ALL OF THAT IN ONE PAGE: THE APPLICATION OF THE 2015 FTC UNFAIR METHODS OF COMPETITION POLICY STATEMENT TO NET NEUTRALITY DISPUTES

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INTRODUCTION

Section 5 of the Federal Trade Commission Act ("FTC Act") provides the Federal Trade Commission (FTC) regulatory jurisdiction to regulate "unfair methods of competition . . . , and unfair or deceptive acts or practices in or affecting commerce."[1] For more than one hundred years, it has been unanimously accepted that Section 5 of the FTC Act affords the FTC the authority to enforce both the Sherman and Clayton Acts. It is also widely understood that Congress intended the FTC to have enforcement powers beyond the four corners of the Sherman and Clayton Acts.[2] The proper scope and implementation of that power, often referred to as the FTC's "standalone authority," has been the subject of constant debate. For the first hundred years of the agency's existence, the FTC never articulated any definition of what conduct would constitute a violation of Section 5 pursuant to its standalone authority.

This ambiguity was resolved on August 13, 2015 when the FTC issued a one-page policy statement ("UMC Policy Statement") providing the enforcement framework for standalone Section 5 authority.[3] The three prongs of the UMC Policy Statement are: (1) the FTC will be guided by promotion of consumer welfare; (2) the FTC will evaluate the conduct under the rule of reason; and (3) whenever possible, the FTC will challenge an act or practice under the Sherman and/or Clayton Acts, rather than using its standalone authority.[4]

Although the UMC Policy Statement notes that "Congress chose not to define the specific acts," and "recogniz[es] that application of the statute would need to evolve with changing markets and business practices,"[5] the concise UMC Policy Statement went a long way to tether the FTC's standalone authority to antitrust precedent, sound economics, and an evidence-based approach to antirust.[6]

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1. 15 U.S.C. § 45(a)(1) (2018).

2. *See generally* JOSHUA D. WRIGHT & ANGELA M. DIVELEY, UNFAIR METHODS OF COMPETITION AFTER THE 2015 COMMISSION STATEMENT 1 (2015), https://www.americanbar.org/content/dam/aba/publishing/antitrust_source/oct15_wright_10_19f.authcheckdam.pdf [https://perma.cc/2NZY-PFET] (discussing why Congress intended Section 5 to reach beyond traditional antitrust laws).

3. FED. TRADE COMM'N, STATEMENT OF ENFORCEMENT PRINCIPLES REGARDING "UNFAIR METHODS OF COMPETITION" UNDER SECTION 5 OF THE FTC ACT (2015), https://www.ftc.gov/system/files/documents/public_statements/735201/150813section5enforcement.pdf [https://perma.cc/T2W4-2LJ2] [hereinafter UMC POLICY STATEMENT].

4. *Id.*

5. *Id.*

6. Press Release, Mike Lee, Lee Commends FTC on Issuing Section 5 Guidelines, Commits to Active Oversight (Aug. 13, 2015) [hereinafter Lee Press Release], http://www.lee.senate.gov/public/index.cfm/2015/8/lee-commends-ftc-on-issuing-section-5-guidelines-commits-to-active-oversight [https://perma.cc/U9QE-FBBM].

The debate over whether and how to regulate the Internet has been one of the most divisive policy debates of the last decade. There is disagreement over all aspects of Internet regulation including most notably which government agency should act as the cop on the Internet beat. From 1996 to 2010 the FTC, using antitrust and consumer protection laws, was in charge while the Federal Communications Commission (FCC) took on a relatively minor role.[7] From 2010 to 2017 the FCC was in charge, and from 2015–2017 the FTC was legally unable to regulate in any way.[8] In 2017 the FCC sent exclusive regulatory jurisdiction back to the FTC.[9]

Although some have argued that the FTC is incapable—or unwilling—to adequately regulate the Internet, and that the FCC should be left in charge.[10] The FTC, through the exercise of its Section 5 authority, is well-situated to police the Internet and ensure that ISPs do not restrain competition or harm consumers through deceptive or unfair practices. We argue the UMC Policy Statement provides all the guidance necessary for the FTC to adequately regulate the Internet through its Section 5 power.

Part I explores the history of Section 5 both before and after the UMC Policy Statement, describing the FTC's unfairness and deception authority under Section 5 of the FTC Act as well as its standalone authority to regulate unfair methods of competition. Part II briefly explains Internet regulation, from the 2015 Open

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> Clarity is necessary both to ensure that enforcement pursuant to Section 5 does not vary with the make-up of the Commission, and to provide adequate guidance to businesses. With this policy statement, the FTC has made progress towards that goal by formally committing to positions that represent the general consensus of the antitrust bar as to how and when Section 5 should be applied. Lee Press Release, *supra*;

see also ROBERT DAVIS, ONE STEP ON THE ROAD TO CLARITY: THE 2015 FTC STATEMENT ON UNFAIR METHODS OF COMPETITION (2016), https://www.americanbar.org/content/dam/aba/publishing/antitrust_source/feb16_davis_2_12f.authcheckdam.pdf [https://perma.cc/4ZYR-ZBMS]; Leah Nylen, *FTC's Section 5 Guidance — 'Historic Step' or Much Ado About Not Very Much?*, MLEX MARKET INSIGHT (Aug. 14, 2015), https://mlexmarketinsight.com/insights-center/editors-picks/antitrust/north-america/ftcs-section-5-guidance-historic-step-or-much-ado-about-not-very-much [https://perma.cc/Z5RU-LT76] (FTC Chair Edith Ramirez "stressed that the principles don't represent a policy change for the agency, but merely reflect more explicitly how the commission has used its authority in the recent past.").

7. *See e.g.*, Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified in scattered sections of 47 U.S.C.).

8. *Restoring Internet Freedom*, WC Dkt. No. 17-108, Declaratory Ruling, Report & Order, and Order, 33 FCC Rcd. 311, 420–21 (2018) [hereinafter *2018 Restoring Internet Freedom Order*]; *Protecting and Promoting the Open Internet*, GN. Dkt. No. 14-28, Report & Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd. 5601, 5624–25 (2015) [hereinafter *2015 Open Internet Order*].

9. *2018 Restoring Internet Freedom Order*, *supra* note 8, at 421–23.

10. *See, e.g.,* Ed Black, *The Business Reasons Why the FCC — Not FTC — Should Enforce Open Internet Rules*, HILL (Oct. 31, 2017, 4:15 PM), https://thehill.com/blogs/congress-blog/technology/357894-the-business-reasons-why-the-fcc-not-ftc-should-enforce-open [https://perma.cc/VK2Y-9T8J]; Kaleigh Rogers, *We Can't Rely on the FTC to Defend Net Neutrality*, MOTHERBOARD (Nov. 29, 2017, 2:00 PM), https://motherboard.vice.com/en_us/article/j5dek8/net-neutrality-ftc-rules [https://perma.cc/W7AG-RLXJ].

Internet Order to the 2018 Restoring Internet Freedom Order, within the context of the broader debate on the appropriate regulatory framework to govern net neutrality disputes and, specifically, the potential role of the FTC and Section 5. Part III then analyzes several examples of potential net neutrality violations under the FTC standalone authority after the UMC Policy Statement and shows how the tenets of the UMC Policy Statement should guide analysis of potential net neutrality violations.

I. A PRIMER ON THE FTC'S STANDALONE UNFAIR METHODS OF COMPETITION AUTHORITY AFTER THE UMC POLICY STATEMENT

This Section provides a background on the scope of the FTC's authority to govern disputes that might arise in the context of the broadband market generally and, in particular, in the context of alleged violations of net neutrality principles.[11] We describe the three prongs of the FTC's enforcement authority: (1) the authority to prosecute violations of the traditional antitrust laws under both the Sherman and Clayton Acts, (2) consumer protection authority to regulate unfair or deceptive practices, and (3) the FTC's standalone authority to identify violations of Section 5's prohibition on "unfair methods of competition" that do not also violate the traditional antitrust laws. Both the traditional antitrust laws and consumer protection authority are well ideated with robust precedent, while the rationale and bounds of the standalone authority are much more opaque. We then explain how the UMC Policy Statement refines and expands the FTC's standalone authority and how those powers are likely to be interpreted in the future.

A. The Sherman and Clayton Acts

Both before and after the enactment of the UMC Policy Statement, the FTC has used its Section 5 standalone authority anywhere that the Sherman Act and Clayton Acts do not apply. Conversely, any conduct from which there is a cause of action under either the Sherman or Clayton Acts should not give rise to a standalone case.[12]

The explicit purpose of the Sherman Act is to protect the competitive market as a whole, not to protect individual

11. *See generally* Tim Wu, *Network Neutrality, Broadband Discrimination*, 2 J. ON TELECOMM. & HIGH TECH. L. 141 (2003).

12. *See, e.g.*, E.I. du Pont de Nemours & Co. v. FTC, 729 F.2d 128, 136–37 (2d Cir. 1984); Boise Cascade Corp. v. FTC, 637 F.2d 573 (9th Cir. 1980); *see also* UMC POLICY STATEMENT, *supra* note 3.

competitors.[13] Generally, there are two types of conduct that are violations under the Sherman Act: (1) anticompetitive agreements—covered by Section 1 of the Sherman Act;[14] and (2) attempts to monopolize a market—covered by Section 2 of the Sherman Act.[15]

Specifically, Section 1 prohibits "[e]very contract, combination . . . , or conspiracy, in restraint of trade,"[16] but this has long been understood to mean only "unreasonable" contracts.[17] Section 1 violations typically have three elements: (1) an agreement; (2) a restraint of trade; and (3) an impact on interstate commerce.[18] These violations are typically evaluated with the rule of reason, a framework for case-by-case analysis that balances procompetitive efficiencies with anticompetitive effects.[19]

Section 2 prohibits "monopoliz[ation], or attempt[ed] . . . monopoliz[ation], or combin[ation] or conspir[acy] . . . to monopolize."[20] Section 2 violations require: (1) possession of monopoly power in the relevant market; and (2) willful acquisition or maintenance of the monopoly power.[21] Section 2's broad condemnation of monopolization or attempted monopolization covers a variety of other conduct: raising rivals' costs through either customer foreclosure or input foreclosure,[22] unilateral refusals to deal,[23] exclusive dealing,[24] predatory pricing,[25] and tying.[26] But the common link between all of these Section 2 violations is a showing

13. KATALIN JUDIT CSERES, COMPETITION LAW AND CONSUMER PROTECTION 291–93 (2005).

14. 15 U.S.C. § 1 (2018).

15. *Id.* § 2.

16. *Id.* § 1.

17. United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 213–14 (1940).

18. *See, e.g.*, 15 U.S.C. § 1; *Socony-Vacuum Oil Co.,* 310 U.S. at 213–14.

19. Procompetitive efficiencies are beneficial consequences of an agreement or conduct, such as a merger resulting in marginal cost savings. Anticompetitive effects are harmful consequences of an agreement or conduct, such as the ability to collude or increase the market price and restrict market output. *See, e.g.*, Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Oklahoma, 468 U.S. 85, 103 (1984); Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 19–20 (1979); Polygram Holding, Inc. v. FTC, 416 F.3d 29, 34–35 (D.C. Cir. 2005).

20. 15 U.S.C. § 2.

21. United States v. Grinnell Corp., 384 U.S. 563, 570–71 (1966). Section 2 is careful to exclude a lawfully acquired monopoly through the development of a superior product from prong 2. *See* 15 U.S.C. § 2 (2004). Section 2 also broadly bans attempted monopolization. *Id.*

22. Lorain Journal Co. v. United States, 342 U.S. 143, 154–56 (1951).

23. *See, e.g.*, Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 399 (2004); Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 608–10 (1985).

24. Jefferson Par. Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 44–45 (1984).

25. *See, e.g.*, Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 222–24 (1993); Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 588–90 (1986).

26. *See, e.g.*, *Jefferson Par. Hosp. Dist. No. 2*, 466 U.S. at 2–4; United States v. Microsoft Corp., 253 F.3d 34, 84–85 (D.C. Cir. 2001).

of monopoly power and establishing that the conduct resulted in harm to competition.

The scope of antitrust enforcement grew with the passage of the Clayton Act in 1914, which primarily dealt with unlawful mergers. Previously, under the Sherman Act, a merger would only be unlawful if it were a merger to monopoly. But Section 7 of the Clayton Act expands that prohibition to also include mergers where "the effect of such acquisition may be substantially to lessen competition. . . ."[27] There are an array of tools used to show that a merger may lessen competition, but the analysis boils down to whether the post-merger firm can profitably raise price or collude with other firms in the industry.[28]

B. Section 5 of the FTC Act

Violations not covered by either Section 1 or Section 2 of the Sherman Act, or Section 7 of the Clayton Act can still be actionable under the FTC Act. The FTC Act, also passed in 1914, created the FTC as an independent enforcement agency, and gave it additional power to police "unfair methods of competition . . . and unfair or deceptive acts or practices in or affecting commerce. . . ."[29] The Senate ideated the FTC as a special tribunal comprised of experts, both lawyers and economists, to impartially determine what conduct would be illegal and therefore protect consumers.[30] To achieve that objective, Section 5 of the FTC Act prohibits two broad classes of conduct: (1) unfair or deceptive practices—the consumer protection authority; and (2) unfair methods of competition—the standalone authority. The 1938 Wheeler-Lea Act provided significant clarity to the consumer protection authority and broadened the FTC's power to also cover "unfair or deceptive acts or practices," allowing the FTC to enforce false advertising practices.[31] The FTC also has jurisdiction to enforce both the Sherman and Clayton Acts.

In 1980, the Commission provided a three-part test to evaluate consumers' injury to determine whether a certain business practice

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27. 15 U.S.C. § 18 (2018).

28. *See* U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES (2010), https://www.ftc.gov/sites/default/files/attachments/merger-review/100819hmg.pdf [https://perma.cc/DU9G-VMYK].

29. 15 U.S.C. § 45(a)(1).

30. *See* S. REP. NO. 63-597, at 13 (1914); 51 CONG REC. 11,083 (1914); William E. Kovacic & Marc Winerman, *Competition Policy and the Application of Section 5 of the Federal Trade Commission Act*, 76 ANTITRUST L.J. 929, 930–32 (2010). Today, on the FTC's website, the agency describes the goal of the FTC Act is to "protect the process of competition for the benefit of consumers, making sure there are strong incentives for businesses to operate efficiently, keep prices down, and keep quality up." *The Antitrust Laws,* FED. TRADE COMM'N, https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws [https://perma.cc/G9J9-ZM29].

31. *See* 1938 Wheeler-Lea Act, Pub. L. No. 75-447, 52 Stat. 111 (codified as amended at 15 U.S.C. §§ 41–64 (2018)).

was unfair. The injury "must be substantial; it must not be outweighed by any countervailing benefits to consumers or competition that the practice produces; and it must be an injury that consumers themselves could not reasonably have avoided."[32] Congress eventually codified this three-part test as "an act or practice [that] causes or is likely to cause substantial injury to consumers which is not reasonably avoided by consumers themselves and not outweighed by countervailing benefits to consumers or to competition."[33] Rationally, the definition of what is unfair constitutes a balancing of a potential injury with potential benefits, and a practice is only unfair if the potential injury is greater than the potential benefits.

FTC Commissioner J. Howard Beales added several "common sense principles" about the Commission's unfairness doctrine:

> The Commission should not be in the business of trying to second guess market outcomes when the benefits and costs of a policy are very closely balanced or when the existence of consumer injury is itself disputed. That's the point of the substantial injury test. And the Commission should not be in the business of making essentially political choices about which public policies it wants to pursue. That is the point of codifying the limited role of public policy.[34]

Commissioner Beales summarizes modern unfairness authority as "protect[ing] consumer sovereignty by attacking practices that impede consumers' ability to make informed choices."[35]

By contrast, a deceptive act or practice is "a representation, omission or practice that is likely to mislead the consumer acting reasonably in the circumstances, to the consumer's detriment."[36] Deceptive practices are the quintessential false advertising or misleading claims that "almost invariably cause consumer injury because consumer choices are frustrated and their preferences are not satisfied."[37]

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32. Letter from the Fed. Trade Comm'n, to Hon. Wendell Ford and Hon. John Danforth, Senate Comm. on Commerce, Sci. and Transp. (Dec. 17, 1980), *reprinted in* International Harvester Co., 104 F.T.C. 949, app. at 1073 (1984).

33. 15 U.S.C. § 45(n).

34. J. Howard Beales III, *The Federal Trade Commission's Use of Unfairness Authority: Its Rise, Fall, and Resurrection*, 22 J. PUB. POL'Y & MARKETING 192, 196 (2003).

35. *Id.* at 195.

36. Letter from James C. Miller, Chairman, Fed. Trade Comm'n, to Hon. John D. Dingell, Chairman, House Comm. on Energy & Commerce (Oct. 14, 1983), https://www.ftc.gov/system/files/documents/public_statements/410531/831014deceptionstmt.pdf [https://perma.cc/5NCG-JFUH].

37. Beales III, *supra* note 34, at 196.

The key difference between unfairness doctrine and deception doctrine is that unfairness balances injury and benefits, while deception never inquires about any benefits. Because the key to deception is a misleading or false claim, it is presumed there are no associated benefits because the company could easily refrain from such conduct that violates the integrity of the market.[38]

In contrast to the consumer protection authority, the unfair methods of competition doctrine is much more opaque. When Congress enacted the FTC Act in 1914, it declined to provide a list of conduct that would qualify as an unfair method of competition, or a specific definition to aid enforcers and businesses in interpreting the statute.[39] During the passage of the FTC Act one senator defined "unfair competition" quite expansively as "every practice and method between competitors . . . that is against public morals."[40] While Congress undoubtedly wanted this authority to be vague so it could be flexible and broadly applicable, "relying upon the common law approach to define the scope of Section 5 ultimately offers no certainty and results in a boundless standard under which the Commission may prosecute any conduct as an unfair method of competition."[41] Thus, for nearly one hundred years a violation was "anything three Commissioners imagined it was."[42] As a result, the unfair methods of competition doctrine, originally envisioned by Congress to be one of the FTC's best enforcement tools, wound up playing a rather insignificant role in antitrust enforcement or in the shaping of competition policy more broadly.[43]

The malleability of the doctrine also means that what constitutes an unfair method of competition changed dramatically over the twentieth century. Prior to 1938, the unfair methods of competition precedent involved challenges to lotteries and commercial bribery, essentially practices that were only unfair to competitors.[44] For example, in the 1934 case *R.F. Keppel & Bro.* the Supreme Court condemned using penny candy as prizes in games of chance involving kids as immoral.[45] This holding was significant because the practice in question was not anticompetitive in economic terms, and thus, the Court held that Section 5 violations

38. *Id.*

39. H.R. REP. NO. 63-1142, at 19 (1914) (Conf. Rep.) (observing "[i]f Congress were to adopt the method of definition, it would undertake an endless task").

40. Gilbert Holland Montague, *Unfair Methods of Competition*, 25 YALE L.J. 20, 21 (1915).

41. Jan M. Rybnicek & Joshua D. Wright, *Defining Section 5 of the FTC Act: The Failure of the Common Law Method and the Case for Formal Agency Guidelines*, 21 GEO. MASON L. REV. 1287, 1304 (2014).

42. WRIGHT & DIVELEY, *supra* note 2, at 2.

43. *See* Kovacic & Winerman, *supra* note 30, at 931–35.

44. *Id.* at 945 (citing Circle Cilk Co., 1 F.T.C. 13 (1916)).

45. FTC v. R.F. Keppel & Bro., Inc., 291 U.S. 304, 314 (1934).

are not restricted to the types of anticompetitive violations that typically fall within the purview of the Sherman Act.[46]

Furthermore in 1972, the Supreme Court held that the Commission can "define and proscribe an unfair competitive practice even though the practice does not infringe either the letter or the spirit of the antitrust laws."[47] Neither Congress nor the Supreme Court provided the guidance or contours necessary to define or provide a limiting factor for Section 5 violations.

Left to their own devices, FTC Commissioners have articulated vastly different interpretations of the agency's Section 5 unfair methods of competition authority, often including ideas far afield from economics or competition. For example, in 1977 FTC Chairman Michael Pertschuk included "social and environmental harms produced as unwelcome byproducts of the marketplace: resource depletion, energy waste, environmental contamination, worker alienation, the psychological and social consequences of marketing-stimulated demands" as a part of a definition of unfair methods of competition.[48] In 2006 Commissioner Jon Leibowitz defined an unfair method of competition as "actions that are 'collusive, coercive, predatory, restrictive, or deceitful,' or otherwise oppressive."[49] The words "otherwise oppressive" provide what is essentially a catch-all in broadening the definition of a Section 5 violation to just about any conduct. And, as recently as 2015, prominent academics Jonathan Baker and Steven Salop suggested that Section 5 could be used as a tool to redress income inequality if firms price discriminate against poorer consumers.[50] From a competition standpoint, the only unfair method of competition violation that prompted widespread agreement was an invitation to collude.[51]

Thus, while modern consumer protection law was reasonably well ideated with standards and best practices, unfair method of competition doctrine and practice was marked by a lack of clarity and moving boundaries out of step with an economics evidence-based approach to antitrust.

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46. *Id.* at 310.

47. FTC v. Sperry & Hutchinson Co., 405 U.S. 233, 239 (1972).

48. Michael Pertschuk, Chairman, Fed. Trade Comm'n, New Directions for the FTC, Prepared Remarks Before the Eleventh New England Antitrust Conference (Nov. 18, 1977), *reprinted in* 308 Trade Reg. Rep. (CCH) (Supp. 1977).

49. Rambus, Inc., No. 9302, 2006 WL 2330118, at 15 (Fed. Trade Comm'n Aug. 2, 2006) (Leibowitz, Comm'r, concurring).

50. *See* Jonathan B. Baker & Steven C. Salop, *Antitrust, Competition Policy, and Inequality*, 104 GEO. L.J. ONLINE 1, 15 (2015).

51. *See, e.g.*, Joe Sims, *Section 5 Guidelines: Josh Wright as the New King of Corinth?*, CPI ANTITRUST CHRON. Sept. 2013, at 1, https://www.competitionpolicyinternational.com/assets/Uploads/SimsSEP-3.pdf [https://perma.cc/GPC9-V34C].

C. *The UMC Policy Statement*

For the first time in its history, on August 13, 2015 the FTC provided, in its own words, formal guidance on "the principles and overarching analytical framework that [will] guide the Commission's application of Section 5."[52] Specifically clarifying the agency's standalone unfair methods of competition authority, the UMC Policy Statement covers actions that "contravene the spirit of the antitrust laws . . . but may not fall within the scope of the Sherman and Claytons Acts."[53] The UMC Policy Statement, a bipartisan effort that passed via a 4-1 Commission vote,[54] cleverly relies on both the "accumulated knowledge" of the agency after more than one hundred years and the traditional tools in the agency's arsenal.[55]

The three prongs of the UMC Policy Statement are:

- the Commission will be guided by the public policy underlying the antitrust laws, namely, the promotion of consumer welfare;
- the act or practice will be evaluated under a framework similar to the rule of reason, that is, an act or practice challenged by the Commission must cause, or be likely to cause, harm to competition or the competitive process, taking into account any associated cognizable efficiencies and business justifications; and
- the Commission is less likely to challenge an act or practice as an unfair method of competition on a standalone basis if enforcement of the Sherman or Clayton Act is sufficient to address the competitive harm arising from the act or practice.[56]

1. Consumer Welfare

Modern antitrust law seemingly goes hand-in-hand with economic analysis, and the UMC Policy Statement is no different.[57]

52. FED. TRADE. COMM'N, STATEMENT OF THE FEDERAL TRADE COMMISSION ON THE ISSUANCE OF ENFORCEMENT PRINCIPLES REGARDING "UNFAIR METHODS OF COMPETITION" UNDER SECTION 5 OF THE FTC ACT (2015), https://www.ftc.gov/system/files/documents/public_statements/735381/150813commissionstatementsection5.pdf [https://perma.cc/GNP3-NYG8] [hereinafter FTC STATEMENT ON UMC].

53. UMC POLICY STATEMENT, *supra* note 3.

54. Chairwoman Edith Ramirez and Commissioners Julie Brill, Joshua D. Wright, and Terrell McSweeny voted in favor of the UMC Policy Statement. Commissioner Maureen Ohlhausen dissented.

55. FTC STATEMENT ON UMC, *supra* note 52.

56. UMC POLICY STATEMENT, *supra* note 3.

57. *See, e.g.*, Douglas H. Ginsburg, *Originalism and Economic Analysis: Two Case Studies of Consistency and Coherence in Supreme Court Decision Making* 33 HARV. J.L. & PUB. POL'Y 217, 222 (2010) ("There is now broad and nonpartisan agreement in

The first part of the policy statement ties Section 5 to the central tenet of economic analysis: conduct that leaves consumers in an economically worse position—a decrease in consumer welfare—should be a viewed as anticompetitive, while conduct that does not decrease consumer welfare should be allowed. According to Areeda and Hovenkamp's legendary antitrust treatise, "populist goals should be given little or no independent weight in formulating antitrust rules."[58] And, similarly, the non-competition goals like social and environmental harms and income redistribution are not given weight in the UMC Policy Statement.[59]

2. Rule of Reason

The second part of the UMC Policy Statement also strongly coincides with existing antitrust frameworks and ties Section 5 analysis to Sherman Act Section 1 analysis. Under the Sherman Act, all agreements that are not per se unlawful are analyzed under the rule of reason. And indeed, the rule of reason is exactly the type framework that the FTC was referring to when it mentioned relying on "accumulated knowledge" to limit the FTC's standalone authority.[60] Tying a potential Section 5 violation to the rule of reason allows for a principled case-by-case balancing of benefits and harms. And, importantly, the consistency of the rule of reason adds much needed clarity to the Section 5 legal framework. Practitioners are keenly aware of how the FTC is likely to treat rule of reason cases so the UMC Policy Statement adds a layer of transparency for the legal industry as a whole.[61]

The second part further ties Section 5 to traditional antitrust ideas by requiring harm to the competitive process, which adds weight to the anticompetitive side of the rule of reason balancing test. Antitrust has long required harm to the competitive process rather than a mere showing of excessive or supracompetitive prices, or harm to individual competitors, when finding is not sufficient to show anticompetitive harm.[62]

The UMC Policy Statement also borrows from existing antitrust law with regard to efficiencies, the other side of the rule of reason balancing test. The 2010 Horizontal Merger Guidelines

academia, the bar, and the courts regarding the importance of sound economic analysis in antitrust decision making.").

58. 1 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 110 (3d ed. 2006).

59. WRIGHT & DIVELEY, *supra* note 2, at 4–5.

60. "The 'rule of reason' is the cornerstone of modern antitrust analysis." FTC STATEMENT ON UMC, *supra* note 52, at 1 n.3.

61. *See* WRIGHT & DIVELEY, *supra* note 2, at 7; Lee Press Release, *supra* note 6 ("Clarity is necessary . . . to provide adequate guidance to businesses.").

62. *See, e.g.*, Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 407 (2004); Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 767 (1984); Brown Shoe Co., Inc. v. United States, 370 U.S. 294 (1962).

use the term "cognizable efficiencies" to refer to procompetitive efficiencies "that have been verified" and are specific to the merger in question.[63] The same theory applies to Section 5 efficiencies in that they must be cognizable and conduct specific.

3. Conduct Not Covered by Sherman or Clayton Acts

The third part takes a different approach and provides a much-needed Section 5 limiting factor. While standalone Section 5 enforcement power is a tool in the FTC's arsenal, as was originally intended by Congress, the UMC Policy Statement makes clear that the Commission should rely on Sherman or Clayton Act authority whenever possible, to avoid chilling any procompetitive conduct.[64] The limiting factor prevents broad application of Section 5 to cases that may be tenuous under either the Sherman or Clayton Acts.[65] This third part is also consistent with important Section 5 precedent.[66]

But, at the same time, the third part of the statement also leaves a clear area for standalone Section 5 authority to apply to "novel conduct that has not yet been addressed by the Sherman or Clayton Acts."[67] This makes standalone Section 5 flexible enough to apply to future innovation harms that may not be covered by normal Sherman and Clayton Act liability

D. Post-UMC Policy Statement Developments

Since the publication of the UMC Policy Statement, there have been very few opportunities to test or apply the new guidance. Simply put, standalone unfair methods of competition cases are rare, because when a case is litigated there is usually sufficient conduct to also prove a Sherman Act violation. And, in many other instances, the parties will settle with the FTC rather than litigate the case through Article III courts.

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63. HORIZONTAL MERGER GUIDELINES, *supra* note 28, at 29–30; *see also* Nat'l Soc. of Prof'l Engineers v. United States, 435 U.S. 679 (1978); Polygram Holding, Inc. v. FTC, 416 F.3d 29 (D.C. Cir. 2005).

64. WRIGHT & DIVELEY, *supra* note 2, at 10.

65. For example, loyalty discounts, anticompetitive product design, and product hopping. *See* WRIGHT & DIVELEY, *supra* note 2, at 11–12.

66. Boise Cascade Corp. v. FTC, 637 F.2d 573 (9th Cir. 1980). This case held that since the anticompetitive effect element of a Section 1 case could not be satisfied, allowing a Section 5 violation would "blur the distinction between guilty and innocent commercial behavior." *Id.* at 582.

67. WRIGHT & DIVELEY, *supra* note 2, at 12; *see also* SUSAN A. CREIGHTON & THOMAS G. KRATTENMAKER, APPROPRIATE ROLE(S) FOR SECTION 5, at 3–4 (2009), http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/Feb09_Creighton2_26f.pdf [https://perma.cc/W68C-VBVX]. Creighton and Krattenmaker refer to these types of cases as "frontier cases," cases that might otherwise give rise of a Sherman Act violation, but involve conduct that "fall[s] outside traditional categories of conduct" accompanied by settled law. *Id.* at 3.

For example, in February 2018 the FTC brought an invitation to collude case against three large dental supply companies, Benco, Schein, and Patterson, who combined had an eighty-five percent market share in the market for sale of dental products and services.[68] The case was brought as a Section 5 unfair methods of competition claim and alleged that these three companies had conspired to refrain from offering discounted prices or negotiating with groups representing multiple independent dentists.[69] But, in October 2018, the parties settled for $80 million.[70] Thus, the courts still have not yet interpreted the scope of the FTC's standalone Section 5 UMC authority after the 2015 UMC Statement.

One pending litigation offers hints as to how a court might interpret that authority. *FTC v. Qualcomm*[71] features a Section 5 unfair methods of competition claim. In its complaint, the FTC asserted its standalone authority by claiming that Qualcomm's "exclusive dealing with Apple—is anticompetitive and constitutes an unfair method of competition in violation of Section 5(a) of the FTC Act . . . regardless of whether they constitute monopolization or unreasonable restraints of trade."[72] In denying Qualcomm's motion to dismiss, the district court analyzed the state of Section 5 law and stated "the FTC's authority to proscribe 'unfair methods of competition' under [Section] 5 is not unbounded."[73] Prior to the UMC Policy Statement, when Section 5 could allegedly cover "social and environmental harms" as well as the catch-all "otherwise oppressive" conduct, there arguably was no limiting factor to Section 5.[74] The UMC Policy Statement provided exactly such a limitation, which brought the contours of Section 5 in line with the Second Circuit's holding in *du Pont de Nemours*, as applied by the district court in *FTC v. Qualcomm* in 2017.

Even though the district court held that the FTC had alleged violations of Section 1 and Section 2 of the Sherman Act and thus did not need to prove a standalone Section 5 violation, by declining to address a Section 5 claim when there were valid Sherman Act

68. Complaint, In re Benco Dental Supply Co. et al., FTC File No. 151-0190, Docket No. 9379 (Feb. 12, 2018).

69. *Id.*

70. Amanda Ostuni, *Patterson Cos. to Pay Roughly One-Quarter of $80M Settlement in Price Fixing Suit*, TWIN CITIES BUS. (Oct. 2, 2018), http://tcbmag.com/news/articles/2018/october/patterson-cos-to-pay-roughly-one-quarter-of-80m [https://perma.cc/S7BN-KZB6].

71. FTC v. Qualcomm Inc., No. 17-CV-00220, 2017 WL 2774406 (N.D. Cal. June 26, 2017).

72. Complaint for Equitable Relief at 31, FTC v. Qualcomm Inc., No. 17-CV-00220, 2017 WL 2774406 (N.D. Cal. June 26, 2017).

73. *Qualcomm Inc.*, 2017 WL 2774406, at *31 (citing to E.I. du Pont de Nemours & Co., 729 F.2d 128, 137 (2d Cir. 1984)).

74. *See supra* Section I.B.

claims, the district court's holding was consistent with the third prong of the UMC Policy Statement.[75]

II. NET NEUTRALITY

The debate over whether and how to regulate the Internet, and what precise types of conduct should constitute a legal violation has colloquially been combined into two words: net neutrality. Indeed, this debate has gone from niche to mainstream in just a few years.[76] But, while there has been endless debate, there have been very few regulatory solutions that can properly identify violations without under- or over-regulating.

The substance of the debate involves blocking, throttling, and paid prioritization. Blocking is an Internet service provider (ISP) blocking a consumer's access to certain websites. Throttling is an ISP slowing a consumer's connection speed either because of websites visited or bandwidth used. Paid prioritization is an agreement between a content provider and an ISP to favor the content provider's content, with the implication that other content will be disfavored. This Part will briefly explain the history of Internet regulation and of Internet enforcement actions.

A. Brief History of Internet Regulation and Net Neutrality

Early attempts at Internet regulation essentially boiled down to a difference between "telecommunications services" and "information services." "Information services" were defined as "data processing and other computer-related services" while "telecommunications services" were more heavily regulated data transmission services, historically long-distance phone providers.[77] The 1996 Telecommunications Act codified this difference into statute and denoted a difference between lightly regulated information services (Title I of the Act) and telecommunications services, that were more heavily regulated as common carriers (Title II of the Act).[78] The Telecommunications Act regulated the Internet as an information service and stated that the Internet "flourished to the benefit of all Americans with a minimum of government regulation."[79] This regulatory framework was in place with no major changes from 1996 until 2010.

The term net neutrality first came to prominence in this law journal in 2003, when Columbia law professor Tim Wu pointed out

75. *Qualcomm Inc.*, 2017 WL 2774406.

76. When we use the term "net neutrality" in this paper, we intend for it to mean specific conduct by ISPs: blocking, throttling, and paid prioritization.

77. United States v. Am. Tel. & Tel. Co., 552 F. Supp. 131, 179–80, 228–29 (D.D.C. 1982).

78. *See generally* 47 U.S.C. § 230 (2018).

79. *Id.* § 230(a)(4).

the importance of maintaining an open Internet ecosystem allowing all types of content and applications with no discrimination.[80] Just two years later the FCC released a policy statement articulating their first attempt at a net neutrality position:

> (1) Consumers are entitled to access the lawful Internet content of their choice; (2) consumers are entitled to run applications and services of their choice, subject to the needs of law enforcement; (3) consumers are entitled to connect their choice of legal devices that do not harm the network; and (4) consumers are entitled to competition among network providers, application and service providers, and content providers.[81]

While this position was never codified into any formal agency action or law, the FCC was cognizant of net neutrality principles even as the Internet was regulated under the Title I lighter-touch regulatory scheme.

In 2010 the FCC reclassified the scheme for regulating the Internet from Title I of the Telecommunications Act to Section 706 of the Telecommunications Act.[82] This reclassification instituted no-blocking and no-throttling rules[83] and set a nondiscrimination standard that had the effect of a near-ban on paid prioritization.[84] In 2014 the D.C. Circuit vacated the ban on the blocking and non-discrimination rules finding that the FCC had impermissibly relied on Section 706 to regulate the Internet like a common carrier, which was not possible short of a full shift to Title II.[85]

In 2015, the FCC reclassified the Internet as a common carrier under Title II of the Telecommunications Act.[86] The 2015 Open Internet Order mandated no-blocking, no-throttling, and no-paid prioritization rules, and added a catch-all Internet conduct standard that effectively allowed the FCC to regulate any hitherto unregulated area of the Internet.[87] Another major change accompanying the 2015 Open Internet Order was a shift in regulatory jurisdiction from the FTC to the FCC, since the FTC is

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80. Wu, *supra* note 11, at 141.

81. *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, CC Dkt. Nos. 02-33, 01-337, 95-20, 98-10, GN Dkt. No. 00-185, CS Dkt. No. 02-52, Policy Statement, 20 FCC Rcd. 14986, 14988 (2005).

82. *Preserving the Open Internet*, GN Dkt. No. 09-191, WC Dkt. No. 07-52, 25 FCC Rcd. 17905, 17907 (2010) [hereinafter *2010 Open Internet Order*].

83. *Id.* app. at 17,992.

84. *See* Hal Singer, *My Remarks at the Catholic Law School Symposium on Net Neutrality*, HAL SINGER (March 17, 2018, 4:18 PM), https://haljsinger.wordpress.com/2018/03/17/my-remarks-at-the-catholic-law-school-symposium-on-net-neutrality/ [https://perma.cc/J2PK-Q4HW].

85. Verizon v. FCC, 740 F.3d 623, 655–58 (D.C. Cir. 2014). The no-blocking rules "would appear on their face to impose *per se* common carrier obligations" on ISPs. *Id.*

86. *2015 Open Internet Order*, *supra* note 8, at 5628.

87. *Id.* at 5607–09, 5661–63.

statutorily unable to regulate common carriers.[88] The 2015 Open Internet Order specifically rejected using antitrust law when regulating the Internet.[89] In 2016, the D.C. Circuit upheld the 2015 Open Internet Order as consistent with administrative rulemaking requirements.[90]

In 2017, the FCC reversed course, and again reclassified the Internet this time returning to the less stringent Title I regulatory scheme.[91] The 2017 Notice of Proposed Rulemaking (NPRM) ignited the fervor of the general public, generating over 22 million comments into the official record, a figure several times larger than that of the next most commented on proceeding.[92] The 2018 Restoring Internet Freedom Order repealed the per se bans on blocking, throttling, and paid prioritization, and returned regulatory jurisdiction to the FTC. But, the 2018 Restoring Internet Freedom Order prominently retained a transparency requirement that required ISPs to disclose to consumers any blocking, throttling, or paid prioritization.[93]

Ever since the 2018 Restoring Internet Freedom Order, approximately twenty states have initiated their own frameworks for Internet regulation. These legal frameworks vary from essentially duplicating the 2015 Open Internet Order (California[94]) to states unilaterally requiring ISPs that contract with state agencies to abide by prohibitions on blocking, throttling, and paid prioritization (Hawaii, Montana, New Jersey, New York, and Vermont[95]). While there is an impending legal battle that will likely turn on whether the FCC has the legal authority to preempt states from issuing their own Internet regulatory frameworks,[96] this Article proceeds in a different direction and examines the sufficiency of the existing Section 5 law to appropriately regulate the Internet.[97]

88. *See* 15 U.S.C. § 45(a)(2) (2018).

89. *See 2015 Open Internet Order*, *supra* note 8, at 5633, 5665. ("We find that . . . competition alone is not sufficient to deter mobile providers from taking actions that would limit Internet openness.").

90. *See* United States Telecom Ass'n v. FCC, 825 F.3d 674 (D.C. Cir. 2016).

91. *2018 Restoring Internet Freedom Order*, *supra* note 8.

92. *See generally* Lorenzo Franceschi-Bicchierai, *More Than 80% of All Net Neutrality Comments Were Sent by Bots, Researchers Say,* VICE (Oct. 3, 2017), https://motherboard.vice.com/en_us/article/43a5kg/80-percent-net-neutrality-comments-bots-astroturfing [https://perma.cc/6GWN-85UV].

93. Restoring Internet Freedom, 82 Fed. Reg. 25,568 (proposed June 2, 2017) [hereinafter 2017 NPRM].

94. S.B. 460, 2017–18 Leg., Reg. Sess. (Cal. 2018).

95. *See, e.g.*, Laura Hautala & Marguerite Reardon, *New York State Joins Montana in Requiring Net Neutrality,* C|NET (Jan. 24, 2018), https://www.cnet.com/news/net-neutrality-fcc-new-york-state-governor-andrew-cuomo-signs-executive-order [https://perma.cc/5LEQ-VSPR]; Timothy Karr, *Net Neutrality Politics is Local,* FREE PRESS (Feb. 14, 2018), https://www.freepress.net/our-response/expert-analysis/explainers/net-neutrality-politics-local [https://perma.cc/TMR7-ASLR].

96. 47 U.S.C. § 230(b)(2) (2018) ("unfettered by Federal or State regulation").

97. *See infra* Part III.

B. Internet Enforcement Actions

Internet enforcement violations have significant competitive implications. Net neutrality proponents argue that consumers value protections from blocking, throttling, and paid prioritization. In that case, ISPs should compete on providing these protections leading to a competitive advantage for whichever ISP promises to deliver an Internet experience free from such conduct. If an ISP then blocked or throttled they would be "misleading" the public—leading to a Section 5 deception case.

Conversely, if consumers value protections from blocking, throttling, and paid prioritization, and ISPs are able to refrain from competing with each other this would be indicative of ISPs having market power. Any firm with market power that does something anticompetitive—which arguably blocking or throttling would be—would likely run afoul of unfair methods of competition under Section 5. And, if ISPs got together to agree to avoid competing on the merits of blocking, throttling, or paid prioritization this would be a collusive and unreasonable restraint of trade, likely a per se violation of Section 1 of the Sherman Act. Thus, the FTC's enforcement frameworks provide three different avenues to protect consumers from ISPs' nefarious conduct.

While much has been made of the maligned trio of blocking, throttling, and paid prioritization, there have been very few verifiable instances of ISPs engaging in such conduct. In proposing a broad reclassification to Title II, the 2015 Open Internet Order cited to just a few net neutrality violations, many recycled from the 2010 Order; all of which are discussed below.

The FCC brought a complaint against Comcast in 2008 for what was an early attempt at throttling. Comcast, claiming that it had limited bandwidth and was trying to manage limited resources, allegedly interfered with customers' peer-to-peer networking and throttled speeds.[98] The FCC found that Comcast "significantly impeded consumers' ability to access the content and use the applications of their choice,"[99] but under a Title I framework, the FCC did not have the proper statutory authority to bring the case.[100]

The 2010 Open Internet Order cites to a few other potential violations but does so in rather vague terms. In 2009 RCN Corporation agreed to a settlement agreement where allegedly RCN "ceased P2P Network Management Practices" but in reality,

98. *Formal Complaint of Free Press & Pub. Knowledge Against Comcast Corp. for Secretly Degrading Peer-to-Peer Applications,* WC Dkt. No. 07-52, Memorandum Opinion & Order, 23 FCC Rcd. 13,028, 13,058 (2008) [hereinafter *FCC Comcast Opinion*]; *see also* Comcast Corp. v. FCC, 600 F.3d 642, 658–61 (D.C. Cir. 2010).

99. *FCC Comcast Opinion*, *supra* note 98, at 13,054.

100. *Comcast Corp.*, 600 F.3d.

had been throttling P2P traffic.[101] In 2010, Cox Communications included terms that enabled the company to engage "without limitation," in "port blocking, . . . traffic prioritization and protocol filtering."[102]

The 2015 Open Internet Order cites to a few other violations: (1) from 2005-2008 Comcast throttled BitTorrent's peer-to-peer file sharing;[103] (2) in 2012 AT&T blocked and throttled Apple's iPhone Facetime application from its mobile network;[104] (3) Comcast exempted its own video service when users streamed such video using an Xbox;[105] (4) in 2011 MetroPCS blocked streaming video from all websites except Youtube;[106] (5) from 2011 to 2013 AT&T, Sprint, and Verizon blocked Google Wallet because all three companies had a stake in a competing payment processor.[107]

The second example above, with AT&T, is perhaps the best example of the FTC acting to stop what was both a pattern of conduct that harmed consumers and constituted a net neutrality violation. In 2014 the FTC filed suit against AT&T for a large-scale, multi-year pattern of throttling.[108] The FTC alleged that AT&T "throttled its customers more than 25 million times, affecting more than 3.5 million unique customers" and maintained numerous creative ways to reduce data usage.[109] AT&T set an arbitrary data cap such that consumers with unlimited data plans were throttled if they went above AT&T's data cap. The FTC alleged that this was deceptive because AT&T promised unlimited data then reduced data speeds without telling consumers.[110] The FTC also alleged this conduct as unfair because it was a barrier to consumers using data they paid for, and were forced to pay large early termination fees if they wanted to get out of the AT&T service contract.[111] The FTC's press release states that "FTC staff worked closely on this matter

101. *2010 Open Internet Order, supra* note 82, at 17,926.

102. *Id.* (citing WCB Letter 12/10/10, Attach. at 81–92, Cox Communications, Cox High-Speed Internet Acceptable Use Policy, ww2.cox.com/aboutus/policies.cox [https://perma.cc/XG5H-5ZAU]).

103. *2015 Open Internet Order*, *supra* note 8, at 5628 n.123; *see also* Jon Brodkin, *Comcast Throttling BitTorrent Was No Big Deal, FCC Says*, ARSTECHNICA (Nov. 28, 2017), https://arstechnica.com/tech-policy/2017/11/comcast-throttling-bittorrent-was-no-big-deal-fcc-says/ [https://perma.cc/Z8VM-SFCX].

104. *2015 Open Internet Order*, *supra* note 8, at 5628 n.123.

105. *Id.*

106. Timothy Karr, *Net Neutrality Violations: A Brief History,* FREE PRESS (Jan. 24, 2018), https://www.freepress.net/our-response/expert-analysis/explainers/net-neutrality-violations-brief-history [https://perma.cc/2W3H-E9J5].

107. *Id.*

108. Complaint for Permanent Injunction and Other Equitable Relief, FTC v. AT&T Mobility LLC, 87 F.Supp.3d 1087 (N.D. Cal. Oct. 28, 2014) (No. 3:14-CV-04785-EMC).

109. *Id.* at 7.

110. *Id.*; *see also* Press Release, Fed. Trade Comm'n, FTC Sues AT&T for Limiting 'Unlimited Data' (Oct. 28, 2014), https://www.consumer.ftc.gov/blog/2014/10/ftc-sues-att-limiting-unlimited-data [https://perma.cc/34XW-WFGT].

111. Complaint for Permanent Injunction and Other Equitable Relief, *supra* note 108; FTC Sues AT&T for Limiting 'Unlimited Data, *supra* note 110.

with the staff of the Federal Communications Commission"[112] but in the end the FTC was better situated to bring a complaint.

AT&T sought to dismiss the case based on its status as a common carrier, claiming that the FTC was thus unable to regulate them. But, the Ninth Circuit held that these harmful throttling practices were still subject to the FTC's unfair and deceptive practices jurisdiction because AT&T's status as a common carrier is "activity-based" and the data throttling practices were not a part of AT&T's status as a common carrier.[113] Despite numerous factual and legal challenges, the FTC was able to challenge anticompetitive Internet conduct and protect consumers.

This case should serve as a counterexample to those who have attacked the FTC as unwilling or unable to use a combination of its various authorities to prevent ISPs' bad conduct. In this case the FTC used two avenues, both consumer protection and unfairness and deception authorities, to stop a pattern of illegal throttling. But, even if the consumer protection authority did not yield an actionable case, the standalone power as enumerated in the UMC Policy Statement remained a tool in the FTC's arsenal.

Another great example of a potential net neutrality violation was T-Mobile's Music Freedom program. In 2014 T-Mobile proposed a program to provide free streaming music that would not count against data caps, a form of paid prioritization known as zero rating.[114] But, under the 2010 Order, this business model was not data-neutral since it amounted to T-Mobile favoring some data—the free music—while disfavoring other data—any music counting against a data cap. In the face of this potential violation, T-Mobile elected to cancel this free program rather than litigate the matter.

In the year since the FTC regained regulatory jurisdiction over Internet violations there have been no Internet enforcement actions. This is used as ammunition by net neutrality proponents to argue that the FTC is not up to the task of regulating ISPs, which is likely not the case.[115] Perhaps there have simply been no violations, or perhaps the FTC is still investigating conduct prior to bringing cases. Regardless, the four-year battle between the FTC and AT&T shows that the FTC can effectively bring a Section 5 action against a large ISP, can litigate said case for several years, and can prevail over big business in appellate court.

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112. Press Release, Fed. Trade Comm'n, FTC Says AT&T Has Misled Millions of Consumers with 'Unlimited' Data Promises (Oct. 28, 2014), https://www.ftc.gov/news-events/press-releases/2014/10/ftc-says-att-has-misled-millions-consumers-unlimited-data [https://perma.cc/ERG4-M2BK].

113. FTC v. AT&T Mobility LLC, 883 F.3d 848, 850 (9th Cir. 2018).

114. *See* Klint Finley, *T-Mobile's Unlimited Video Raises Net Neutrality Concerns,* WIRED (Nov. 10, 2015, 4:00 PM), https://www.wired.com/2015/11/t-mobiles-zero-rating/ [https://perma.cc/7S48-3SZX].

115. *See infra* Part III.

III. A FRAMEWORK FOR NET NEUTRALITY VIOLATIONS AFTER THE UMC POLICY STATEMENT

Section 5 of the FTC Act is sufficient to protect the Internet through either an unfair or deceptive acts claim, or an unfair methods of competition claim. The enforcement plan for an unfair or deceptive claim is already reasonably well understood.[116] But, the three-pronged guidance of the UMC Policy Statement provides the enforcement clarity that will be vital when it comes to evaluating conduct that is on the margin between a violation or allowable conduct.

A. The UMC Policy Statement and Net Neutrality

One of the key struggles with regulating the Internet is that it is difficult to balance Type I and Type II errors to achieve the optimal level of enforcement.[117] Enforcement agencies have struggled to find the right balance between ex ante and ex post enforcement. An ex ante regulatory scheme seeks to regulate on the front end, through bright line rules, whereas ex post enforcement regulates on the back end, and determines whether conduct that has already happened is illegal. A good example of an ex ante scheme is the FCC's Title II Order, which codified a bright line rule that prohibited all forms of blocking, throttling, and paid prioritization.[118] In comparison, a good example of ex post enforcement is the "rule of reason" which looks at conduct that has happened and seeks to balance harms with benefits before determining whether or not to take action.[119] Both ex ante and post schemes can provoke worry; the first, because its rigid strictures tend to inhibit procompetitive conduct; and the second, because anticompetitive conduct occurs and harms consumers, prior to any enforcement effort on the back-end.

In choosing between an ex ante and an ex post framework, in order to maximize consumer welfare, one must consider which framework will most effectively constrain anticompetitive conduct, while promoting procompetitive conduct.[120] This is done through an "error cost framework" which analyzes: (1) the probability that conduct is anticompetitive; (2) the probability of enforcement errors; and (3) the agency's costs of implementing the system.[121] The two types of enforcement errors are: "false positives, in which

116. *See, e.g.*, *AT&T Mobility LLC*, 883 F.3d at 850.

117. A Type I error is when procompetitive conduct is prohibited, also known as a false positive. A Type II error is allowing anticompetitive conduct, also known as a false negative.

118. Joshua D. Wright, *Antitrust Provides a More Reasonable Regulatory Framework than Net Neutrality*, GEO. MASON L. & ECON. RES. PAPER SERIES, Aug. 15, 2017, at 5.

119. *Id.*

120. *Id.* at 6.

121. *Id.*

agreements that benefit consumers are prohibited, or false negatives, in which agreements that harm consumers are allowed."[122] An ex ante scheme is optimal if there are an abundance of false negatives, while an ex post scheme is optimal if there are an abundance of false positives.[123]

When regulating the Internet, the probability that conduct is anticompetitive is rather low. Despite the widespread of discourse on blocking, throttling, and paid prioritization, over a period of many years, there have only been a limited number of violations.[124] Under an ex ante scheme, the probability of false positive errors is high, since vertical agreements—the type of agreement that generally facilitates paid prioritization—are so often procompetitive.[125] There is no worry about false positive errors in an ex post scheme. Thus, an ex post scheme is designed to more effectively promote procompetitive behavior, and is a better fit than is an ex ante scheme. And, worries about false negatives in an ex post scheme can be ameliorated by agency expertise,[126] and formal guidance like the type in the UMC Policy Statement, which provides a meaningful enforcement framework. Thus, the UMC Policy Statement is crucial in helping the FTC get as close to this optimal level of ex post enforcement as possible, specifically in difficult cases.

The first prong of the UMC Policy Statement—the promotion of consumer welfare—is the lodestar for antitrust law. It rightly underpins any enforcement action, whether under the Sherman Act, the Clayton Act, or Section 5. In considering a potential net

122. *Id.* at 6–7.

123. *Id.* at 7.

124. *See supra* Section II.B.

125. *See* Daniel O'Brien, *The Antitrust Treatment of Vertical Restraints: Beyond the Possibility Theorems*, *in* THE PROS AND CONS OF VERTICAL RESTRAINTS 40, 72–73 (2008) (There is "a fairly strong prior belief that these practices [vertical agreements] are unlikely to be anticompetitive in most cases."); *see also* Francine LaFontaine and Margaret Slade, *Vertical Integration and Firm Boundaries: The Evidence*, 45 J. ECON. LIT. 629, 680 (2007) ("[W]e have found clear evidence that restrictions on vertical integration. . .are usually detrimental to consumers. Given the weight of the evidence, it behooves government agencies to reconsider the validity of such restrictions."); Comment from Thomas B. Paul, Acting Dir., Bureau of Consumer Protection, Markus H. Meier, Acting Dir., Bureau of Competition, & Ginger Z. Jin, Acting Dir., Bureau of Econ., *Restoring Internet Freedom*, WC Dkt. No. 17-108, 28 (filed July 17, 2017) https://www.ftc.gov/system/files/documents/advocacy_documents/comment-staff-bureau-consumer-protection-bureau-competition-bureau-economics-federal-trade/ftc_staff_comment_to_fcc_wc_docket_no17-108_7-17-17.pdf [https://perma.cc/B2QS-W7XZ] ("Most forms of vertical integration can generate procompetitive efficiencies, thus antitrust analysis generally regards them as harmless or even beneficial to consumer welfare.").

126. Maureen K. Ohlhausen, Chairman, Fed. Trade Comm'n, Internet Privacy: Technology and Policy Developments 2 (May 1, 2017), https://www.ftc.gov/system/files/documents/public_statements/1213203/ohlhausen_internet_privacy_remarks_rayburn_hob_5-1-17.pdf [https://perma.cc/YTX2-YUPJ] ("[The FTC has] successfully brought more than 150 privacy and data security-related cases, including cases against some of the largest players on the Internet, including Google and Facebook . . . [the FTC] actively educate[s] business and consumers about privacy and data security risks.").

neutrality violation, the most effective way to evaluate an ISP's conduct is to determine whether such conduct has made consumers better or worse off. If an ISP blocks consumers' access to a large group of websites, consumers have received a worse quality good, their freedom of choice has been inhibited, and they are left worse off. Conversely, if an ISP offers a month of free connectivity to spur consumers to switch ISPs, consumers are better situated because they are receiving a comparatively cheaper good.

The second prong of the UMC Policy Statement—that challenged conduct will be analyzed under the rule of reason—provides the balancing test to determine whether the conduct is an antitrust violation. The second prong nicely complements the first by ensuring that the FTC will not over-enforce by inhibiting procompetitive behavior. Applying the rule of reason to a relatively simple paid prioritization example sheds light on the usefulness of the rule of reason framework.

If an ISP contracts with a content provider to provide certain content exclusively to that ISP, consumers who are not subscribers to that ISP may be denied access to that content. On the other hand, consumers who subscribe to that ISP may receive that content at a reduced rate. Under the rule of reason, the harms to consumers—inhibiting consumer choice—can be weighed against the benefits to consumers—reduced cost—and if the harms outweigh the benefits, the agreement should be challenged; if not consumer welfare is best served by preserving the agreement from challenge.

The third prong of the UMC Policy Statement—that, when possible, conduct should be challenged under the Sherman or Clayton Acts—provides clarity to practitioners. Specifically, using the example in the preceding paragraph, an ISP contract with a content provider to provide exclusive content, is an agreement, and would thus be more appropriately evaluated under Section 1 of the Sherman Act rather than Section 5 standalone authority. And since Section 1 cases have been litigated for decades, the precedent to guide practitioners is more robust. By contrast, very few cases have been litigated under the Section 5 standalone authority. Practitioners, and enforcers, can use precedent to determine the likelihood or viability of a challenge, whereas Section 5 is more opaque.

These three prongs provide useful guidance to prevent under- or over-enforcement, which will be particularly useful in difficult Internet enforcement cases.

B. Alleged Net Neutrality Violations and The UMC Policy Statement

Some critics have argued that Section 5 authority is insufficient to regulate the Internet.[127] To rebut this assertion, this Section analyzes a series of hypothetical net neutrality violations to demonstrate that the FTC has both the expertise and tools necessary to prevent anticompetitive ISP activity while enabling some procompetitive conduct that would have been illegal under the Title II framework.

1. ISPs' Unfair and Deceptive Acts or Practices

Before turning to more complicated examples that rely exclusively upon the FTC's unfair methods of competition authority, it is important to understand the how the FTC's consumer protection authority applies. Both play an important role in generating optimal enforcement. As demonstrated by the AT&T throttling case,[128] the more common net neutrality violations are seamlessly covered by consumer protection law.

First, if an ISP voluntarily commits to refrain from blocking or throttling, whether in their terms and conditions, to gain a competitive advantage, or in a consent decree with an agency,[129] failing to abide by this commitment is a deceptive act and a Section 5 violation. Moreover, if an ISP commits to not block or throttle, and a consumer subscribes as a result, if the ISP does not abide by that commitment, the ISP should be held accountable under Section 5. There is no need to balance any potential benefits, because, under the deception prong, there are no cognizable benefits when an ISP blatantly misleads consumers.

Second, if the same ISP makes a commitment to refrain from all blocking or throttling for consumers who switch services to that ISP, but does not offer that same commitment to existing customers who pay the same price, this is an example of an unfair practice, and a Section 5 violation. Presumably, existing customers would want this higher quality offering of Internet with no blocking or throttling, and would immediately switch, especially since these two products were offered at the same price. But they are unable to do so because of standard early termination fees. The Ninth Circuit held in *AT&T* that creating a meaningful barrier to switching by

127. *See, e.g.*, Harold Feld, *No, the FTC Cannot Have a Ban on All ISP Blocking*, PUB. KNOWLEDGE (Dec. 12, 2017), https://www.publicknowledge.org/news-blog/blogs/no-the-ftc-cannot-have-a-ban-on-all-isp-blocking [https://perma.cc/2X8Y-R98J].

128. FTC v. AT&T Mobility LLC, 883 F.3d 848, 850 (9th Cir. 2018).

129. For example, in the NBCU/Comcast Universal merger, the FCC mandated net neutrality compliance as a pre-condition to approve the merger. Christopher Yoo, *Merger Review by the Federal Communications Commission: Comcast–NBC Universal*, 45 REV. IND. ORGAN. 295, 310–15 (2014).

using large early termination fees is unfair and is a consumer protection violation.[130]

2. Free Music—Good or Bad?

The T-Mobile Music Freedom program, referenced *supra*, is an example of a difficult case. Under the Title II framework this program, which used zero rating to facilitate a free music streaming service for T-Mobile customers, was likely a net neutrality violation as a prohibited form of paid prioritization. Indeed, T-Mobile elected to cancel the free music streaming program rather than litigate the matter. However, there is little doubt that this program offered a benefit: a free music streaming service. At the same time, however, it was also discriminatory; it provided this service only on pre-selected music platforms. Critics of this type of zero rating claim that there is nothing to prevent T-Mobile from "using data cap exemptions as a punitive measure against content providers [they] aren't on good terms with."[131]

Notwithstanding that criticism, this type of conduct does not seem facially unfair or deceptive. T-Mobile was not breaking any promises, and it is hard to argue that a free offering is unfair. And, per the third prong of the UMC Policy Statement, it would be difficult to bring this case under either the Sherman or Clayton Acts.[132] So, any action against T-Mobile would fall squarely within the standalone unfair methods of competition authority.

The first two prongs of the UMC Policy Statement provide the necessary guidance to determine whether T-Mobile's free music streaming service amounts to a Section 5 violation. Starting with the second prong's rule of reason balancing test, there are clear benefits to T-Mobile's customers, and perhaps to a magnitude to spur switching from other cell phone carriers. The harms, on the other hand, are speculative. Specifically, consumers who subscribe to other cell phone carriers are not harmed because the agreement between T-Mobile and music providers does not affect them. Although it is possible that in the future T-Mobile might act punitively against certain content providers, ex ante, the benefits clearly outweigh the harms. Because this conduct passes the rule of reason balancing test, it should thus be allowed. In the future, if T-Mobile does act punitively, the FTC can use its ex post enforcement power, and the same balancing will take place all over again, but

130. *AT&T Mobility LLC*, 883 F.3d at 850.

131. *See* Chris Ziegler, *T-Mobile's 'Music Freedom' is a Great Feature — And a Huge Problem*, VERGE (June 18, 2014), https://www.theverge.com/2014/6/18/5822996/t-mobile-music-freedom-net-neutrality [https://perma.cc/RH6D-4PUQ].

132. The only potential avenue would be a Sherman Act Section 1 case. However, this type of vertical agreement accompanied by clear efficiencies is unlikely to amount to a Section 1 violation because T-Mobile, one of the smaller cell phone carriers does not possess market power.

with better information. But, since T-Mobile's consumers realized an increase in consumer welfare, it is unlikely that this program would have been considered a Section 5 violation.

3. Website Bundles, Legal Blocking?

Another example of a false positive resulting from the Title II framework is the prohibition on ISPs offering packages of Internet access website bundles. These bundles have been legal, popular, and successful abroad for many years. For example, a Turkish cell phone company, Turkcell, successfully sold a social media plan that provided mobile access only to certain social media sites like Facebook and Twitter for a comparatively small fee.[133] French telecom company, Orange, likewise offered a menu style plan where consumers could choose a certain number of premium subscription-based services from a predetermined list.[134]

The viability of these types of limited access bundles is unknown in the US, but presumably there is a subset of consumers that would enjoy limited Internet access, a lower quality good for a reduced cost. This type of limited access bundle or menu is a form of consented-to blocking, since consumers are not able to access all websites. It is unlikely this limited access bundle would be an antitrust violation under either the Sherman or Clayton Acts because it is common for companies to offer lower price lower quality goods, and higher price higher quality goods. It is likely even consumer welfare enhancing since it enables additional competition on the merits.

Thus, this limited access bundle would fall under the purview of standalone Section 5 authority as defined in the UMC Policy Statement because it is not a consumer protection issue, and allowing consumers additional product choice is typically welfare enhancing. Perhaps an elderly person might only want to use the Internet to access email, news, and banking with no interest in video streaming platforms that are popular with younger generations. Enabling that person to select a slate of websites of their choice for a reduced cost would certainly outweigh the harm realized from being blocked from other websites.

Or, perhaps a young adult with limited income would desire a menu-style Internet where they can get access to selected premium pay-wall content of their choice. Allowing an ISP to enter into a paid prioritization agreement with these content providers would then be welfare enhancing because it would allow that consumer to get access to content they otherwise would not have had. The young

133. Daniel A. Lyons, *Innovations in Mobile Broadband Pricing*, 92 DENV. U. L. REV. 453, 468–69 (2016).

134. *Id.* at 475.

adult, like the elderly person, is also receiving a well-tailored product; neither is made worse off from being blocked from accessing certain websites.

This type of agreement does not give rise to the same harms that are typically associated with involuntary website blocking as envisioned by net neutrality proponents. But, in this case, the consumer is voluntarily declining access to these websites in exchange for a reduced price. And, given the success of these types of product offerings abroad, there is little evidence to suggest welfare is being decreased and to dictate a standalone Section 5 violation.

4. Everyone's Worry—Netflix Exclusivity

Netflix is one of the most pervasive and popular content providers. Netflix uses an astonishing fifteen percent of the world's global bandwidth, and approximately forty percent of the US's bandwidth during peak times, like the evening.[135] As such, consumers are worried about whether ISPs will throttle Netflix speeds, which would prevent consumers from watching videos at high speed or in high resolution. But even more concerning is the potential for anticompetitive conduct between ISPs and Netflix. Specifically, what if an ISP entered into a vertical agreement with Netflix whereby the ISP pays Netflix so that ISP's customers gain exclusive access to certain video content, a form of paid prioritization? This ISP could use that agreement as a method of competition to incentivize customers to switch ISPs, since customers connecting to the Internet using another ISP would not have access to this Netflix content.

The paid prioritization in this agreement differs from the T-Mobile paid prioritization example because of the exclusivity provision.[136] The benefits of the exclusivity agreement include access to certain Netflix content, but this benefit only extends to customers of that ISP. The group of non-customers realize some of the harms—content that might otherwise have been available is no longer available. However, the market for competition among ISPs is also harmed. The importance of Netflix, as demonstrated by the percentage of bandwidth it consumes, dictates that other ISPs might not be able to compete as effectively with the ISP that entered into this agreement. In short, competition in the market for ISPs will be harmed.

This conduct, which exists outside the bounds of the Sherman Act, the Clayton Act, and the consumer protection mandate, is a

135. Matt Binder, *Netflix Consumes 15 Percent of the World's Internet Traffic, Report Says*, MASHABLE (Oct. 4, 2018), https://mashable.com/article/netflix-15-percent-worlds-internet-traffic/?utm_cid=hp-h-1#riQI6tX1OGqs [https://perma.cc/8A4R-SG8H].

136. *See supra* Section III.B.2.

good example of a conduct that might constitute an unfair method of competition. The harms felt by the non-customers seem to outweigh the benefits realized by the ISP's customers, and thus under the rule of reason balancing this conduct is harmful. Thus, the UMC Policy Statement guidance leads to a conclusion that this agreement should be challenged as anticompetitive. And under the first prong of the UMC Policy Statement, consumer welfare has been decreased. While these types of agreements are typically procompetitive, this example demonstrates how the FTC is well-positioned to police the limited number of anticompetitive paid prioritization agreements. Thus, the guidance of the UMC Policy Statement is able to protect consumers from nefarious ISP conduct.

CONCLUSION

The FTC's UMC Policy Statement was just a single page. But its impact cannot be overstated. The UMC Policy Statement took an opaque and unbounded area of law that changed at the whim of each subsequent commissioner and tied it to existing antitrust tools and precedent. In doing so, the FTC provided clarity for itself, practitioners, businesses, and consumers and took monumental steps toward ensuring there is no under- or over-enforcement of unfair methods of competition. These steps will ultimately be indispensable to regulating fast-paced industries like the Internet and should pave the way for a more optimal level of enforcement in the Internet space for a generation to come.