

Reply Comments of ICLE and Scholars of Law & Economics, In the Matter of Protecting the Privacy of Customers of Broadband and Other Telecommunications Services, FCC
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Summary

The NPRM and many of the comments supporting it reflect an ill-considered approach to privacy regulation for ISPs. Getting regulation right is always difficult, but it is all the more so when confronting evolving technology, inconsistent and heterogeneous consumer demand, and intertwined economic effects that operate along multiple dimensions.

[S]ecuring a solution that increases social welfare[] isn't straightforward as a practical matter. From the consumer's side, the solution needs to account for the benefits that consumers receive from content and services and the benefits of targeting ads, as well as the costs they incur from giving up data they would prefer to keep private. Then from the ad platform's side, the solution needs to account for the investments the platform is making in providing content and the risk that consumers will attempt to free ride on those investments without providing any compensation—in the form of attention or data—in return. Finally, the solution must account for the costs incurred by both consumers and the ad platform including the costs of acquiring information necessary for making efficient decisions.

The NPRM fails adequately to address these issues, to make out an adequate case for the proposed regulation, or to justify treating ISPs differently than other companies that collect and use data.

Perhaps most important, the NPRM also fails to acknowledge or adequately assess the actual market in which the use of consumer data arises: the advertising market. Whether intentionally or not, this NPRM is not primarily about regulating consumer privacy; it is about keeping ISPs out of the advertising business. But in this market, ISPs are upstarts challenging the dominant position of firms like Google and Facebook.

Placing onerous restrictions upon ISPs alone results in either under-regulation of edge providers or over-regulation of ISPs within the advertising market, without any clear justification as to why consumer privacy takes on different qualities for each type of advertising platform. But the proper method of regulating privacy is, in fact, the course that

both the FTC and the FCC have historically taken, and which has yielded a stable, evenly administered regime: case-by-case examination of actual privacy harms and a minimalist approach to ex ante, proscriptive regulations.

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