

Competition, Consumer Protection and the Right [Approach] To Privacy

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Briefing on Big Data, Privacy, and Antitrust

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*The views expressed in these remarks are my own and do not necessarily reflect the views of the Federal Trade Commission or any other Commissioner.

Roadmap

- * The three phase evolution of privacy in the U.S.
- * The early, and persisting, distinction between competition law and consumer protection law
- * Modern calls to blend privacy, antitrust analysis
 - * The FTC's response
 - * My policy concerns
- * A proposed three-part test for choosing antitrust or consumer protection law

Evolution of Privacy Laws In U.S.

- * Personal privacy laws in the United States have evolved in three phases during the modern era.
- * The first period began with Warren and Brandeis and lasted until about the Second World War. This period exhibited a growing recognition of personal privacy and the attempt to protect privacy by extending existing doctrines of law, like trespass.
- * Next came the post-War era and early computer age, in which federal laws developed to augment state and common laws and help reconcile the growing commercialization of personal data and the need to protect the individual;
- * Finally, the modern era that began with commercial use of the Internet in the 1990s and in which we now find ourselves.

The Early Modern Era of Privacy

- * Warren and Brandeis captured the fear of new technology in the face of change in the Second Industrial Revolution.
- * They wrote their paper in response to the creation of the portable camera by Kodak in 1888 and the rise of gossip journalism.
- * They recognized that exposure of personal details to the public could create harm.
- * Their work began a trend to states' recognition of private rights of action, mainly under tort law.

Mid-Century Developments in Privacy Laws

- * Second wave of increased privacy concerns occurred during the immediate post-WWII boom years.
- * Computers and telecommunications technology allowed companies to create files on people that were used to assess creditworthiness.
- * People wanted the credit; but were concerned about the collection, storage, and use or misuse of their personal information.
- * Congress responded with expanded legal protections, including the Fair Credit Reporting Act in 1970.

Relationship Between Privacy and Commerce Today

- * Third wave began with advances in Internet technology that allow for easy collection and use of consumer data.
- * Most online businesses are transactional platforms; they require consumer data as an input to get to scale, realize network effects, and attract advertisers and others to the more heavily monetized side of the platform.
 - * Websites thrive on data as an input – e.g., search engines like Google improve the more queries they receive; Kayak’s data mining technology allows it to offer predictive information about the value of a deal to consumers
- * Consumer data also can be a commodity.

Early Competition and Consumer Protection Confusion at the FTC

- * Initially, Congress gave the FTC authority over “unfair methods of competition.”
- * The early FTC applied this authority to police consumer protection harms, such as false advertising, by reasoning that such acts harmed competitors.
- * With this reasoning supported by the Supreme Court, the FTC began an ambitious consumer protection campaign.

Early Competition and Consumer Protection Confusion at the FTC

“It is that condition of affairs [the loss of competition] which the Commission is given power to correct, and it is against that condition of affairs, and not some other, that the Commission is authorized to protect the public.” The Court closed its analysis by proclaiming, “Unfair trade methods [such as false advertising] are not per se unfair methods of *competition*. . . . If broader powers be desirable, they must be conferred by Congress.”

-- FTC v. Raladam Co., 283 U.S. 643 (1931).

Competition and Consumer Protection Distinct

- * The *Raladam* decision halted the FTC's consumer protection efforts under a competition authority.
- * Congress subsequently passed the Wheeler-Lea Act of 1938, which codified the FTC's separate "unfair or deceptive acts or practices authority."
- * Since that time, courts have recognized the separate and distinct, yet complementary roles of competition and consumer protection laws.

Modern Competition Law and Privacy

- * Multiple groups of proposals to apply competition law to privacy concerns now exist.
 - * Assessing privacy as a non-price dimension of competition
 - * Balancing corporate actions harming privacy against competition concerns
 - * Consumer deception as a form of monopolization or other antitrust violation
 - * Harm to privacy by control of data constitutes potential competition violation

Modern Competition Law and Privacy

- * Each of these approaches are the product of thoughtful consideration.
- * We argue that these approaches to combine competition and consumer protection to protect privacy are largely unnecessary , difficult to apply in practice, and would create doctrinal confusion.
- * The competition and consumer protection laws serve well as complements.

Recent FTC Approaches

- * **Google/DoubleClick**
- * **Facebook/WhatsApp**
- * **Google/Nest**

Data as a Commercial Good

- * **Microsoft/Yahoo!**
- * **Google/ITA**
- * **FICO v. Experian**
and similar cases

Privacy Can Be Commerce

- * Consumers value privacy and worry about data collection
- * More and more websites and commercial services are competing based on their privacy settings and offerings.
 - * Whisper
 - * SnapChat
 - * Apple and Android
 - * DuckDuckGo

Concerns About Inserting Privacy Values Into Competition Analysis

- * Ignores efficiencies from consolidation of data
- * Distorts antitrust analysis with outcomes depending more heavily on the reviewer's unique personal views of privacy.
- * Discriminates in favor of “organic” collection of data, even though outcomes could be the same
- * Creates incentives for firms to experiment with new deal structures to obviate “privacy reviews”
- * Risks innovation from data consolidation

CMA's Report on the Commercial Use of Consumer Data

- * Increased competition concerns in data markets where
 - * consumer data is a significant input into products and services produced;
 - * there are few or no substitutes for data collected in a particular market;
 - * a business with existing market power controls the collection of consumer data in that market; and
 - * there is an absence of competition over privacy.
- * “[W]e see no reason, at present, why our existing competition and markets tools would not be effective at tackling conduct that gave rise to competition concerns in these markets.”

Choosing the Right [Approach] To Privacy

- * What is the nature of the harm?
- * What is the likely scope of the harm?
- * Can the available legal remedies address the harm?

Nature of the Harm

- * Congress and States have tailored specialized laws to specific harms – harm to competition is not a subjective exercise and harm to privacy is not typically objective.
- * Combining these specific types of laws risks doctrinal distortion for no apparent net gain in enforcement.

Likely Scope of the Harm

- * Antitrust focuses on economic efficiency and long-run consumer welfare
 - * Seeks to protect future consumers
- * Consumer protection laws, including those relating to privacy, are about maintaining “consumer sovereignty”
 - * Sanctity of the transaction and reasonable consumer’s expectations

Availability of Adequate Remedy

- * Blocking transactions does not necessarily stop data transfer or promote privacy interests
- * Parties could simply house data in standalone entity and enter licensing arrangements
- * Unless there is a related harm or likely harm to competition, antitrust laws also have no means of protecting privacy

Conclusion

*Thank you for your time

*Any questions?