

“First Amazon, Then Apple: Where Is the FTC Heading on Digital Consumer Protection?”

Tech Freedom and the International Center for Law and Economics  
Woolly Mammoth Theatre, Washington D.C.

0:00—33:12 [Introductory speech by Commissioner Josh Wright, untranscribed]

33:35 [Berin] Any questions from the audience?

33:55 [Alden Abbott, Heritage Foundation] ...unfairness doesn't seem to sound in cost/benefit analysis. Is there a possibility that a greater emphasis on cost-benefit analysis in unfairness would just get the commission to characterize more cases as deception to avoid cost-benefit analysis? And how do you deal with that? Or do you think reforms are needed to also impose cost-benefit analysis on deception?

34:36 [Josh Wright] Two things. Great question. Coming from an antitrust background, the way that I think about the deception authority is something more akin to per se rules in antitrust. I think that it would be a mistake to say for example in antitrust that the per se prohibition on price-fixing is devoid of economic analysis. 34:55... We have some empirical information and some theory that says cartels are always or almost always bad which renders a per se rule or strictly a reliability rule appropriate in part based upon economic analysis.

In pure deception cases, in conduct that has no recognizable efficiency benefit, that analogy holds. I wouldn't call the deception standard devoid of economic analysis despite the fact that it doesn't call for a case by case cost-benefit analysis. That's probably, in terms of economizing on agency resources, a perfectly fine approach to a dividing line between deception and unfairness. In fact, to the extent that calling for a more rigorous application of a cost-benefit analysis and unfairness substitute for case law in deception on what's required and what's not required in order to establish misrepresentations, that's an area of the law where judges are perfectly ...35:55...it's the unbounded nature of adopting something like the cigarette rule style of unfairness that I think is a little bit more of a regulatory risk precisely because it's unbounded.

36:20 [Berin] Tom?

36:21 [Tom] Do you have any more specific suggestions about how to get economic analysis and cost-benefit analysis more involved in privacy and consumer protection issues?

36:44 [Josh Wright] It's always struck me...on this panel...than mine in terms of how to face this challenge but I think that one of the reasons that economic analysis has been so wholly integrated into the competition side is because the antitrust laws from the late 60s to current have at every corner demanded it. Committing malpractice, if they came into a modern antitrust litigation without economic evidence. I think the law changing, there have been other important things too, including innovations within the agency and so

forth, guidelines that the agency has produced, and so forth. There have been other contributing factors but I think the Supreme Court's revolution of the antitrust law is what is motivating that change.

It leaves a little bit of a puzzle on the consumer protection side because here you've got a statute that says do some cost-benefit analysis. But I think that the culture inside the agency on consumer protection side and competition side [37:55] ...--how much economics should be driving the bus so to speak--is quite different. There is no doubt to me whatsoever that we've got the capacity in the agency to do all of the work that needs to be done. The problem that is key, and you'll notice that I said this in my speech ...[38:20] ...decisionmaking is the problem not the capacity to do the analysis. I think on the antitrust side and on the competition side the fear of losing cases in court because the law changes is what induce people's willingness to talk to their friendly neighborhood economist and rely upon his judgment on what cases to bring.

That needs to happen on the consumer protection side too; openly talking about some of these issues. I do also like to hear myself talk and read myself when I write but the main reason to write this dissent is to try to call attention and get some of that discussion to happen. I'm hopeful that it will do so.

39:18 [Unidentified] Josh, to the extent that it's not economics and it's not litigation in the courts, what is driving the bus in consumer protection cases?

39:38 [Josh Wright] A couple of things...in cases, I don't know what the percentage is but I can count the number of dissents—I think I need two hands now. I'm voting in large part ... cases, there are important economic debates in these cases over remedy. I think we've had varying degrees of success in having economic input in context. In terms of case selection, other priorities are shifting into, for example, into privacy, or cases like Apple, I shall not name the other one, but I think those are priorities that come from the Chair's office and from heads of the bureaus. I think those shifts have been, from where I sit I've certainly followed what those agency ... doing under the last chair...40:38 I think there's been some modest shifts from Chairman Lebowitz to the current agenda, nothing dramatic. Apple certainly is, in my view, a shift that we shouldn't have taken but these are priorities that are set upstairs from me. One floor.

41:00 [Unidentified] Josh, on the cost-benefit analysis in Apple, what really is the cost here? A consumer sees notices all the time and clicks through them. What's really the burden on Apple here and how does it really...it just has to provide better notice.

[Josh Wright] I'm a little hamstrung here; they certainly had an answer. As you might imagine, a company designing a platform where its interaction with consumers is its main driver of success thinks long and hard about its, precisely how it designs the platform to make it easy for its consumers to use. You take web experiences, for example, just a little bit of latency on a web site drives a tremendous amount of traffic away and people think long and hard and spend billions of dollars trying to avoid it precisely because consumers have other choices of other platforms to use.

Now there is an issue about separating out liability and rapidity here. One of the interesting arguments related to your question and responds to my dissent is, yes but

what's in the remedy really wasn't a big deal. We just asked them, they could have satisfied it any number of ways they don't have to have a password there's an in-app purchase. What's wrong with our playing with their platform a little bit? We have an idea that we think will be profitable--by which I mean under law you're required for 20 years--separating out liability from remedy here is important. Before we start saying how much will it cost to comply with the order, we should ask whether we've met the initial standard of saying what are the benefits of this practice relative to other options and what are harms have arisen from this practice.

Now do I think that the remedy is going to cause iPads to fall from the sky, no I don't think that, I think they'll find a way to work around it for the next 20 years and we'll see how many iPads are used when they put the orders up. Getting the liability question right, I think it's pretty easy to conceptualize what the benefits are: not having to put in...44:06... I know is a benefit to some users, and it doesn't take a large amount. The number that were complaining is a tiny number so we're talking relative proportions of people to benefit or harm from the practices. Say you think 2 percent of users ... or Apple tells them to do, and 2 percent complained because they're getting their coffee in the morning and they hand it to the child and they go away to get their coffee and the child runs up a bunch of charges. A very small number of people did that and complained about it and the numbers were shrinking because Apple tries to correct it. And if you think 98 percent of people doesn't care but a small number of people say goodness it annoys me ... password additional times, to have to go through additional screens...the answer is the harm outweighs the benefits but...

[45:30] [Unidentified speaker] ...take the prerogative and ask one final question. So I wanted to follow up on Tom's question and ask the extent to which you thought that the use of consent decrees in consumer protection cases was perhaps driving some of the relative paucity of economics there, given that there isn't a constant reminder from the courts that economics is appropriate to the enforcement actions they're undertaking. This should be added to your list of benefits of dissenting because one of the great benefits [46:08] ... Apple is a great example of this, whatever is lacking in those... 46:22...with your dissents anyway, made up for by your dissent that go into a lot more detail and force the commission, the majority on the commission, to go into a lot more detail as well. You just don't see that, you can see a palpable difference between cases in which you've dissented and cases in which you haven't. So let me put in a plug for that as a benefit of dissenting.

46:49 [Josh Wright] I think they're related and one of the reasons you see so many of--you are negotiating consents in the shadow of the law and the threat of litigation and, on the antitrust side, if the threat of litigation is "I don't think that you have credible evidence to prove anticompetitive effect," that is a real threat. Plaintiffs including the agencies lose cases like this in federal court when they don't have economic evidence. That is decoupling what the consent negotiations look like and what the state of the law is, it's very difficult to do, because one provides the backdrop for the other. This is a long way of agreeing. I think the puzzle is in terms of how the agency treats consents internally ... 47:40 ... side why a firm with a merger who has a billion dollar merger wants a divestiture to get the thing through the agency and get it done is willing to sign a

consent. It's more important having economic, we don't have judicial review, more important having cost-benefit analysis done within in order to be able to say there's reason to believe in public interest, to me the public interest is a cost-benefit. Having economic input and ... sometimes on the competition side there is a shot-clock from the Scott Rodino Act 48:30 that makes it difficult, not impossible. Sometimes there are constraints that make it difficult to have a fulsome economic analysis before the clock runs out in conduct investigations. That's certainly not the case in other types of issues that's been vetted through the agency for decades. But I think that really is one of the key challenges is getting agency buy in from commissioners through the bureaus that integrating economic analysis through the consents process is not only good to do when convenient but it is critical.

49:12 [End of Wright]

50:00 [Geoff Manne] In keeping with that... something like what we can learn from Josh Wright with the FTC, I'm going to amplify a lot of what Josh said and I'll try to hit on some points that he missed and hopefully that will provide some setup for the discussion we're going to have. ... [50:20] His role in technology regulation and, as Berin and I have termed it, the Federal Trade Commission is becoming--for better or worse--the Federal Technology Commission. Technology creates special problems for regulators, it's not always apparent ... always know what the consequences both good and bad are... how to craft law that's flexible enough to accommodate that but not arbitrary. It's inherently, and as Section 5--as Josh discussed--incorporates an economic, an error cost analysis that's required. ... 51:20 Through an evolving, in novel areas like privacy and data security and, in those areas in particular, business succeeds or fails through trial and error more than through some kind of theoretical... really important source of a cost over-regulation here, it risks impairing experimentation in exactly those areas that we want more experimentation which is in many ways an essential driver of economic progress.

51:42 These problems arise more in the realm of... than elsewhere and commensurately most if not many of the Federal Trade Commission's significant recent cases are technology related cases, so not only do we have these background concerns, but they are becoming more and more important as the FTC takes on more cases in these novel areas that we're calling technology.

In consumer protection law, unlike in antitrust, I think we've increasingly seen actions being shaped largely by the FTC's... without a lot to rein it in and in particular we aren't seeing that kind of evolution through judicial review or dialogue with economic scholarship that we see on the antitrust side of the house and for reasons I think that's probably problematic. So the paper discusses several of these issues and where they've come up in the FTC both on the competition side and the consumer protection side. I focus on two of them, one that Josh didn't discuss, and amplifying one that he did discuss and then leading into the panel.

First one is the case ... 53:00... but I can, it's the Amazon case. It's pending before the court right now, which is why Josh and Marty and others won't be able to talk about it but I'm not so constrained. In the last decade the FTC ... to address these cutting edge issues to include such things as... online... 53:29... technology related... may... I think Josh actually suggested this too, the issue is not that the FTC always gets it wrong

by any stretch, the FTC may be right in any particular case, but overall what evolves when it engages in these cases isn't law, it's merely a list of assertions as to what the commission thinks companies should and shouldn't do, and I would argue that's exactly what they did in the Apple case and are doing again in the Amazon case.

[54:05] What's notable about the Amazon case, like the Apple case, is the unique relevance of the attributes of the conduct at issue to the product. It's not the cramming case. I think that point that Josh also made is really important. It's not like you can just dismiss the benefits of the action at issue here, because at least Apple, at least Amazon, and at least a lot of people who purchased their products seem to think it does have value, nobody thinks cramming has value, it's a very different beast. Unlike in those past and allegedly similar--and cited as precedent--cramming cases Amazon conducted wasn't aimed at deceiving consumers, nor was it merely incidental to its product offer. Exhibit A is its one-click concept which consumers seemed to value which it patented is important to Amazon's business...55:40... as much as possible to its design choice of one-click but nevertheless taking into account the sorts of issues raised by in-app purchases. But they're making a trade-off, right, they are clearly valuing the benefits of minimizing the number of clicks, clearly valuing at something above zero. Moreover Amazon has implemented this comprehensive parental control regime including the ability to turn off all in-app abilities, called Kindle Free Time. If any of you have kids and have a Kindle you know that this thing is better than sliced bread. It arguably goes beyond anything the FTC required in its Apple consent order, anything it suggests might be in the ...Amazon and yet it seems very much that the FTC has a kind of myopic vision of what's appropriate for dealing with this in-app purchase problem, and Kindle Free Time isn't it. Although someone else, including designers at Amazon, would beg to differ, and I would beg to differ, and suggest that the FTC should be looking at creative, novel solutions to these kinds of problems instead of ruling them out by taking a fairly myopic focus and not sufficiently weighing the cost-benefits.

56:25 In order to keep this a little bit shorter. I would say look at the paper I have some more discussion of Amazon there, in particular the problems that the FTC might run into when they actually have to go to court and deal with the fact that in their complaint they really only address the harms and they really don't do much to address the benefits, but also the problems of Section 5 that they need to address including reasonable avoidance and countervailing benefits. 56:55...role in data security and privacy cases. As many of you know, we're up to 57 or so UDAP enforcement actions in the last decade around data security. Through these the FTC has policed how American companies protect user data. Initially the commission only used this standard in deception cases. Since 2005, however, the FTC expanded its approach to cases in which companies made no security promise, essentially collapsing these unfairness elements—the substantial injury, countervailing benefit, reasonable avoidance elements—into this “reasonableness”--reasonableness of the data security approach which has in turn largely if not explicitly been defined almost entirely by the data security standards promulgated by the FTC under the safeguards rule dealing with financial institutions. That doesn't mean that they're not potentially appropriate elsewhere but that's really what's happened, we've collapsed all that might be required under Section 5 to the safeguards rule, which was promulgated in a different context. Maybe that's applicable elsewhere but we should at least acknowledge that that's what's going on.

[58:10] ...experience would suggest that the FTC is moving a lot more toward—also like the Apple case--to a strict liability regime and a ...the reasonableness of security precautions ex ante on sensible economic grounds and making that assessment without first developing or explaining the elements of unfairness in a rigorous way. Some demonstration of this, a recent empirical paper that I and some colleagues at ICLE have worked on ... a couple of things that I will point to characteristics of the FTC's data security cases. They're considerably shorter, about 3 pages, than complaints in private cases of action, they're often lacking in detail about causation, they lack citation or application of precedent, they obfuscate who is injured and whether injuries might have mitigated, they fail to assert any facts on reasonable avoidance, countervailing benefits or materiality, and they assert formulaic and conclusory causes of action which might very well not survive its motion to dismiss. This is potentially a worthwhile trade-off for administrability or even predictability but that is what's going on with the FTC's cases and it's very hard...59:40 ... even harder to see any ongoing...so, I've spoken enough...I have 50 pages written on this that is available on both the Tech Freedom and ICLE web sites and SSRN...I'm anxious to hear what the panel has to say.

1:00:18 [Berin] Let me introduce our panel:

Marty Gaynor, director of the FTC's bureau of economics since September of last year, he's been professor at Carnegie Mellon where he teaches economics.

Howard Beales runs the FTC's bureau of consumer protection. Josh mentioned his extensive work on the history of unfairness and I encourage everyone to read his, "The Rise and Fall and Resurrection of Unfairness." ["The Federal Trade Commission's Use of Unfairness Authority: Its Rise, Fall, and Resurrection"] He's a professor of economics at George Washington University business school since 1988.

Pauline Ippolito, former deputy director of the FTC's bureau of economics--she also served as acting director--30 years at the FTC, and earned a Presidential Rank Distinguished Executive Award... 1:01:33 ...she has been at the FTC ...1:01:50 little more freely than perhaps Marty can but obviously she and Marty can't comment on what's happened at the agency.

James Cooper, former deputy director and acting director at the FTC's office of policy planning, currently director of research and policy at the law and economics center at the George Mason school of law.

David Balto former assistant director for the office of policy and evaluation, and now has his own law firm. This is an extraordinary group of experts.

1:02:45 [Berin] What is the role of economics in consumer protection and how should we learn from the role that economics has played in competition cases? Marty, since you run the bureau of economics it's only fair for you to start.

1:03:00 [Marty Gaynor] Everything I say represents my views alone and not those of the Federal Trade Commission or any of the individual commissioners. Thanks for the opportunity to speak here....1:03:50 ...economics does play a very important and critical role at the agency, and I understand from what the people are saying that it's not always evident, or a little opaque, and we heard some discussion about what some of the reasons might be for that. Typically the way things happen, a case comes up or a matter comes up, and this is true in competition and consumer protection...1:04:17...our case here are consumer protection in the bureau of economics start looking at the matter and they're communicating very closely with one another and ultimately if this thing is going to have some legs, both the legal bureau and the bureau of economics do independent analyses which are written in internal memos and make their way up to the commission. That's a brief synopses, there's a lot of interaction at all levels, but the important thing, and this touches upon something that Josh said is, the agency is, I don't know if it's unique exactly, but their central feature there is an independent bureau of economics at the agency and one of the key roles at the bureau is to do an independent careful economic analysis of all the matters that come up and get that in front of the commissioners so they have that to weigh along with the legal analyses.

1:05:20 ... [Berin] Is there anything like this anywhere else in the government, does any other agency have a bureau of economics?

[Marty] Well it's not completely unique but I'd say that having an independent bureau is a very important feature. And there are other parts of the government where that's certainly not the case where say agencies where there are economists but those economists answer to lawyers.

[Berin] As far as I know it's really the preeminent think-tank inside the government for doing economic research that's certainly shown very clearly through competition cases.

1:06:00 [Pauline Ippolito] One of the things to recognize is that on a consumer protection side there are many, many more cases than there are on the competition side. And many of them are fraud cases or very simple cases that the economic staff doesn't pay a lot of attention to—I mean we help with the evidence, we help put the facts together and all of that, but once we determine that, yes, this is a fraud or something similar to a fraud we don't spend our resources there.

Where economics becomes important is in these bigger policy cases, where through these cases you're effectively setting consumer policy. That's where you want the commissioners to have a discussion, you want them to think harder about what should they be doing, why should they be doing it, what's the right tradeoffs, are there alternatives, are there simpler remedies? That's where ideally economics play a bigger role. I'll do my pitch for data here, because some of you have clients, the economics becomes much more salient when we have evidence to put in front of the commissioners. When we're doing theory against anecdote, anecdote wins. "We have children who've charged \$300 without their parents even knowing it! How can that be good?" And then there is some theoretical cost somewhere. That's much less persuasive than when we have evidence on: How frequent is the problem? How big is this subpopulation within the

universe of users? What's the time trend look like? ... 1:08:00 having that kind of evidence helps the commissioners who are very busy people. They've got to make a lot of the decisions. It really helps them to see the issues and so it really is important to good policymaking that we have data and evidence to put before the commissioners.

[Berin] As both an economist and former director of the bureau of consumer protections, what was your experience?

1:08:36 [Howard Beales] I think in some ways the place where the bureau of economics has the greatest influence on what the commission does in the long run... [1:08:46] there are some incredibly valuable studies in the economics of information that Pauline did looking at the changes in the regulatory environment and the impact on consumers. There was a very influential study on rent-to-own transactions and their impact on consumers. That kind of research is exceedingly useful in shaping what should be the consumer protection priorities. I've always thought about any consumer protection case from a cost-benefit perspective but as Pauline says the 1:09:29 [unclear] are easy. That is a good chunk of the workload and arguably should be a larger chunk of the workload than it sometimes is. But it is difficult in emerging areas to get good data and that limits what the economists can do and the influence they have on the nature of the decisions that are made.

1:10:13 [Marty Gaynor] Howard's point is an important one but particularly in this day and age firms are... [1:10:22] ...report but that's just one example of these kinds of things. We are often in situations where at least in principle there are quite a lot of data that can be available to the economists to analyze to get a better picture of what's going on either as a general research issue or as Pauline mentioned in a particular case. We're going to be in a stronger position in terms of availability of data than in some matters in the past.

1:11:01 [Berin] You've been involved in policy planning working on both competition and consumer protection sides of the aisle. What difference do you see between how the commission works... might learn from the bureau of competition?

1:11:18 [James Cooper] Just to echo some of the theme's of Josh's--Commissioner Wrights'—speech, and what Pauline was saying, I do think there is definitely a sliding scale and need from economics in consumer protection. You think about consumer protection cases and they can be broken down, there's fraud and there's clearly no benefits, and mapping that into... 1:11:45 ... probably proper to call that per se, and then you get into the area of gross negligence, maybe that's ChoicePoint, things like that where, ok, we don't really need as tough an analysis there, but when we get into such issues that are present in Apple, HTC, and Amazon, we're looking at business practice and the FTC saying well this business practice has this error rate, or it's harming some consumers and we think you can make it better. Well they were getting into, the analogy would be more like if now analyzing antitrust, we're little more like Section 2 where we're looking at unilateral conduct and section 2 case law we know that antitrust has the economic revolution, it's really difficult to bring section 2 cases, the burden on the

plaintiff is quite substantial because... 1:12:30 ...competitive, unilateral...1:12:45...like Apple, like Amazon...1:12:45... is more economic analysis. I think that's where it could be useful in the case law.

Echoing what I think all the panelists have said so far it's in the broader policy area say like the privacy report, the data broker report, that have so much influence in the community. It's using the bully pulpit, it's saying here are the things, telegraphing, here are the things we think you should be doing...1:13:15 ... break a promise that you are going to do those things, then we can sue you for deception. So to the extent that those broader policy pronouncements are going to impact a large portion of industry going forward, think about Facebook's recent purchase of WhatsApp. Easily cleared on the competition side but there was a stern letter from the director of the bureau of consumer protection, Hey Facebook you're under order, watch out. No, you can't tell me that "watch out on how you use WhatsApps data," you can't tell me that the value of WhatsApps data was not somehow part of this merger. And here you have the FTC saying for the next 20 years you're going to have to think very carefully and you're going to be very circumscribed in the way that you can...1:14:10 ...If you're going to have that kind of impact on the economy, that's where you need the economic analysis.

[Berin] I want to unpack some of what you just said, but I also want to give David a chance to weigh in with his opening thoughts.

1:14:21 [David Balto] I agree with a lot of what people say and I want to applaud the FTC's economic research role because I think that can really help educate people here. From my perspective as a consumer advocate there are a lot of chronic problems in the digital marketplace. The FTC fortunately has a broad range of tools to use flexibly and hopefully in a judicious fashion to go after these things. I wonder if the FTC had not brought an enforcement action against Amazon, what exactly would happen? Would there be bad practices that would continue, and that would trouble me as a consumer advocate. You're not after you've been...1:15:10 ... to a product to some other product. I think the FTC needs, I don't think there's disagreement as to what the unfairness standard is, when you look at the statement of the commission, and Commissioner Wright is to be applauded for issuing the dissent to build to create this dialogue, but it's a question of whether or not they agree about whether the cost outweighs the benefits. And I think there that the commission has the better statement, the cost here are really not substantial. But I think what the commission needs to do is look at its broad range of tools and in doing that, I would agree with the other panelists, the economists could play a more significant role.

1:16:02 [Berin] Given the chance that the commission might get it wrong, what is the marginal benefit of the commission intervening—say in example you cite in Amazon—given that there are state attorneys general that can bring action, that private lawsuits can happen, the market can in fact work. Where do you think... 1:16:19

[David Balto] I disagree with that. I actually think looking from the consumers perspective there are relatively few tools, bringing an individual class action is really tremendously difficult under the current standards...1:16:30 ... aren't as active on,

probably everybody in this room would probably like to have the federal agency do it especially one where there was a balance cost-benefit analysis that was part of the equation.

1:16:52 [James Cooper] I want to respond to something that David said about letting the market, we look at Amazon, you said something about there are these complaints and consumers are kind of locked in so they can't do anything about it. Maybe Amazon and Apple say, So what? Is zero consumer complaint where the market needs to go? Is that evidence that the market doesn't work if some consumers complain about a product? Going back to Section 2, or antitrust analogy, antitrust we don't regulate prices, we don't say hey the price is too high so we're going to bring a section 2 case. In a way that's the same thing here, Amazon has this policy and some consumers don't like it, and the FTC thinks we should be at a zero complaint rate or close to a zero complaint rate, 3 percent is too high. Is that just a, could this just be looked at as evidence of Apple or Amazon using their market power, which on the antitrust side we don't really care about, unless it's gained illegal or exclusionary. Here's just a: ok we pleased 97 percent of our customers so we're not going to go any further.

1:18:10 [David Balto] There's a little bit of debate within the statements in the Apple case but as a consumer advocate... 1:18:15 ... making its prudent judgment about what's a significant number of complaints are and those certainly to be the case in both Apple and Amazon.

[Berin] We're talking about initial complaints and those people were reimbursed so there were layers of response here, and the question isn't just--as James put it--well, what are the right number of complaints, it's the right number of how much hassle for consumers? ... 1:18:40 ... or never notices. So there are ever-smaller numbers. And Josh's point was you have to weigh that against the benefits and the commission seemed quite willing to aggregate disparate harms but not willing to aggregate small benefits that might incur to consumers.

1:19:00 [David Balto] Berin, one point that the commission makes that is appropriate is that not everybody is going to complain ... 1:19:08... may just chalk it up to experience.

1:19:20 [Berin] I want to get back to Pauline's question about evidence. So evidence is great but what you do with evidence depends on what your methodology is. And it also depends on seeing what good work happens inside the bureau. So let's step back and remember that comparison that James is offering in competition cases. In competition cases we've got case law, we've courts developing methodology, so we know what evidence does inside the black box on consumer protection. However involved the bureau of economics is, it's hard to say from the outside. Just give us a sense, Pauline, please of how you see that issue.

11:20:00 [Pauline] I think this is one of the challenges in the consumer protection area. And it goes both ways. Apple, because we had data, the case Apple began as is not at all the case it ended as. But none of that is visible to all of you. And I can't say anything

more specific than that. But the debate at the commission level, Josh's concerns, Maureen's concerns, the evidence they put before them produced a very different outcome than the initial proposal. That's completely invisible to the business community, completely invisible to people who have to make real decisions as they design platforms and try to figure out what the regulatory risks are. That's one of the reasons I like a contrarian on the commission at the moment, that that threat of public discussion forces everyone to crystallize their positions, to be much clearer in their own heads as well as to the public as to what they're doing and why, and what they're not doing and why.

If you read Maureen's dissent, and Maureen's [unclear] 1:21:18...but she talks about some of the things that the commission didn't do. For example, they didn't hold Apple liable from the day the platform went live. Real evidence at Apple, we knew that from the data we had, that there were problems. And Apple responded and the commission judged that to be an insufficient response. But this was a new technology 1:21:55...all be anticipated. The issue for the commission in the end was how did they respond once they knew they had serious problems in this particular area? Unless you read very carefully, it's hard to see that, the fact that we had all of these public statements from commissioners made it more visible, that's not typical. And that is one of the real challenges on the consumer protection side. Unless they're a 1:22:23 fraudster, they're just buying time until they're shut down, nobody goes to court on the consumer protection side, almost nobody, so you don't have an opportunity to see the evidence, to see both sides, lay out positions and then get a judgment at the end.

It also goes the other way. We have a lot of good cases 1:22:43... general policy I think are terrible 1:22:49 ...in an ad, so they don't have substantiation for what they say, there's no question it's a good case, and then we put them under a fencing-in order that say you must have two clinical trials of this type with this data and so on and so forth, the only thing the advertisers see is what is the commission putting out in its consents as a likely standard, a guidance for what they should have before they make a claim. It's very hard internally when you have a clear case, it's a good case we all agree—economists and lawyers--it's a good case, it's hard to get the commission to focus on what's in the consent and what's 1:23:38...it's a real challenge.

1:23:38 [Berin] I'll ask the same question of everybody else. But given what you've just mentioned that the commission brings a much larger number of consumer protection cases and we probably don't want to make those generally more difficult. How do we get the commission to explain its analysis better and the cases that set law?

1:23:57 [Pauline] Well I think having a contrarian on the commission is good. The aid to public comment is something the agency doesn't use as much as it could or should in my opinion and I'm speaking for me not anybody else. It is a real challenge, speeches from commissioners is another way. The interest they have in trying to push certain areas at the same time--you're all here because the move into the technology area and the mobile platforms in particular--in some ways start thinking more of policy: what should the policy be in this area? Not on an individual case. And getting them to think at that level is important to communicating and to developing good policy.

1:24:45 [Berin] Marty, we can't put you on the spot about particular cases of course and that's in a way the very problem, we don't know what happens inside. What can your office and the bureau of consumer protection do to work more closely together and to explain how they work to folks on the outside.

1:25:11 [Marty] First let me echo what Pauline said last. An important role for the bureau of economics--and I won't speak for the bureau of consumer protection but Howard can certainly weigh in on things during his tenure there—is to raise these broad issues. We heard a bunch of them already. First question an economist asks, will the market take care of it? How many economists does it take to screw in a light bulb? Well, none, right, the market will take care of it. So that's the first kind of question we ask. We bring up those issues about technology and rapidly changing conditions and try and get those on the radar screens of commissioners 1:26:00 ...as far as external I don't know that I have anything in particular to add. We can certainly do research and that research can be out in the public eye. There's a lot of stuff that we do with the office of policy and planning on the competition side 1:26:29...consumer protections side, that stuff can often be very useful. There's often a quick turnaround and response to... 1:26:39 ...really direct and important manner. So that's another possible outlet for these kinds of things.

1:26:50 [Berin] I want to go to David. But before I do, Marty, are there internal ways just to get the bureau of economics more engaged? For example making sure economists in your bureau get to look at the cases that BCP brings, even if BE decides not to weigh in on them at least being able to identify those cases where there might be a real issue economics raises that wouldn't be visible to attorneys in the bureau of consumer protection that kind of internal process?

[Marty] BE is actively involved and as Pauline said there's a very large volume of cases and I don't think it's efficient to have [1:27:28] ...simple fraud cases where somebody crawls out one side of a rock and they come to our attention and they get beaten down and then a few months later, crawl out the other side. Outside of damage assessments I don't know that it's a good use of resources to have economists working on those kinds of things, so there's got to be some triage there and some discussion but I think when it's an important matter—the kind of things we've been talking about here—where there are important issues then inevitably the bureau of economics is involved.

1:28:05 [Howard Beales] That is certainly consistent with my experience. Inevitably this process 1:28:17 ...the thing that will sometimes go amiss. There will be a case that raises an issue that economists see that attorneys don't. But most of the time I think it worked pretty well. There certainly is efficient resource use, in my tenure there, there was probably too much 1:28:44...and not enough to the bigger-picture questions that are, or the main value added of the bureau of economics. I do think there's more that can be done externally in the way of giving guidance about how the commission is thinking about things. One is the Analysis to Aid Public Comment that Pauline mentioned. That's apparently very informative on the competition side about what the commission is thinking 1:29:20 ...any of you know, and he's always after me to go see the AAPC on the consumer protection cases to understand what's going on, and I keep telling him there's

nothing there. 1:29:39 ... on the competition side so maybe there's leverage there. On the data security area in particular there was for awhile a practice of writing closing letters and putting them on the public... 1:29:55 ... case against somebody ... 1:30:00 ... that it isn't clear why but that seems like a useful practice that can give some more information about what the thinking is about what exactly is the problem and what's not.

1:30:24 [David Balto] I'm sort of troubled about what happens if you didn't bring an enforcement action against Apple. You have companies that legitimately want to obey the law, they want to know what the law is, and if the commission recognizes there is a problem, they have a wide variety of tools 1:30:40... economists talk about some of these... 1:30:50... the Apple case and through that workshop process perhaps you're going to do as much as bring enforcement action. I hear complaints and I think they're legitimate particularly in the data security area that just sort of setting regulation case by case adjudication, especially when it's just consent orders—which are strongly criticized in Geoff's papers—that's a weak way of trying to weed out bad practices.

1:31:30 [Geoff Manne] David, you said something like you're troubled by what would happen if the FTC didn't have an action against Apple. I'm troubled by the implication that there is something so problematic here that the world would collapse if 17 people didn't have stronger incentive to treat their cell phone like the credit card it actually is. Pauline has referred to this evidence that was presented, Josh suggested evidence of benefits is hard to calculate, but I'm troubled by the implication that it's... 1:32:10 ... appropriate to count the benefits at zero... 1:32:18 ... in real trouble if FTC didn't bring action to Apple, and now Amazon, which is even more puzzling to me... 1:32:25....

1:32:40 [David Balto] ... to be better notification. Apple attempted to do things, they didn't change things in a fashion that fully protected consumers. And remember what we're talking about and nobody's said it yet, we're talking about vulnerable children, children who, so ... 1:33:08...

1:33:15 [Geoff Manne] ... thinking about vulnerable children, but here the alleged harm was to parents' pockets and vulnerable children were not the ones who were at risk, it was the parents, right? We can come back to this, it doesn't take away from the points you were making, it's important to point out that this is not about vulnerable children, this is about parents who have to save for college and instead are paying for Angry Birds.

1:33:45 [James Cooper] Berin, I want to get back to your question that Howard and Pauline and Marty were addressing, about the general policy, the role of economics and how it, in my experience when I was in the office of policy and planning, where the big, and I was also at the commission level, and my experience at the commission level with small cases was very much that so many of these are just run of the mill fraud cases, some guy selling fake pills out of his stationwagon—or web site—do you need an economist to figure that out, no. But where I saw a huge difference when I was in the office of policy and planning, one of our biggest missions was to do reports. All the reports we did, wine report, we did a report on postal, real estate report, they all, we all

worked hand in glove with the bureau of economics. It was done with them, they approved it. We had to have their approval, not because we ultimately needed the director of bureau of economics to sign off on the memo going up to the commission to approve it, but we really wanted... 1:35:10...experience would say the privacy report... 1:35:19...in the building for the data broker report, is that these consumer protection reports are done differently. This may be a reflection of policy planning was mostly all competition attorneys so we were used to marrying up of the law and economics and it comes from antitrust, whereas BCP there was not the marrying up of law and economics done there. So what you end up with are reports that are done through workshops where rather than data you have anecdotes. What Pauline said: You have Jeff Chester said X on this panel, or Mark Wattenberg said Y on this panel about privacy, and then so and so from social media company said this. So we took all of this together and here are all of our recommendations.

1:36:10 The bureau of economics to my knowledge at least, I was in the building for the first report and part of the drafting of the second report that came out, they were not... 1:36:20...inside baseball, I know in the commissioner's office the first report we had to fight, maybe fight is too strong, to actually get some cites to the extant, very small extant, economic literature that's out there on the trade-offs of privacy. We actually had to, we'd send it back down and it would come back redlined out, and we'd say we want that back in. Reports are done on the competition side versus on the consumer protection side, and that's where, I haven't been in the building for three years so I don't know if that's changed, but to the extent that policy, especially in the privacy and data security area, is coming out of reports that that's where economists should really be engaged, that's where their value added 1:37:20...

[Berin] Let me just ask, what should the role of reports be here? Pauline, for example, you talked about the importance of evidence in cases. How do you think the commission should use reports and how should it go about policymaking whether it's recommending practices to business or making cases to Congress for new legislative authority.

1:37:50 [Pauline] I'm a fan of, you don't have data to address every question. Where you have data where you find the right opportunities to really test... 1:38:12...in terms of economists going in and documenting. You change policy, here were the worries ahead of time, the tradeoffs, here's how it played out, and really documenting what really happened, those are very valuable studies, I agree with everybody about that. But those opportunities don't come along all that frequently. These kinds of workshop reports, to me, I find them less persuasive than they could be. They gather people from all sides of the issue, they report that there's a big disagreement about what policy should look like and then they make suggestions. I wouldn't find... 1:38:55 ...that it has value because a lot of people on the hill only have time to: Well, what are they suggesting and should we put that into legislation? 1:39:15... the commission should be striving for. I think there ought to be more solid foundation if we're going to be making recommendations on legislation certainly, and even best practices. The government as management consultant makes me nervous.

1:39:33 [Berin] ... economists there are over at the bureau of economics, what do you think the commission should be striving for in its reports? What kind of report the commission should be proud of analytically?

[Pauline] Well I'm an analyst, so I like to stick to an analytical base: What are the issues, what is the evidence we have—unfortunately in a lot of these areas we don't have a lot of hard evidence, and so it makes it hard to make very concrete recommendations so if that's the goal then I'm not going to be very useful. Sometimes the economists are not invited to participate.

1:40:20 [Howard] I think there should be more of a role of economists in shaping some of the workshops so... 1:40:35...data have the opportunity to be presented, I'm not sure that happens in the workshop process. It is the opportunity... 1:40:50...and I think it's really important to engage on those questions even when there's not the kind of evidence we'd like. What troubles me about a lot of the recent reports in particular... 1:41:10 ...what the commission has the authority to do and the way it would like to see the world work. And what I think it's very consciously trying to do is to pressure people to do things that it understands it cannot require. I think that's very problematic when it's done sometimes with a very explicit threat... 1:41:43...things that can be enforced and others that can't... 1:41:50...and what's not.

1:41:49 [Pauline] I don't mean to imply that some of these descriptive reports in and of themselves are not valuable. If it's a brand new area the very fact of pulling together the people who have different perspectives on what the issues are, doing a thoughtful discussion of the issues of the critics and proponents. And making that available to the world, I think that can be a very valuable thing. What's uncomfortable is doing that and then tacking on legislative recommendations or tacking on best business practices. If that hasn't been the focus of the descriptive report then I don't know how you get from A to B. 1:42:39...I really don't want to say...the commission is struggling to figure out how the old consumer protection principles that are well established move into this new world. On its face that people should be notified before they're billed is pretty good concept, it helps make contracts work, it helps make markets work, it's: How, when, how much, how in what form, that's where it gets tricky.

1:43:10 [Berin] I think we all find great value in the workshops that the commission purposes in describing issues and hearing from people what's really going on, and what challenges are in consumer protection. But I find it troubling that there's more focus on anecdote than evidence, and there's very little discussion, in fact there seems to be a concerted effort to avoid the commission's legal authority, the doctrines that it's applying, the existing laws that are already in place. For example, Commissioner Wright didn't issue a concurrence or a dissent on the data broker report but he did include a number of footnotes inserted that explained his concerns. Among them was the fact that the thing that the commission talked about needing a new legislative authority are already covered. The example the commission led with, that they put in its press release right at the top, was the example of the motorcyclists getting, on the one hand, ads about motorcycling, not problematic, but also perhaps being discriminated against in insurance

eligibility. That is certainly very troubling but the commission didn't mention that that's already covered by the commission's own interpretations of fair credit reporting act and various other laws covering many of the issues that are raised about lending and housing discrimination and so on.

There seem to be three concerns: one is about anecdote versus... 1:44:40...for new legislative authority without really... 1:44:45 ...why new legislative authority might work better. And then the third is establishing those reports as de facto law and turning around and enforcing them. Certainly the commission has in its LMD 1:44:55 and window proceedings has pointed back to workshops and reports it's issued in the past as if it were stated duties that companies had to follow. Does anybody have thoughts on reports the workshops and what the workshops should be doing with those?

1:45:19 [David Balto] I can't imagine that the commission citing its own report is going to be all that persuasive to a federal judge as to what the law is, the judge is going to want to know what other courts have decided.

1:45:36 [Berin] Funny you should mention that. What have other courts decided? Well of course the answer is: Not much. So let me use this to pivot the conversation, David. Which is of course that the FTC has been bringing consumer protection actions related to 1:45:50... moved into privacy cases and moved into data security cases around the turn of the millennium. We're starting to see some new product design cases. We don't have any clear case law to point to. In the Apple case the majority cites to a few cases with no explanation in their footnotes, it's not exactly clear how they are on-point. This is really uncharted law and Josh's dissent is valuable because it starts to explicate [replicate?] some of that but not much of it. My question to the panel is what will it take to actually get some clarity here on Josh's point, what is or isn't good enough? Is it just litigation? And if so is there ways to encourage that, and if that's not going to happen, what can the commission do to produce clarification of its own doctrines?

1:45:00 [Howard Beales] I think we've talked about what, other than the things we've talked about, it's not clear what the commission... 1:47:05...for people to fight with the FTC. It's hard to tell the client you ought to spend a lot of money on attorneys fighting. That's why it doesn't happen, it has to be important enough to be worth fighting about.

[Berin] Anybody want to suggest on why that's so rare compared to competition cases, is it just PR?

1:47:35 [James Cooper] Huge body of outside law that constrains what they do. You know what price-fixing is, you know what it's not, there's some cutting edge cases in Section 2. There's no outside constraint for unfairness 1:47...place where there could be in deception, the First Amendment reins them in a little bit—a lot of the commercial speech, that came about in the 70s and 80s, GoldFarb, Virginia Board of Pharmacy, Central Hudson—that sort of reins in Cabins Deception a little bit. But there's nothing Cabins unfairness from the outside and like Howard said you have a client, there's a huge public good aspect to litigating and getting a clear rule, OK now just take the consent for 20 years it's no big deal, or do you say yeah let's litigate this all the way to the Supreme

Court or the 4<sup>th</sup> circuit or the 11<sup>th</sup> circuit 1:48:35...maybe with Lab MD, of course they're out of business so somebody else is taking that on...1:48:49...clarify the law, I just think, it is this conundrum, we like to have law, but there's just no, I will go on record saying this, some ways the antitrust with a private right of action you end up with this great body of case file out there that constrains the Federal Trade Commission, there's not private right of action under Section 5—I'm not suggesting, there are a lot of cons with having a private right of action under Section 5, I think they probably far outweigh the pros—but that's the central, it's kind of a Catch 22 here.

[Berin] Let me ask you about two other sources of discipline. One is other external discipline from the media. For example the Washington Post had this to say, to David's point, I'm quoting from an editorial: "But what are the children to be protected from? The FTC's proposal in reality is designed to protect children from the weaknesses of their parents, and the parents from the wailing insinuations of their children. That traditionally is one of the role of a governess, if you can afford one. It is not the proper role of the government." And if that doesn't ring a bell it's because that is the long forgotten but recently uncovered 1978 editorial by the Washington Post about the FTC being a national nanny.

Just reminding everybody here there was a moment when the FTC, to Howard and Josh's point, went much too far with the cigarette rule version of unfairness. And there was a moment when a democratic Congress did intervene, provide an external constraint, asked the agency to 1:50:29...rulemaking and set the FTC on a course that...1:50:38 and now we're seeing the FTC struggling to deal with its doctrines in new areas of law, is starting to raise some of the same concerns. My question is what should we learn from the experience of the 1970s when the FTC's legitimacy was called into question.

1:51:00 [Pauline] One of the things that the agency has done relatively well is that they haven't gone that far out on anything. Reasonable people can disagree about Apple, but in the end what did they do? They said ok, we're not going to tell you how, make sure that people have notice that when they put in their password there's a 15-minute window, that's what they said. That's not an outrageous thing, Apple is going to deal with it, they're getting there, whether we really needed it or not, whether it's going to do a lot of good or not, it's not something that's really way out there. In order to get people to fight, you have to have three activist commissioners who have plans, then you'll get a commission that goes...1:52:00...

[Berin] Any other thoughts on what we should learn from the experience of the 70s?

[Howard Beales] I think one of the threats to the commission going forward is that there are very few people left at the commission who went through that trauma in the 1970s and the people who have been through it are universally more cautious about expansive notions of unfairness and more sensitive to the costs and benefits than the people who think I can make this up 1:52:40...none of the history and sort of ...1:52:50...

[Berin] ...time for congress to consider whether having ...1:53:05 rulemaking, maybe it's time to look at how the commission operates generally and why it is that the commission...1:53:17 unfairness policy statement does specifically talk about the commission's expectation that unfairness would develop over time through the courts. That hasn't happened, it's worth asking either why or if that's not going to happen what can be done to make sure that the commission substitutes for that analytic development? Are there things that Congress can do that would be constructive and bipartisan?

1:53:45...[David Balto] ...prepared by the House Oversight Committee 2 hours and 45 minutes, you'd figure if there was a place to pillage ... the FTC you'd figure this would be the place, and it was titled The FTC Jury. Sounded to me like where it would happen, but at the end of the day they seemed to reach consensus that the FTC—there were problems in a certain case—but the FTC Section 5 powers seemed to me not something they wanted to... 1:54:30...

1:54:39 [Berin] I think there were a number of legitimate questions raised about Fair Notice and how the agency works. We'll see what comes of that. Any other thoughts before we move to questions from the audience?

[Pauline] One thing to remember here is we're having very rapid technological change. Consumers don't know what they're doing, their getting caught by technological change, there isn't demand for what the agency is doing, being the cop on the beat, watching what's going on and trying to push firms to do better. The agency doesn't get a lot of heat when it goes to the Hill, there is a demand for this. That said, the commission's job is to do that well, and in the vast majority of times they do. It's when we get into these more technological areas it's harder to know what the right policy is and they're struggling with it a bit I think.

1:55:40 [Marty Gaynor] To echo something Pauline said, and actually back to something I said earlier. Roughly two key questions to ask 1:55:52... in this area without commenting on any specific matter at all, I think there's some real question marks. There's some reasons to think that the market may not...1:56:05 question marks there. Economic theory is far from clear on that, although again I think there are reasons to at least be concerned. As to cost-benefit analysis one of the key parts of unfairness certainly from the economics perspective, one of the key parts of that is deciding in a reasonable fashion, in a principled fashion, how broad the base is, who are the group of consumers who benefit, who are the group upon whom costs are imposed? One, it is very difficult if not impossible to do that without in some sense thinking about what the remedy might be, it doesn't have to be exact but you have to have some sense of what the remedy might be. And two, I don't think there's a clear bright line on that... 1:57:05 ...but you could end up in different places.

The closest analog [analogy?] I could think of is the question of market delineation on the competition side which is still with us to some degree, and there, once you make a decision, often about where the market boundary is, the rest often flows from there. The rest... 1:57:20...with regard to Apple, you had three different statements from the four commissioners on there and certainly Josh's statement lays out his take on the

economic issues very clearly and completely but you can see that in the statements of the other commissioners...1:57:52...they all fully written up and you don't have a full economic analysis in all of the statements, but I think you can see these things coming up and they're coming down in different places on them. I think that you do see these issues being raised and being grappled with by the commission.

[Berin] I'll take questions from the audience.

1:58:15 [inaudible audience comment] ...a very elegant solution to what was many regarded as the second coming of the children's advertising rule, this being the interagency working group proposal to prohibit advertising of most foods to kids did not gain the Washington Post editorial of 1978 but it died a very similar death. Congress came out and said, Federal Trade Commission ...any further with this rule until you've completed a cost-benefit analysis showing the rule, a guide, actually would improve the ...1:59:55...we actually heard statements from some of the officials at the commission at the time that we couldn't possibly conduct such a cost-benefit analysis. So I think a very simple rule would be to ask the commission to give more information...case is decided that says here's how we analyze this order and how this order will improve the operation of the marketplace over the status quo. I'm not sure the Apple order would do that, 2:00:31...thing right now....never.....orders...with the way the marketplace will be operating 15...that would be a useful exercise for the commission to make.

2:00:50 [Berin] To distill for the audience: first question is, is there a problem without a clear remedy? Second question is, shouldn't the commission have to establish...quick responses...

2:01:04 [Pauline] It also raises the issue of the 20 years. The commission's posture these days, all orders are 20-year orders. In an era of rapid technological change, it makes everyone nervous. In their defense they have tried to stay away from engineered solutions because of the knowledge that everything is changing. But another margin is: do orders have to be 20-year orders?

2:01:30 [David Balto] In competition cases in high tech areas the orders are certainly less than 20 years. For Intel I think it was something like 5 or 7 years. So for something as complicated as 2:01:51...I betcha processors are going to look pretty much the same way, after 5 to 7 years from now I can't imagine Apple's billing practices are going to look like what they look like two years from now.

[Berin] As we look back on this in 20 years, ...isn't the Apple case, or the HTC case, but the Google Safari case, could it be the case that the commission...02:25...ends up even further bypassing the analysis it does today by saying, whatever you did, how simple it was, whether it was material or not, you violated a consent decree and that becomes a de facto basis for regulating the technology field.

[James Cooper] I think that is a real fear. I brought up in earlier remarks the...03:00 complementary pairing of assets in the future that we couldn't even imagine now. So

you've got a startup now, and then you're Facebook or you're Google and you want to take your start up—or Twitter—I guess everyone's under a 20-year order. You want to use that data to make an even better product that we can't even imagine now but now: Oh wait, I have to remember that I'm going to have to get express consent, because they're going to become part of Facebook, I've got to get express consent, I'm going to use the What'sApp data and I'm going to have some real difficulty mingling these data from the FTC trying to get approval from them... how business is structured, that can have a big ripple effect.

2:03:35 [Berin] Give your three suggestions on—concrete, constructive suggestions-- what can the commission be doing that's even better than what it's doing today?

[David Balto] ...process more robust. If you look at public comments, Josh wrote this great dissent. So where are the public comments in 30 days, there are 43 consumers who filed public comments who said they are happy or unhappy. The only most interesting comment, no organizations apparently....2:04:25 ...listed his organization as “parent and grandparent” and this is what he said. “Government gone amok. If my kids order apps without my permission I myself deal with the order and my kids. How are kids going to learn, or parents teach them, if some bozo from Washington steps in and interposes his or her views. Lord help us. Plus I make sure this doesn't happen in our house.” That wasn't a meaningful answer to your question but I thought this comment needed to be read.

[James Cooper] More use of economics and data works available and all BCP reports.

[Pauline] The commission do more to articulate the basis for their decisions on these bigger cases for the public to absorb.

[Howard] More explanation would be extremely useful. It can be done in lots of different ways. In analysis to any public comment and speeches after the fact, and dissents, to try to explain as much as possible about what's going on.

[Marty] Research, research, research. Research to provide better, stronger evidence in cases. Basic research to enhance our fundamental understanding of what's ... of the report process to inform our understanding of what we're actually seeing going on in the world.

[Geoff] More explanation to go along, assuming that it actually incorporates economic methodology and economic analysis of evidence, that's what's needed. We need to see more of it and not just having it happen in the background.

[Berin] Stay tuned for more from Tech Freedom and International Center for Law and Economics. Our working group of distinguished experts who are listed on the back of the report that you'll find outside on this issue this fall...we'll put Josh's paper and Geoff's paper up online as well. There's a Federal Trade Commission workshop coming up on September 15 about what to do with discrimination...communities, I for one am delighted to hear that the FTD is returning to a harm-based framework having decided

that they weren't going to they are apparently doing that and that's all for the best. The agency is turning 100 on September 28 its anniversary gala is November 7. I'll be there I'll be expecting those one-finger thingys... Stay tuned, the 3<sup>rd</sup> Circuit announced yesterday that they will hear Wyndham's appeal so we are going to get more development in case law in this area, I'm excited about that. I'm looking forward to answering some more of these questions, perhaps here at the Woolly Mammoth Theatre in the months to come. You can find more about our work on Tech Freedom and [laweconcenter.org](http://laweconcenter.org). Thank you.

2:08: [end]