Public Versus Private Restraints on the Online Distribution of Contact Lenses: A Distinction Without a Difference

Comments by Dr. Robert D. Atkinson in response to “Public versus Private Restraints on the Online Distribution of Contact Lenses: A Distinction with a Difference”, presented by James Cooper, Federal Trade Commission, at the George Mason University Mercatus Center symposium on “Anticompetitive Barriers to E-Commerce,” May 24, 2006.

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In his paper “Public Versus Private Restraints on the Online Distribution of Contact Lenses: A Distinction with a Difference” Federal Trade Commission Economist James Cooper argues that consumers are hurt when state governments, acting on the behalf of optometrists, deny consumers choice in where they can purchase their prescribed contact lenses, but not when manufacturers, exploiting the prescription requirement, act in concert with optometrists to deny consumers choice. 1

Mr. Cooper and I concur that government-enabled restraints on online purchases of contact lenses are anti-competitive and anti-consumer. However, we disagree as to whether private restraints instigated by manufacturers on behalf of optometrists and which exploit the governmental requirement that contacts be sold only pursuant to a prescription are a “distinction without a difference.”

In both cases, middlemen optometrists are using the power government has vested in them to choose the brand of contact lenses worn by their patients, to restrict consumer choice, and force consumers to pay higher prices. In both cases the answer must come from government – federal preemption of protectionist state laws (as Congress did in 2003 when it passed the Fairness to Contact Lens Consumers Act) and federal legislation to require manufacturers to sell lenses to all legitimate distributors (as Senators Bennett [R-UT] and Leahy [D-VT] are proposing).
Optometrists are hardly alone in trying to squelch e-commerce competition. With the emergence of the Internet economy, a host of middlemen in a variety of service, retail, and professional industries have worked to erect all manner of legal, regulatory, and marketplace barriers to hobble online competitors. This group includes travel agents, wine distributors, real estate agents, car dealers, and even morticians. Rather than compete fairly in the marketplace, these incumbent professional interests have sought to stifle online competition.

But there has been perhaps no profession that has more aggressively sought to fend off e-commerce competition than have optometrists. With the rise of competitors selling contact lenses over the Internet, and offline competitors (like Walmart and Costco), independent eye care professionals (ECPs) (who both prescribe and sell contact lenses), face stiff new competition with regard to the sales of lenses.

In response, the profession has engaged in a host of tactics to thwart consumer choice. Its trade association, the American Optometric Association, (which was sued by 32 state attorneys general and ultimately paid a fine and agreed to not collude with manufacturers, and to cease making unsubstantiated claims that one’s health is impacted by where one’s lenses are purchased), allegedly colluded with manufacturers to pressure them to cut off sales to Internet sellers. As Cooper points out, “Because online sellers offer prices roughly 30 percent lower than the majority of offline channels, depriving consumers of this choice (buying online) would lead to serious consumer harm.” If consumers are denied this choice through restrictive practices by optometrists, exploiting a government regulation in concert with contact lens manufacturers, consumers will not only pay more for contact lenses but their ocular health could suffer as well.

Why Private Restraints on Contact Lens Sales Harm Consumers and Thwart Competition

The doctors’-only contact lens marketing practice is designed to shield prescribers from competition, making the lenses more expensive and more difficult to obtain. Despite this, Cooper claims these private restraints on contact lens sales are pro-consumer, mistakenly applying conventional anti-trust doctrine and theories of competitive markets to justify his recommendation against government action to limit this anti-consumer behavior. But, in
making this claim, he ignores entirely the fundamental differences between the contact lens market and the market for non-prescriptive consumer products.

First, before a consumer can purchase contact lenses, he or she must first get permission from a gatekeeper (an optometrist) with a financial interest in the consumer’s choice. Cooper admits that “ECPs have an incentive to prescribe the lens that provides them with the most profit”5 and this includes a lens that the consumer can’t buy elsewhere.

Second, as Cooper points out, contact lenses are a “credence” good where consumers have a difficult time in judging the quality of the product.6 If a doctor tells a patient that CooperVision/ OSI “doctors’-only” lenses are the right ones for her, who is she to second-guess her health care professional? As a result, because of the unique nature of this market, consumer choices will not serve as a counter-weight to the optometry profession’s anti-consumer, anti-competitive practices.

In applying conventional anti-trust doctrine to this relatively unique industry, Cooper relies on three main arguments to justify his claim that this practice does not hurt contact lens wearers: 1) optometrists do not appear to be obtaining supra-normal profits from the sales of doctors’-only lenses; 2) because only one lens manufacturer (CooperVision/OSI) is engaged in this practice, there is no exercise of market power; and 3) if optometrists engage in such practices, consumers will exercise their choice in the marketplace, thereby thwarting this practice. As I will show, all three arguments are wrong.

Cooper’s arguments are similar to those contained in a February 2005 FTC report on competition in the contact lens market – a report that Cooper had a significant role in writing.7 The critique of Cooper’s analysis that follow apply equally to the FTC report.

1) Optometrists’ profits are higher for doctors’-only lenses, but even if they weren’t consumers would still be hurt.

The conventional measure of anti-competitive behavior by a company is whether it is earning higher than normal profits. The presence of supra-normal profits indicates anti-competitive practices. Otherwise, competition would drive profits down to a more normal level.8 Cooper examines the profits (margins) that optometrists make on the two leading doctors’-only lens sold by CooperVision/OSI (ProClear and Biomedics55) and finds that margins on ProClear are $7.75 higher than they should be. Cooper argues that this result does not take into account the type of distribution channel the lenses are sold at (e.g., independent eye care professional [ECP], offline big box retailer, or online). After controlling for this factor he finds that higher margins for ProClear are reduced, but not eliminated. Using a different statistical model, he finds that prices for ProClear are the same as other similar lenses, but that Biomedics55 lenses are $13.45 more expensive that lenses with similar attributes.9 However, because his statistical models come up with differing results, he concludes there is no consumer harm.

But this is wrong for several reasons. First, the profits for ProClear and Biomedics55 remain higher than normal. But even if one were to grant that margins on doctors’-only lenses were normal, this doesn’t mean that consumers are still not being hurt. Cooper fails to consider what is the primary benefit to ECPs of doctor’s only lenses – their utility in compelling the patient to buy their lens from the ECP and providing the ECP with the profits from those lenses (as
compared to receiving no profits if the patient buys their lenses elsewhere).

Moreover, Cooper ignores an important component of consumer cost – the cost of obtaining the lenses. Despite the fact the FTC has stated that the cost to a consumer in terms of time and money spent in obtaining the lenses (i.e., driving to the ECP’s office to pick up the lenses) could exceed the monetary cost of the lenses themselves, Cooper ignores this factor.

At the end of the day, Cooper ignores a central economic fact – consumers can be harmed even if an ECP makes the same profit on doctors’-only lenses as on lenses consumers can purchase online. The issue is not whether ECPs obtain 30 percent instead of 20 percent margins on doctors’-only lenses, it’s whether they have any margins at all. In other words, because lenses cost so much less at online and large chain retailers, consumers can be hurt and ECPs can benefit if ECPs force consumers to buy doctors’-only lenses.

Even if independent ECPs get the same margins from doctors’-only lenses as from other lenses, with the former they make a sale and receive revenue from it, even though the consumer pays more than they would if they could buy it at a big box retailer or online. This is precisely why the optometric profession so strongly pushes doctors’-only lenses and why the leading provider of doctors’-only lenses, Ocular Sciences, advertises that optometrists enjoy 95 percent return patient rates when they prescribe their doctors’-only lens.

2) The lack of concentration and explicit collusion by the eye care industry does not mean that optometrists’ behavior is not anti-competitive.

After the finding of supra-normal profits, the second factor that traditional anti-trust doctrine relies on for evidence of anti-competitive behavior is market power and explicit collusion by market players. Relying on conventional analysis Cooper assumes that in an industry as diffuse as the independent ECP industry, there is no exercise of market power and no explicit collusion between optometrists and contact lens manufacturers. Hence, he concludes that action by one manufacturer to push doctors’-only lenses is not anti-competitive. But like the metric of supra-normal profits, explicit collusion and industry concentration is also an inadequate metric of anti-competitive behavior in this industry in an online world.

To see why, it’s important to understand how Cooper views the motivation of the industry players. With reference to CooperVision/OSI’s marketing of doctors’-only lenses Cooper writes that because this policy “is the result of unilateral manufacturer, rather than concerted retail, action, economics supports a presumption – one adopted by the anti-trust laws, that this behavior is efficient.”10 He goes on to write, “Absent some indication of concerted horizontal activity, a suppliers’ unilateral decision to restrict the distribution channels in which its product is available will raise anti-trust concerns only if a plaintiff can show that such restraint is likely to harm interbrand competition and that his harm outweighs any pro-competitive benefit.”11

Cooper is correct when he writes that it may sometimes be efficient for a manufacturer to impose restrictions on retailers, such as resale price maintenance restrictions to limit “free riders.” But in this and other cases Cooper explains the logic behind how consumers benefit. Yet, when it comes to the practice of selling doctors’-only lenses Cooper admits that he can find no evidence or logic for why doctors’-only lenses are in the consumers’ interest. Instead, he simply assumes that since a manufacturer is engaging in this practice unilaterally it must be in the consumer interest. But this is not a
conventional industry where it makes sense to indiscriminately apply standard anti-trust doctrine regarding vertical restraints. In the case of doctors’-only lenses there is no free riding to correct for because the patient is paying for the advice (the eye exam) and the product separately.

If it’s not correcting a market failure, what explains CooperVision/OSI’s doctors’-only lens practice? A more compelling answer is found in game theory and in particular in the prisoner’s dilemma game. The prisoner’s dilemma is a type of non-zero-sum game in which two players try to get rewards from a jailer by cooperating with or betraying the other player. In the prisoner’s dilemma, an individual has a strong incentive to defect (i.e., to claim that they are innocent and their partner is guilty), so that the only possible equilibrium for the game is for all players to defect.

Contact lens manufacturers are in their own prisoners’ dilemma. Like prisoners in the game, their optimal strategy is to cooperate and sell all their lenses to all legitimate distributors, including Internet and big box sellers. Such an agreement would benefit the industry because contact lens wearers would pay lower prices and therefore replace their lenses more often, leading to higher industry sales.

If both consumers and the manufacturers would benefit from widely distributed lenses, why does one company, CooperVision/OSI, sell doctors’-only lenses? The answer is that like a prisoner ratting on his fellow prisoners so he can get off, CooperVision/OSI can gain market share over other manufacturers by selling limited distribution lenses. One reason other manufacturers don’t also defect and sell doctors’-only lenses is that they are temporarily precluded by a State Attorneys General consent decree from selling doctors’-only lenses to which they are bound because of past alleged anti-competitive collusion with optometrists.

By selling doctors’-only lenses that virtually guarantee patient lock in, CooperVision/OSI knows that optometrists are much more likely to prescribe their lenses. Unfortunately, what makes economic sense for an individual company, just as what makes economic sense for the individual prisoner in the prisoners’ dilemma game, produces a suboptimal result for the entire industry and for consumers.

CooperVision/OSI’s strategy only works because optometrists have a strong financial incentive to prescribe doctors’-only lenses and will favor companies that provide them. Cooper follows traditional anti-trust doctrine, claiming that only “concerted efforts by retailers to boycott or otherwise coerce manufacturers to disadvantage discounters is a per se violation! … We presume that agreements among competitors to suspend the normal give and take of the marketplace will lead to consumer harm.” But because he can’t find a smoking gun of explicit collusion (such as a memo from AOA to CooperVision/OSI agreeing to collude to sell doctors’-only lenses), he assumes that the practice is not anti-competitive.

Yet, while the standard of explicit collusion might be correctly applied to traditional industries, it does not necessarily apply to a regulated industry like optometry, which is as much a profession as it is an industry. As Dean Harvey writes in a forthcoming California Law Journal article entitled “Anticompetitive Social Norms as Antitrust Violations,” “Robust, anti-competitive, price fixing social norms may flourish in a market structure of low entry barriers and very low concentration levels.” In the case of the eye care industry, the collusion may not be in a smoke-filled room, but it’s collusion all the same. In this case, it’s professional collusion through norms that is leading CooperVision/OSI to restrict the sales of its
lens to ECPs (and could lead the other producers to follow suit once the state AG’s consent decree expires later this year).

In the optometry profession these anti-competitive social norms are expressed in a variety of means, particularly in articles in professional journals that send a clear message to optometrists that they should prescribe doctors’-only lenses. An article in the Optometric Physician states, “CooperVision currently does not authorize any Internet reseller to distribute ProClear Compatibles.” The editor of Review of Optometry writes, “Another move toward keeping patient care where it belongs: CooperVision has developed a contact lens that would be available … only through doctors.” Optometric Management tells its readers to “sell contact lens that aren’t as readily shopable or sell private-label lenses…. If you choose your vendors carefully, they’re not readily available on the Internet.”

Other professional journal articles bear titles such as “When Mail-Order Calls, How to Verify an Rx – or Not.” In Contact Lens Spectrum one optometrist advises his professional colleagues “be more aggressive as a profession in putting up barriers against Internet providers siphoning our patients away.” Another doctor writes how he is foiling insurance companies who are pressuring him to prescribe lenses that can be purchased less expensively from third party sources, by stating “if they do not have access to the Hydrogenics lens, then that is definitely a determining factor in which lens I’m going to reach for.”

CooperVision/OSI essentially colludes with these self-interested health care professionals by maintaining a vigorous campaign to let optometrists know that they are fighting to protect the optometrists’ restrictive practices. For example, an OSI ad in an optometric journal states, “OSI does not sell to alternative channels of distribution, such as mail-order and Internet companies and pharmacies.” OSI went on to say that it aims to sell contact lenses directly to eye-care practitioners, and refuses to sell to mail-order and Internet distributors. So the message is “reward CooperVision/OSI with your business and we will do all we can to make sure your patients do not have the choice to purchase their lenses from lower cost alternative channels.” In this case the profession and CooperVision/OSI are colluding to restrict patient choice and make them pay more for lenses.

3) In contrast to most other markets, contact lens wearers do not have the freedom or knowledge to make their own independent purchasing choices.

Finally, in contrast to what is happening in the marketplace, Cooper argues that ECPs won’t engage in these anti-consumer practices because consumers will not continue to do business with optometrists that try to restrict their choice. In fact, for two reasons it’s unlikely that consumers will discipline this particular marketplace.

First, contact lenses are a credence good. In other words, few patients have enough information to challenge their ECP’s claim that a doctors’-only lens is the right one for them. Indeed, the fact that lenses are available only by prescription reinforces in the patient’s mind that the prescriber possesses special knowledge the patient does not. Indeed, ECPs know this and rely on this imbalance of authority to limit consumer choice and maximize their revenues. For example, one eye doctor states, “I don’t give patients a choice. I tell them ‘This is the best lens for you, it’s the only one you should be wearing.’” Another optometrist states that when patients question why he’s prescribing a doctors’-only lens, “I tell them it’s the best lens for them.”
Optometrists readily admit that their position of authority allows them to get away with this manipulation. One optometrist states that private label lenses “create the problem in the patient’s mind about whether or not it’s the same lens that they can get at Walmart.” It would take an exceptional consumer to even know that their optometrist is manipulating them in order to ensure that they can sell lenses to them.

Second, Cooper claims that consumers will be aware of restrictive practices. In fact, consumers are likely to have little knowledge of them. My own experience, I believe, is indicative. My 14 year old son was recently prescribed a doctors’-only lens. When I tried to fill the prescription at a leading online seller their Web site informed me that while the company sold the brand they didn’t sell that exact lens as named in the prescription (which was precisely why my ECP prescribed it). It was only after I went back to my ECP and demanded that they give me the same lens but with a name that would enable me to buy it from an Internet provider that I was able to buy the lens online (and save money). But I was able to do this only because I was aware of these restrictive practices and did not take my ECP’s word for it when he told me at this time that this lens was not available online. But few consumers are aware of this practice. Most would simply take their ECP’s word for it that doctors’-only lenses were the best ones for them.

Finally, Cooper assumes that ECPs will not prescribe doctors’-only lenses because their reputation will suffer. But the facts belie this hypothesis. If reputation is such an important issue, why are doctors’-only lenses the fastest growing part of the market? The reason of course, is that the risk to ECP’s reputation is very small. And even Cooper admits as much; “Of course reputation will discipline sellers only if consumers can detect that they have been cheated… lacking specialized knowledge in optometry, a consumer may never discover that her lens is not the best one, but the most profitable one.” Indeed.

**Conclusion**

Cooper makes a number of important points, especially with regard to the optometrist-instigated protectionist state laws that limit consumer choice. But in trying to apply a conventional market-based analysis of anti-trust to the contact lens industry, Cooper mistakenly assumes that a leading manufacturer’s attempt to limit consumer choice is somehow pro-consumer and pro-competition – even though the manufacturer itself markets its lenses based on their utility in restricting competition. Cooper further suggests that even if the practice of selling and prescribing doctors’-only lenses were not pro-consumer and pro-competition, that it would be naturally corrected by “market forces.” But this is not an industry in which a traditional anti-trust market analysis makes sense. Rather it’s a “market” where consumers have limited choice and even less knowledge and are dependent upon health care professionals who face a strong incentive to limit consumer choice in order to maximize revenues.

As a result, it is naïve to assume that government action is not needed to curb this abuse. Indeed, the state Attorneys General stated as much when they argued that litigation is ineffective at addressing fundamentally structural problems in the contact lens market where eye doctors prescribe and sell contact lenses. In this case, narrow and targeted legislative action can correct this market failure and ensure that this market becomes competitive and consumers have choice.
ENDNOTES


4. The FTC reports that, “For contact lenses, higher prices or less convenient purchase options may influence how often consumers replace their contact lenses.” Possible Anticompetitive Barriers to E-Commerce: Contact Lenses,” A Report from the Staff of the Federal Trade Commission, March 2004.

5. Cooper, p. 15.

6. A credence good is a term used in economics for a good whose utility impact is difficult or impossible for the consumer to ascertain; unlike experience goods, the utility gain or loss is difficult to measure after consumption as well.


8. Indeed, Cooper argues that, “finding that offline sellers enjoy higher margins for limited distribution lenses is merely a necessary, not a sufficient conduction to conclude that limited distribution policies for contact lenses harm.” (p. 18)


10. Cooper, p. 11.


12. Ibid.


19 Ibid.


21. Ibid.

22. Ibid.

23. Cooper, p. 17.


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