December 21, 2018

Via Electronic Submission

Mr. Donald S. Clark
Secretary of the Commission
Federal Trade Commission
600 Pennsylvania Avenue NW
Washington, DC 20580

Re: Competition and Consumer Protection in the 21st Century Hearings—Public Comments Following Hearing #4, Innovation and Intellectual Property Policy

Dear Secretary Clark,

I respectfully submit these comments in response to the request for public comments following the Federal Trade Commission's Consumer Protection in the 21st Century Hearings on Innovation and Intellectual Property Policy, held October 23-24, 2018. I participated in person as a panelist during the Competition Policy & Copyright Law Session of the Hearings. I believe the discussion generated near consensus that more transparency is needed in copyright-related licensing and that the FTC has an important role in developing relevant guidelines. My comments will address both business-to-consumer and business-to-business copyright-related licensing frameworks and will conclude with some brief suggestions related to the intersection of copyrighted content and artificial intelligence.

I. Introduction

As a threshold matter, the FTC's enforcement and policy agenda should reflect both current status of copyright law and current business practices. Although historical practices provide valuable guidance, the rise of public-facing firms ("Big Internet") and the ever-increasing availability of more content than ever before, in more formats and price points than ever before, necessitates that the FTC agenda evolves accordingly. Of course, free and fair markets and robust competition should serve as underlying goals for any action or policy.

II. Business-to-Consumer Licenses

The sheer volume and availability of content raises concerns about potential unfair competition and consumer protection issues. In the dynamic world of audio and video streaming services, on-line computer games, apps, ebooks, and software, consumers may be giving up disproportionate rights for the convenience of virtually instant access to the content. Business-to-consumer ("B2C") licenses[1] provide the most apparent and troubling examples.

[1] Also known as "EULAs" (end user license agreements) or Terms of Service.

Due to the length and complexity of typical B2C licenses, most consumers do not fully understand the terms and conditions to which they have agreed. Vague or buried provisions in such licenses may grant the service provider broad rights to consumers' content and information, including perpetual licenses and the right to assign and sublicense that content. Many consumers, especially teenagers and young adults, learn this the hard way; once posted, sensitive content is difficult if not impossible to take down.

What can be most surprising to consumers is where their content may end up. Those obscure sublicensing and assignment rights mean that sensitive or hoped-for proprietary content can appear on any number of other sites even if one deletes or makes it private on the initial platform. Further, it is not common knowledge that posting to the various social media platforms may effectively surrender a creator's ability to control or monetize their work. The lack of standard functions on streaming sites and some photo apps for others to capture the streams or download the files can give a false sense of control to creators. First, stream ripping software and tools to capture images off any platform means that the content can be redistributed far and wide. Of course, the foregoing may well be copyright infringement. But, second, the more insidious problem is the lawful-yet-covert transfer of content behind the scenes under the B2B contracts discussed in Part III, enabled by the creator's initial B2C license.

Similarly, consumers may not appreciate their rights and obligations regarding future license modifications. B2C licenses regularly employ "rolling" contract provisions, where consumers agree in advance to subsequent changes by the service provider with little if any notice. The required consideration for the license modification is often based on nothing more than the consumer's continued use of the service.

Provisions in B2C licenses may also be constraining consumers' legal options in the event of a dispute. B2C licenses often contain mandatory arbitration clauses with no opportunity for discovery, jury, or judicial appeal. Such clauses, which often disfavor consumers by limiting damages, providing an inconvenient forum, or prohibiting class processes, are increasingly unpopular.

These concerns should not lead to the conclusion that B2C licenses, which are predominantly "take it or leave it" contracts of adhesion, are necessarily improper. There is nothing inherently wrong with adhesion contracts. In theory, a diligent minority of consumers would catch problematic provisions or changes, but the torrent of B2C licensing activity precludes timely remedial action. This vast activity also leads to a gradual devolution of consumers' "reasonable expectations" in B2C licenses. Big Internet companies, who "disrupt" as a mission statement and ask forgiveness instead of permission as a business model, push the envelope so that what was (and should be) unreasonable may no longer be for purposes of contract defenses.

I believe the FTC can play an important role in addressing the above-noted B2C licensing concerns. At a minimum, to the extent the licenses are adhesion contracts, they invite heightened scrutiny, especially with the flood of new agreements and modifications that consumers face every day in digital life. Heightened scrutiny may also help identify and stall the downward creep of reasonable expectations.

I also encourage the FTC to use its longstanding, strong guidance on intellectual property licensing and markets to develop B2C license guidelines. In any such guidance, I recommend the FTC consider including the following requirements:

- Consumers should be made aware, explicitly, of what can be done with their own content and information and who has rights and access to it;
- Companies should be obligated to do all they reasonably can to remove sensitive consumer content;
- Consumers should have enforceable rights to remove their own content, similar to the "right to be forgotten" movement in the EU;
- Standards should be provided for reasonable and enforceable private and public zones in social media;
- Perpetual licenses with vague assignment/sublicensing provisions should be discouraged;
- Rolling contracts should provide sufficient notice prior to agreement modification.

III. Business to Business Licenses

Turning to copyright-related business-to-business ("B2B") licenses, Big Internet is displacing better understood and vetted open licensing regimes like Creative Commons in favor of a private, poorly understood licensing system. The market power of and interconnected relationships among Big Internet firms cause the most concern here. Certain behind the scenes actions may negatively affect consumers and fair competition.

For example, consumers' information and content licensed to Big Internet through B2C licenses are somehow being linked to B2B deals for advertising, search engine optimization, data mining, and the like. Most people who engage in any on-line activity have experienced this unsettling reality—after searching for a product one day, having little ads for that same product appear on every website for the next week.

In addition, increasingly Big Internet login options (e.g. for Facebook and Google) enable the use of one login for many seemingly unrelated sites. There must be underlying B2B licenses in place permitting such information sharing. This raises significant concerns about what happens to user-generated content under these deals.

Like adhesion contractions, exclusive B2B licenses are not improper in the abstract, but properly invite heightened scrutiny. It is important to question whether Big Internet unfairly leverages market power to force other firms into content and data-sharing deals. Non-exclusive B2B licenses, on the other hand, can seem innocuous and so might fly under the radar more for both consumers, professional creators, and regulators. The vast interconnections of social media and Big Internet mean that content can wind up far from where the originator believe he authorized it.

Regarding issues related to exclusive B2B licenses, I respectfully recommend that the FTC work with the DOJ to apply longstanding antitrust investigation and enforcement policies. I also recommend that the FTC revisit policies regarding horizontal and vertical exclusive arrangements in the era of Big Internet, with particular focus on potential tying of different proprietary assets such as data and content. The FTC should also investigate whether the vast, interconnected networks of content sublicenses raise any anticompetitive effect or consumer protection concerns.

IV. Artificial Intelligence

Content, in all its origins and forms, is critical for creating training databases for AI programs. AI must experience a wide range of ordinary content to learn to identify objects in images, music, etc. Certain content databases may be being treated as proprietary (in the aggregate), creating potential problems for AI innovation and learning by firms other than Big Internet. Platforms may also use AI to control what content consumers and professionals see, resulting in de facto blocking of independent content.

In this fast-moving area, proceeding with caution will allow nascent innovation and business models to develop. It will be critical for the FTC to watch closely for leveraging and anticompetitive behavior in this space from Big Internet.

V. Conclusion

I believe that the FTC could beneficially use its enforcement and policy agenda to address significant consumer and competition-related concerns regarding copyright licensing activity. While drawing from a strong history of IP-related guidance, the FTC's enforcement and policy agenda should reflect copyright law and business practices as they exist currently, in an arena heavily dominated by Big Internet.

I want to thank the Commission for allowing me the opportunity to provide these comments. I invite the Commission to let me know if I might provide additional information about any of the comments discussed above or any other related matter.

Sincerely,

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