TECHFREEDOM
LAW FOR A DYNAMIC FUTURE

Comments of

TechFreedom

Berin Szóka,[i] Andy Jung,[ii] and Bilal Sayyed[iii]

At the

Open Commission Meeting

November 16, 2023

---

[i] Berin Szóka is President of TechFreedom, a nonprofit, nonpartisan technology policy think tank. He can be reached at bszoka@techfreedom.org.

[ii] Andy Jung is an Associate Counsel at TechFreedom. He can be reached at ajung@techfreedom.org.

[iii] Bilal Sayyed is Senior Competition Counsel at TechFreedom. He can be reached at bsayyed@techfreedom.org.

TABLE OF CONTENTS

INTRODUCTION

On November 16, 2023, three of TechFreedom's legal scholars delivered remarks at the FTC's Open Commission Meeting. Their oral remarks are presented here, lightly edited for clarity.

I. Comments of Berin Szóka

The Federal Communications Commission has proposed reclassifying broadband as a Title II common carrier service. As in 2015, that would strip the FTC of its jurisdiction, which excludes common carriers. The FTC should file comments with the FCC defending its jurisdiction and explaining its approach.

The FCC repealed its net neutrality rules in 2018. Yet the Internet remains as neutral as ever. That's because broadband providers have long committed to respect net neutrality principles, and the FTC enforces those commitments.

The FCC calls consumer protection law inadequate because industry's commitments are voluntary. But the judges who upheld the FCC's 2015 rules did so precisely because those rules, too, were "voluntary."[1] If, they said, an ISP "were to . . . hold itself out to consumers as offering them an *edited* service rather than *indiscriminate* internet access . . . it would bring itself outside the [FCC's] rule."[2]

This surprising conclusion flowed from the FCC's definition of broadband internet access service: the FCC's rules applied only to services that promised neutral connectivity. The same goes for the new proposed rules. That makes the FCC's approach essentially similar to how the FTC polices deception—except the FCC would lose jurisdiction entirely over any service that involved *any* clearly disclosed non-neutral practice. The FTC, by contrast, could still enforce every representation about such non-neutral broadband service, punish every material omission, and also police non-neutrality as an unfair or anti-competitive practice. When it comes to marketing representations, the FTC has a lot to teach the FCC.

Moreover, the FTC will continue to play a much larger role than most realize. Few constitutional scholars expect the courts to uphold reclassification of broadband. In 2017, then-Judge Brett Kavanaugh called broadband regulation a "major question" that the FCC can't decide without unambiguous authority.[3] The Supreme Court has since struck down a

---

[1] U.S. Telecom Ass'n v. Fed. Commc'ns Comm'n, 855 F.3d 381, 390 (D.C. Cir. 2017).

[2] *Id*. (emphasis added).

[3] *Id*. at 419.

slew of agency actions under the major questions doctrine.[4] Title II reclassification is almost certainly next.

But the sky won't fall without FCC rules; it hasn't fallen yet. The FTC will continue to be the *real* cop on the net neutrality beat, but the sooner the Commission explains its approach, the better. Comments to the FCC are the right place to start.

II. Comments of Andy Jung

This fall, the Commission has spent considerable time discussing artificial intelligence and copyright. In October, the Commission hosted a roundtable on creative economy and AI,[5] and last week the FTC submitted a comment on AI to the U.S. Copyright Office.[6]

The comment claims that conduct like selling AI-generated content mimicking an artist may both violate "the copyright laws" and "also constitute an unfair method of competition or an unfair or deceptive practice."[7] At the October roundtable, Commissioner Slaughter listed copyright alongside the FTC's UMC and UDAP powers, describing them as "powerful tools we can use" to protect artists from AI.[8]

Let's be clear: none of the FTC's authorizing statutes mention copyright.

---

[4] Ala. Ass'n of Realtors v. Dep't of Health & Human Servs., 141 S. Ct. 2485 (2021); National Federation of Independent Business v. OSHA, 595 U.S. __ (2022) (Gorsuch, J., concurring); West Virginia v. EPA, No. 20-1530 (U.S. June 30, 2022).

[5] *Creative Economy and Generative AI*, FTC, https://www.ftc.gov/news-events/events/2023/10/creative-economy-generative-ai (last visited Nov. 16, 2023).

[6] Comments of FTC on Artificial Intelligence and Copyright, Docket No. 2023-6 (Oct. 30, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/p241200_ftc_comment_to_copyright_office.pdf.

[7] *Id.* at 5. The comment also broadly states that "conduct that may be consistent with the copyright laws nevertheless may violate Section 5" of the FTC Act. *Id.* at 6.

[8] Statement of Rebecca Slaughter at *Creative Economy and Generative AI* roundtable at 4, FTC, https://www.ftc.gov/system/files/ftc_gov/pdf/creative-economy-and-generative-ai-transcript-october-4-2023.pdf (last visited Nov. 16, 2023).

> Copyright provides your livelihood and the ability to continue to create and promote further creation and learning. Generative AI poses important questions and concerns about how copyright law and policy must be applied or adapted to continue to both protect creators and promote the useful arts, but copyright is not and cannot be the only tool to address the deeply personal concerns creators hold about how their works are used. The Writer's Guild of America has demonstrated the power of collective bargaining to secure important rights on how they will interact with, use, and be subjected to generative AI. Many but not all states have laws that provide rights to publicity, which may provide avenues for legal protection and compensation, and as the chair noted, the FTCs prohibitions against unfair and deceptive practices and unfair methods of competition apply to applications of AI just as much as they have to every other new technology that's been introduced in the market over the last hundred years. These are powerful tools we can use on behalf of creators, workers, and consumers, and there may also be gaps in the law that need to be filled.

Copyright law has a structured and unambiguous enforcement process centered around the U.S. Copyright Office,[9] whose authorizing statutes do not mention the FTC.[10] On its website, the Copyright Office lists executive branch agencies it works alongside on "copyright matters." It does not list the FTC.[11]

In its comment to the Copyright Office, the FTC expressed "an interest" in the question of "where to draw the line between human creation and AI-generated content."[12] But "an interest" is not equivalent to congressional authorization to regulate.[13]

The Commission proposes to use its unfairness authority to regulate AI-related copyright violations. To prohibit an AI practice as unfair, the Commission would have to show that it likely causes "substantial injury to consumers" that is not outweighed by countervailing benefits and that consumers cannot reasonably avoid.[14]

The FTC has no authority or experience related to copyright. It has no expertise weighing the tradeoffs between creativity, innovation, and free speech inherent to AI-generated content.

The Commission should tread carefully: courts are likely to strike down any broad conception of unfairness which would allow the FTC to regulate copyright. Here, AI is merely a red herring.

III. Comments of Bilal Sayyed

The FTC's monopolization and UMC case against Amazon raises interesting and complex questions of law.[15] So, too, does its monopolization and exclusive dealing case against

---

[9] 17 U.S.C. § 501.

[10] *Id.* 17 U.S.C. §§ 701-710.

[11] *Overview*, U.S. COPYRIGHT OFFICE, https://www.copyright.gov/about/ ("The Copyright Office works on a wide variety of copyright matters with the courts and executive branch agencies, such as the Department of Justice, the Department of State, the Office of the U.S. Trade Representative, the Department of Commerce (including the U.S. Patent and Trademark Office), and the Office of the Intellectual Property Enforcement Coordinator.") (last visited Nov. 16, 2023).

[12] Comments of FTC on Artificial Intelligence and Copyright at 5, Docket No. 2023-6 (Oct. 30, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/p241200_ftc_comment_to_copyright_office.pdf.

[13] Similarly, the recent Executive Order on AI is not equivalent to congressional authorization. Moreover, the EO "encouraged" the FTC "to exercise the Commission's existing authorities" to protect consumers and competition "from harms that may be enabled by the use of AI." Exec. Order No. 14110, 88 Fed. Reg. 75191, 75209 (2023) These existing authorities do not cover copyright. Instead, copyright law leaves little wiggle room for FTC to assert any regulatory power.

[14] 15 U.S.C. § 45(n).

[15] Complaint, FTC v. Amazon, Case. No. 2:23-cv-01495 (W.D. Wa., Nov. 2, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/1910134amazonecommercecomplaintrevisedredactions.pdf.

Syngenta,[16] the monopoly maintenance case against U.S. Anesthesia Partners[17] and the monopolization case in the Endo/Impax matter.[18] In these four matters, the Commission has chosen to bypass the FTC's administrative trial and Commission review process and file in federal court. The very significant Facebook,[19] Vyera Pharma,[20] SureScripts,[21] Shire,[22] and Qualcomm[23] monopolization cases were also filed in district court, by recent previous Commissions.[24]

---

[16] Amended Complaint, FTC v. Syngenta, Case. No. 1:22-cv-00828-TDS-JEP (M.D. N.C., Oct. 5, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/0149-2023-10-05-Lesser-Redacted-Amended-Complaint-%28PursuanttoSept28Order148%29.pdf.

[17] Complaint, FTC v. U.S. Anesthesia Partners (S.D. Tex., Sept. 21, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/2010031usapcomplaintpublic.pdf.

[18] Complaint, FTC v. Endo Pharmaceuticals, Case No. 1:21-cv-217-RCL (D.D.C., Jan. 1, 2021), https://www.ftc.gov/system/files/documents/cases/003_2021.03.02_revised_redacted_complaint.pdf.

[19] Complaint, FTC v. Facebook, Case No. 1:20-cv-03590 (D.D.C., Dec. 9, 2020), https://www.ftc.gov/news-events/news/press-releases/2020/12/ftc-sues-facebook-illegal-monopolization.

[20] Complaint, FTC v. Vyera Pharmaceuticals, Case No. 20-cv-00706 (S.D.N.Y., Jan. 27, 2020), https://www.ftc.gov/legal-library/browse/cases-proceedings/161-0001-vyera-pharmaceuticals-llc.

[21] Complaint, FTC v. Surescripts, Case No. 1:19-cv-01080 (D.D.C., Mar. 17, 2019), https://www.ftc.gov/system/files/documents/cases/surescripts_redacted_complaint_4-24-19.pdf.

[22] Complaint, FTC v. Shire Viropharma, Civ. No. 17-cv-0013 (D. Del., Feb. 7, 2017), https://www.ftc.gov/system/files/documents/cases/170216viropharma_unredacted_sealed_complaint_.pdf.

[23] Complaint, FTC v. Qualcomm, Case No., 5:17-cv-00220 (N.D. Cal., Jan. 17, 2017), https://www.ftc.gov/system/files/documents/cases/170117qualcomm_redacted_complaint.pdf.

[24] In addition to these monopolization matters, the Commission brought another two dozen monopolization cases subsequent to the U.S. Government's initiation of its monopolization case against Microsoft in the mid-1990s. Most matters were settled without litigation, or prior to a federal court decision. Daniel Francis lists twenty-three FTC monopolization cases for the June 1998 through June 2021, in Daniel Francis, *Making Sense of Monopolization*, 84 ANTITRUST L. J. 779 (2022). Additional monopolization cases or matters with monopolization counts not included in that list include the more recent monopolization cases filed by the current Commission, as discussed in the text, and another 10 cases filed after May 1998. *See* Complaint, Pool Corporation, Docket No. C-4345 (Jan. 10, 2012), https://www.ftc.gov/sites/default/files/documents/cases/2012/01/120113poolcorpcmpt.pdf; Complaint, Polypore International, Docket No. 9327 (Sept. 9, 2008), https://www.ftc.gov/sites/default/files/documents/cases/2008/09/091008cmp9327.pdf; Complaint, FTC v. Cephalon, Civ. No. 08-0244 (D.D.C., Feb. 13, 2008), https://www.ftc.gov/sites/default/files/documents/cases/2008/02/080213complaint.pdf; Complaint, Biovail (Apr. 23, 2002), https://www.ftc.gov/sites/default/files/documents/cases/2002/04/biovailcomplaint.htm; Complaint, MSC Software, Docket No. 9299 (Oct. 10, 2001), https://www.ftc.gov/system/files/documents/cases/001_0077.pdf; Complaint, FTC v. Hearst Trust, Civ. No. 1:01CV00734 (D.D.C., Apr. 4, 2001), https://www.ftc.gov/sites/default/files/documents/cases/2001/04/hearstcmp.htm; Complaint, Schering-Plough, Docket No. C-9297 (Mar. 30, 2001), https://www.ftc.gov/sites/default/files/documents/cases/2001/04/scheringpart3cmp_0.pdf; Complaint, Abbott Laboratories, Docket No. C-3946 (Mar. 16, 2000),

Each of these matters was a significant lost opportunity for the Commission to clarify and shape monopolization law much more directly than in its briefing and arguing of the cases, or through its amicus program.

While I likely disagree with some of the theories the Commission has pursued in the aforementioned cases, and in its over two dozen post-Microsoft monopolization complaints and settlements, during the last quarter century, the Commission, writing in review of an initial decision of the ALJ, has issued thoughtful opinions in nearly a dozen competition matters, most of which have been upheld on appeal.

The Commission should not shy away from attempting to develop an updated competitive effects analysis of monopolization,[25] and should have the goal of replicating in the monopolization area then-Chairman Muris's use of the Part 3 process to revive the hospital merger program.

Some procedural corrections of the Part 3 process are necessary and without endorsing each of his recommendations, the Commission may wish to consider the thoughtful analysis and recommendations of Keith Klovers.[26]

---

https://www.ftc.gov/sites/default/files/documents/cases/2000/03/ftc.gov-abbottcmp.htm; Complaint, Hoechst Marion Roussel, Docket No. 9293 (Mar. 16, 2000), https://www.ftc.gov/sites/default/files/documents/cases/2000/03/hoechstandrxcomplaint.htm; Amended Complaint, FTC v. Mylan, Case No. 1:98-cv-03114 (D.D.C., Feb. 8, 1999), https://www.ftc.gov/sites/default/files/documents/cases/1999/02/mylanamencmp.htm. In many instances, including at least four of the five monopolization matters filed or settled by the Biden-led FTC, the investigations were opened by one administration and filed in the subsequent administration.

[25] See, e.g., Bilal Sayyed, Revival of the Essential Facility Doctrine is Not Essential; Joint Agency Guidelines will Better Strengthen Monopolization Law, CPI Antitrust Chronicle (April 2023), https://techfreedom.org/wp-content/uploads/2023/04/CPI-REVIVAL-OF-THE-ESSENTIAL-FACILITY-DOCTRINE-IS-NOT-ESSENTIAL-JOINT-AGENCY-GUIDELINES-WILL-BETTER-STRENGTHEN-MONOPOLIZATION-LAW-Bilal-Sayyed-1.pdf. The Commission staff drafted excellent and substantial working papers on monopolization law in conjunction with the 2006-2007 Section 2 hearings. See William F. Adkinson Jr., Karen L. Grimm, & Christopher N. Bryan, Enforcement of Section 2 of the Sherman Act: Theory and Practice, https://www.ftc.gov/system/files/documents/public_events/section-2-sherman-act-hearings-single-firm-conduct-related-competition/section2overview.pdf; Karen L. Grimm, General Standards for Exclusionary Conduct, https://www.ftc.gov/system/files/documents/public_events/section-2-sherman-act-hearings-single-firm-conduct-related-competition/section2generalstandards.pdf; Thomas J. Klotz, Monopoly Power: Use, Proof, and Relationship to Anticompetitive Effects in Section 2 Cases, https://www.ftc.gov/system/files/documents/public_events/section-2-sherman-act-hearings-single-firm-conduct-related-competition/section2monopolypower.pdf; and, Patricia Schultheiss & William Cohen, Cheap Exclusion: Role and Limits, https://www.ftc.gov/system/files/documents/public_events/section-2-sherman-act-hearings-single-firm-conduct-related-competition/section2cheapexclusion.pdf.

[26] Keith Klovers, *Three Options for Reforming Part III Administrative Litigation at the Federal Trade Commission*, 85 ANTITRUST L. J. 409 (2023), https://www.americanbar.org/content/dam/aba/publications/antitrust/journal/85/2/three-options-reforming-part-3.pdf.

Thank you.

Respectfully submitted,

_____/s/_____

Berin Szóka
President
bszoka@techfreedom.org

Bilal Sayyed
Senior Competition Counsel
bsayyed@techfreedom.org

Andy Jung
Associate Counsel
ajung@techfreedom.org

TechFreedom
1500 K Street NW
Floor 2
Washington, DC 20005

Date: November 16, 2023