these thorny issues are often interactive; responses that bring together the range of stakeholders to consider what those policy issues are and the range of potential responses. We also have to recognize that government may not be the only, or even the best vehicle to provide a solution. Because of this, I think the next principle is that we should try to create opportunities and government should be aware of our role incentivising innovation by creating a marketplace that values positive business to consumer relationships as well as opening vigorous competition.

Finally, any approach to these problems must be organic. Our role has to be to educate consumers and businesses about how this market changes; embrace new ideas and flexibility so that any rules that occur can change over time to reflect changes in market conditions.

Now, for those of you who have followed our work, that is what we did with online privacy. When we supported self-regulation, even though consumer groups tended to paint an Orwellian picture of online businesses exploiting all consumers.⁸ Although I will tell you there is some truth to that. How many of you have worked for any of these companies in Silicon Alley in Manhattan?

⁸ GEORGE ORWELL, 1984 (Harcourt, Brace, Jovanovich ed. 1949). See Flavio L. Komuves, *We've Got Your Number: An Overview of Legislation and Decisions to Control the Use of Social Security Numbers as Personal Identifiers*, 16 J. MARSHALL J. COMPUTER & INFO. L. 529, 535 (1998) (noting majority of personal information available extends beyond vendor-consumer relationship); Richard L. Marcus, *Complex Litigation at the Millennium: Confronting the Future: Coping with the Discovery of Electronic Material*, 64 LAW & CONTEMP. PROBS. 253, 270 (2001) (suggesting increase in internet-connected home surveillance methods).

They are companies who are involved in the world of online advertising, and data collection. I call them the slicers and the dicers.

It is very interesting, one of the things that Mayor Giuliani does to try to promote industries is that he has this thing called the Silicon Alley Street Fair in August. So around Union Square, all of these small companies are there showing their wares. I was there in a T-shirt and shorts and wandering around, talking to all these young CEO's about what they were doing to surreptitiously collect information about all of you and how they were going to sell it to the highest bidder.

I ran into one CEO, and I said aren't you a little concerned about the fact that people are not happy with the idea that you are breaching their privacy? And he said with a straight face, I am going to do as much as I can and go as far as I can until somebody stops me. And I gave him my card and told him he should look me up sometime.

Not withstanding that Orwellian picture, the reality is that consumers can actually benefit from data collection as well. But one of the big problems that you see a lot in the Internet industry is that they have not made their case to you the public, as to what is in it for you. Why you can benefit by working with them? So that is why we have supported some form of privacy legislation that incorporates the important information protections of: notice,— they should tell you they're collecting data;⁹ choice,—they should give you a choice whether to participate,¹⁰ access,— give you reasonable access to what they're collecting about you, so you can be sure it's right,¹¹ and

⁹ See generally Fed. Trade Comm'n, *Online Profiling: A Report to Congress, Part 2, Recommendations* (2000), available at <http://www.ftc.gov/os/2000/07/onlineprofiling.html> (reporting to Congress FTC's recommendations on consumer internet privacy concerns); see also Center for Democracy & Technology, *Legislation Affecting the Internet: 107th Congress*, (2001-2002), at <http://www.cdt.org/legislation/107th/privacy/> (last visited Aug. 31, 2002) (describing the various bills before Congress relating to internet consumer privacy). But see Andy Sullivan, *FTC Chair Urges Enforcement, Not New Privacy Laws*, REUTERS (October 4, 2001), available at <http://news.cnet.com/investor/news/newsitem/0-9900-1028-7410945-0.html> (last visited Aug. 31, 2002) (explaining that FTC Chairman Timothy Muris plans on emphasizing greater enforcement of existing privacy laws through larger staff and increase in budget rather than introducing new privacy legislation).

¹⁰ See Fed. Trade Comm'n., *supra* note 9, at 4 (emphasizing choice to participate or not should be made after being informed about network advertiser's policy regarding collection practices).

¹¹ See *id.*, at 5 (addressing need for consumers to be provided with reasonable access

security,— make sure the information you're giving to someone actually gets to the people who you wanted to get to.¹²

We recommended this while also recognizing that self-regulation should be important. That industry that does it themselves should be rewarded by having their own self-policing, but we need at least one legislative tool to get at the holes in the Swiss cheese. And I think that that is very important and in some ways that is also what the COPPA legislation that you will hear about this afternoon did for children.

So I raised this because it shows you a degree of balance on how we approach these issues because they are complicated. But how lawyers in some cases have to actually fight their initial reaction to say, let us have a hard and fast rule, the answer is X, when we do not even necessarily know what the question is yet.

Another example of that: how many people know what B-to-B marketplaces are? The B-to-B marketplace is sort of this online phenomenon where companies who are usually competitors can get together.¹³ It is usually done in the context of companies who want to engage in some sort of streamlining of their purchasing stream. I'll give you an example.

We looked at one called Covisint,¹⁴ in which the major automakers decided to get together, that should send up some red flags right there, and create an entity, a separate company that would essentially be a funnel for all of those who had supplied goods, parts, all sorts of things, to have a uniform system of supply. This online company, Covisint will be able to engage in such practices like having online auctions, for people to bid into, provide them with supplies and then work for reducing the cost to companies.

to identifiable information retained by network advertisers for profiling).

¹² See *id.* (explaining advertisers must make reasonable efforts to protect data they collect from being used or accessed inappropriately).

¹³ See Dictionary.com., at <http://www.dictionary.com> (last visited Aug. 31, 2002) (defining "B2B" as "Electronic commerce between businesses, as opposed to between consumer and business (B2C)"); see also BUSINESS TO BUSINESS MAGAZINE, Vol. XI, Issue 1 (Jan/Feb 2002), available at <http://www.business2business.on.ca/welcome2.html> (devoting itself entirely to B2B).

¹⁴ See *About Covisint*, at <http://www.covisint.com/about/> (last visited Aug. 31, 2002) (describing Covisint as central hub where suppliers of all sizes do business in single environment using same interface, user id., and password); see also *Exclusive Interview with Kevin English, Chairman of the Board, President and CEO of Covisint*, (Sept. 25, 2001), available at <http://www.telematicsupdate.com/subpages.asp?news=20920> (discussing Covisint's management and services).

Now, our initial knee jerk reaction when we see something like that is that this is not a good thing. For instance, automakers get together to try to control prices and supplies of goods. But instead what we said, is there are some circumstances where it is possible that this could be a good thing for consumers because it could cause reduction in prices. So instead of saying, no, you can't do this, we had a workshop to explore the issue.

We went to the Federal Register and published a notice. Then we held a two-day workshop attended by over 550 practitioners, experts, and yes, even law professors, who came in to talk to us.¹⁵ We shared information with them about areas of concern that we have about price fixing and collusion, and they could tell us the circumstances under which consumers could actually benefit. Because of what we learned on the subject, when reviewed Covisint, we issued an order saying we are not going to stop this company from being created. Whether it benefits consumers or whether it's anti-competitive, will be determined by how they operate, right?

The FTC Staff calls this our sting operation—every step you take, every move you make, we will be watching you.

Remember when I talked about principles about incentivising innovation? Well, what it did was instead of telling the whole segment of the marketplace to stop any new ideas from this area, we said to investors, hold on, this might be something that might be worthwhile. Let's make the marketplace test whether this kind of facility can actually provide benefits to consumers or not.

Now I will tell you in the past six to eight months, they have not done well at all. Primarily, because they have failed to convince investors that there is a benefit to consumers. But there are some that do exist that have been very successful. For example, e-steel which is a group of small steel manufacturers in middle of America, who use this online marketplace to provide spot market supply of steel so they can actually make sure that their small company can provide steel to the marketplace around the world whenever there is a limited need.¹⁶ That is something

¹⁵ See NATIONAL ARCHIVE AND RECORDS ADMINISTRATION, *What is the Federal Register and How Can the Public Use it?*, at <http://www.nara.gov/fedref/whatisfr.html> (last visited July 20, 2002) (describing Federal Register as official daily publication for rules, proposed rules and notices of federal agencies and organizations).

¹⁶ E-Steel has changed its name to "NewView Technologies". See <http://www.newview.com/home.shtml> (last visited Aug. 31, 2002) (containing information

that these companies couldn't have done individually, but having these companies do it collectively is a benefit. So there are some benefits out there.

For those of you who are just chomping at the bit, in about I think what is it, the 3rd and 4th of May, we are having our second workshop on this subject in Washington. It is free, it is open and we are going to be talking about what we call the morphing of these marketplaces into something else. For example, here is a question for you. You can chew on this and you will get an exam on this later. If a group of companies decide to create a Napster like entity, or more like Neutella, which does not have a central company there but has a set of software and it allows companies to feed into it, and trade information about prices, is that illegal? Does that violate antitrust laws?

It may, but it depends on what they know and what they do not know. If you use peer-to-peer technology to share information, can that shield you from the antitrust laws? These are among the questions that we will be talking about.

And what is interesting about it, last year, this kind of facility would not even have been possible, let alone people thinking about how to do it. So that illustrates how you take some very important principles about competition and say those principles do not make sense, but how do we apply them now?

Before we get to questions, I want to say this. So what does this mean to all of you? It means you had better study for your exams. It means that perhaps in the next year or so, you will be representing a startup or a bankrupt startup or some new wireless technology company that is trying to create a B-to-B marketplace or something else. How should you approach that? And how should you work with those clients?

I think the first thing you have to do is begin by identifying core principles that might govern that client's activities. Whether they be antitrust principles, consumer protection principles, and remember what I told you, it's not the "Wild, Wild West" out there. Fraud and deception for example in consumer protection, it does not matter whether it occurs on the telephone or on the Internet, it is still illegal.

Second, you should look for opportunities to form interactive

connections between government, your clients and consumers, the stakeholders. That is your best opportunity to smoke out potential problems and find solutions. And you can do that for free, preferably before you are a defendant.

And third, you should always strive to find ways to include your end user in the value proposition. To show them what is in it for them. We have lost our way somewhat in that last year, but I think we're back to that now. And it is very interesting, I remember a year and a half ago I gave a speech to a lot of dot coms for Fortune Magazine and they acted as if I did not know anything, that I just did not get it. And I went back to that group this winter and suddenly I am a lot smarter. Trust your gut, your gut is very important here.

So those are some rules and some ideas you can think about. It might give you some perspective on some of the things you will hear this afternoon. All of you are in a unique position to take the knowledge that you are getting here and that you have gotten in the marketplace and provide guidance to some who may not understand those basic principles. That is a challenge for you and if you're lucky, like some people here, you can make money doing it.