

The Great Doing Remarks from the Chief Technologist Stephanie T. Nguyen As Prepared for Delivery - Rio de Janeiro, Brazil The Association for Computing Machinery (ACM) Fairness, Accountability, and Transparency (FAccT) Conference

June 2024

Part 1: The Great Doing

I want to start by thanking the FAccT organizers for inviting me to this keynote and to join an opportunity to convene, share ideas, and spark action. I also want to especially thank Amritha Jayanti, Alex Gaynor, Noam Kantor, my team members, FTC colleagues, and Chair Lina Khan, without whom none of the work I get to share today would be possible.

I'm Stephanie Nguyen, Chief Technologist and head of the Office of Technology at the Federal Trade Commission – today's remarks are my own views and not that of the Commission or any Commissioner. The FTC's mission is to protect consumers against unfair and deceptive acts and practices and prevent unfair methods of competition. Put more simply, the agency exists to ensure that consumers, workers, and businesses don't get tricked, bullied, or coerced in the marketplace.

Dr. Seeta Peña Gangadharan teed up an incredible keynote yesterday talking about the state of surveillance technologies, how the development of more technology could facilitate the undoing of so much of our societal norms, and going more upstream to focus our interventions. Inspired by the sessions yesterday and building from the foundation setting of the great undoing, today's keynote theme is: "The Great Doing"

There's a lot happening at the FTC.

The FTC voted to finalize a new rule banning non-competes which could raise wages by hundreds of dollars a year on average and impact nearly 30 million workers – including hairdressers, nurses, bartenders, and engineers – to have the ability to switch jobs or leave for better pay. ¹

¹ https://www.ftc.gov/system/files/ftc gov/pdf/Non-Compete-Fact-Sheet.pdf

The Commission challenged over a hundred junk patent listings on medical devices including asthma inhalers, epi-pens, and weight loss drugs, which can "harm competition from cheaper generic alternatives" and "inflate the cost of prescription drugs." ³

The agency banned RiteAid from using facial recognition technology for surveillance purposes for five years – which the Commission alleged falsely tagged women and people of color as shoplifters and recklessly left its customers facing humiliation and other harms.⁴

Last year, Commissioners voted unanimously to launch and establish the Office of Technology.⁵ – and since then, we've been hiring a team of experts including software and privacy engineers, investigative data journalists, and product managers to keep pace with new markets.

Today, I'll give you a sense of the breadth of the topics that the agency covers on a day-to-day basis. There is value to be unlocked when there is dialogue between researchers and the agency.

When the agency has issued "Requests for Information" (RFI) or "Notice of Proposed Rulemakings," a few non-government practitioners reached out in confusion. How do you engage with comments in an RFI? How do I navigate regulations.gov? How do I make sure my file uploads don't exceed 10 megabytes? Is it worth my time?

Anyone who has worked in government knows that navigating complex systems and services meant to serve 300 million Americans can be challenging. I spent years seeing people give up on high stakes decisions like repaying student loans, navigating citizenship, and applying for Medicaid.

To people in this room: researchers, practitioners, and experts: you can continue to be force multipliers to this mission. So today, I'd like to provide a framework for continued engagement.

To start, I'd like to focus on one word that carries weight and meaning to our respective communities. This word is transparency.

I'm going to define transparency, explain a policy approach that is based on transparency that has failed, and then pivot to a useful guiding principle that drives much of our work.

Part 2: On Transparency

2.1. On transparency

What does it mean for something to be transparent? Some definitions have highlighted it is:

- The property of allowing light to pass through so objects that are behind can be seen..6
- The quality of being readily understood.⁷

² https://www.ftc.gov/news-events/news/press-releases/2023/11/ftc-challenges-more-100-patents-improperly-listed-fdas-orange-book

³ https://www.ftc.gov/news-events/news/press-releases/2024/04/ftc-expands-patent-listing-challenges-targeting-more-300-junk-listings-diabetes-weight-loss-asthma

⁴ https://www.ftc.gov/news-events/news/press-releases/2023/12/rite-aid-banned-using-ai-facial-recognition-after-ftc-says-retailer-deployed-technology-without

⁵ https://www.ftc.gov/news-events/news/press-releases/2023/02/ftc-launches-new-office-technology-bolster-agencys-work

⁶ https://www.merriam-webster.com/dictionary/transparent

⁷ https://www.merriam-webster.com/dictionary/transparent

• "Making information available and accessible to others." ⁸ Journalist Karen Hao has described this term to in practice sometimes meaning - "revealing a company's data and code." ⁹

Transparency without accountability can lead to shortcomings.¹⁰ and a good example is the "notice and choice" regime. Companies may deploy "notice and choice" in the form of privacy policies and terms of service pop-ups to signal they are enabling consumer control.

2.2: Transparency by consumer "notice and choice" has failed

This transparency by consumer notice and choice is broken and has failed. ¹¹ I've learned this through years of first-hand experience as a designer of these interfaces. And decades of academic research and investigative reporting has shown this. It places the burden on users to navigate complexity. ¹² and creates the illusion of control that is unintelligible. ¹³ opaque. ¹⁴ and ineffective. ¹⁵

"[N]otice and choice is a fantasy world, divorced from reality of how people live or how firms operate," said Samuel Levine, Director of the Bureau of Consumer Protection. 16

Seeking transparency may help clarify decisions or processes. But, alone, this will not change a company's bottom line. It's like stripping fresh paint off a ship to see that the hull is corroding, which can cause the floors to sag, the walls the crack, and the ship to eventually sink.

2.3. Scrutinize business model incentives

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So in the spirit of "The Great Doing," how does our team think about our work? One guiding principle Chair Khan outlined.¹⁷ is scrutinizing how business models drive incentives.

Amassing consumer data is often a tech company's primary source of economic power. This incentive can create data asymmetries between the firm and the consumer. To do this, companies will design ads, optimize interfaces, onboarding experiences, and on-app experiences that will get you to sign up and get you to keep using their product or service.

https://dictionary.cambridge.org/us/dictionary/english/transparent

https://www.repository.law.indiana.edu/cgi/viewcontent.cgi;

Chair Khan has stated the FTC "is taking bold steps to move away from the flawed 'notice and choice' privacy framework and establish substantive protections for consumers' personal data." https://www.ftc.gov/system/files/ftc_gov/pdf/testimony-chair-khan.pdf

https://www.heinz.cmu.edu/~acquisti/papers/acquisti-onlinepurchasing-privacy.pdf

⁸ https://www.dictionary.com/browse/transparency

https://www.technologyreview.com/2021/04/13/1022568/big-tech-ai-ethics-guide/

¹⁰ https://www.bu.edu/articles/2023/we-need-stronger-safeguards-from-artificial-intelligence/

¹¹ https://www.heinz.cmu.edu/~acquisti/papers/Acquisti_Sleights_of_Privacy.pdf; https://dl.acm.org/doi/10.1145/985692.985752;

¹² https://lorrie.cranor.org/pubs/readingPolicyCost-authorDraft.pdf

¹³ https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1618&context=faculty_scholarship

¹⁴ https://faculty.ist.psu.edu/xu/papers/ecra.pdf

¹⁵ https://law.stanford.edu/wp-content/uploads/2018/03/Waldman Final 031418.pdf

¹⁶ https://www.ftc.gov/system/files/ftc_gov/pdf/20240417-Reidenberg-Lecture-final-for-publication-Remarks-Sam-Levine.pdf

¹⁷ https://www.ftc.gov/policy/advocacy-research/tech-at-ftc/2024/01/tick-tick-office-technologys-summit-ai

In addition, vast data collection can also create barriers to entry and distort competition in the marketplace. ¹⁸

In fact, research from this year indicates that thousands of websites in the EU may be using claims of legitimate business interest to override consumer consent..¹⁹

Transparency, especially through "notice and choice" alone, cannot remedy the multi-ton steamship's corroding hull. It's at the mercy of the briny sea - that is, a company's core business model incentives. Notice and choice has had the opposite of its intended effect. Instead of informing and empowering users, it has emboldened corporations to recklessly amass consumer data.

¹⁸ https://www.ftc.gov/policy/advocacy-research/tech-at-ftc/2023/06/generative-ai-raises-competition-concerns

¹⁹ A Study of GDPR Compliance under the Transparency and Consent Framework | Proceedings of the ACM on Web Conference 2024

This "notice and choice" regime has led to further entrenching commercial surveillance.²⁰ in the most sensitive areas of our lives – including our browsing history.²¹, health information,.²² biometric data,.²³ home life,.²⁴ work life,.²⁵ kids' lives,.²⁶ daily navigation through cars,.²⁷ and our wallets..²⁸

So once we identify sources for corrosion - what can be done? And what can you do to boost this mission? I'll start by sharing how the Office of Technology strives to achieve our mission and approach our work with this core point of business model incentives in mind. Then, I will articulate areas of harm and challenges we are facing. Lastly, I will end with open questions and a call-to-action.

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https://www.ftc.gov/system/files/ftc_gov/pdf/Statement%20of%20Chair%20Lina%20M.%20Khan%20on%20Commercial%20Surveillance%20ANPR%2008112022.pdf;

https://www.federalregister.gov/documents/2022/08/22/2022-17752/trade-regulation-rule-on-commercial-surveillance-and-data-security

²¹ https://www.ftc.gov/news-events/news/press-releases/2021/10/ftc-staff-report-finds-many-internet-service-providers-collect-troves-personal-data-users-have-few

https://www.ftc.gov/news-events/news/press-releases/2024/02/ftc-order-will-ban-avast-selling-browsing-data-advertising-purposes-require-it-pay-165-million-over

²² https://www.ftc.gov/news-events/news/press-releases/2021/06/ftc-finalizes-order-flo-health-fertility-tracking-app-shared-sensitive-health-data-facebook-google

https://www.ftc.gov/news-events/news/press-releases/2023/02/ftc-enforcement-action-bar-goodrx-sharing-consumers-sensitive-health-info-advertising;

https://www.ftc.gov/news-events/news/press-releases/2023/07/ftc-gives-final-approval-order-banning-betterhelp-sharing-sensitive-health-data-advertising;

²³ https://www.ftc.gov/news-events/news/press-releases/2021/05/ftc-finalizes-settlement-photo-app-developer-related-misuse-facial-recognition-technology

 $\frac{https://www.ftc.gov/news-events/news/press-releases/2023/12/rite-aid-banned-using-ai-facial-recognition-after-ftc-says-retailer-deployed-technology-without;$

²⁴ https://www.ftc.gov/news-events/news/press-releases/2023/05/ftc-doj-charge-amazon-violating-childrens-privacy-law-keeping-kids-alexa-voice-recordings-forever;

https://www.ftc.gov/news-events/news/press-releases/2023/05/ftc-says-ring-employees-illegally-surveilled-customers-failed-stop-hackers-taking-control-users;

https://www.nytimes.com/ 2020/ 05/ 06/ technology/ employee-monitoring-work-from-home-virus.html

²⁶ https://www.ftc.gov/news-events/news/press-releases/2023/03/ftc-finalizes-order-requiring-fortnite-maker-epic-games-pay-245-million-tricking-users-making;

https://www.ftc.gov/news-events/news/press-releases/2020/09/childrens-online-learning-program-abcmouse-pay-10-million-settle-ftc-charges-illegal-marketing;

https://www.ftc.gov/news-events/news/press-releases/2023/06/ftc-will-require-microsoft-pay-20-million-over-charges-it-illegally-collected-personal-information;

https://www.ftc.gov/news-events/news/press-releases/2023/05/ftc-doj-charge-amazon-violating-childrens-privacy-law-keeping-kids-alexa-voice-recordings-forever;

²⁸ https://www.ftc.gov/news-events/news/press-releases/2023/08/ftc-action-stops-business-opportunity-scheme-promised-its-ai-boosted-tools-would-power-high-earnings; https://www.ftc.gov/news-events/news/press-releases/2023/06/ftc-takes-action-against-amazon-enrolling-

consumers-amazon-prime-without-consent-sabotaging-their;

²⁷ https://www.ftc.gov/news-events/events/2017/06/connected-cars-privacy-security-issues-related-connected-automated-vehicles; https://www.ftc.gov/policy/advocacy-research/tech-at-ftc/2024/05/cars-consumer-data-unlawful-collection-use

Part 3: Our Methods & Approach

3.1. About the team and our mission

At the FTC, the Office of Technology is staffed with experts who have dedicated much of their careers thus far to building, designing, deploying, reporting on, and studying technology and how it impacts people.

With the increased digitization of the economy, we define our work across technology broadly, as many industries now have critical tech components – including healthcare, finance, and transportation. I'm also excited to see how law enforcement agencies - like DOJ and CFPB can use their role to continue to cultivate this outcome. It's a core part of the reason I'm optimistic - is because we helped create a pipeline and more structure to ensure there were tech experts internally to support our enforcement work.

Over a year ago, the FTC's Office of Technology (OT) was established with three core principles in mind:

- 1. Strengthen and support the agency through law enforcement investigations and cases.
- 2. Serve as internal experts to advise and engage with FTC staff and the Commission on policy and research initiatives.
- 3. Engage and inform outside stakeholders and experts to advance the Commission's enforcement work.

Technologists came to the FTC to apply their skills at a law enforcement agency to ensure that companies don't trick, deceive, or coerce people, workers, and businesses. For example, as much as generative AI can help detect fraud – we know it can amplify fraud and scams at scale.²⁹

Such aggregation of power can also have broad chilling effects of fear and retaliation, as Chair Khan recently noted. 30 "Small business owners live in constant terror that Amazon will punish them and demote their products [or their] listings may disappear from Google search results altogether," she said.

This is why we are here. Our team is about a dozen of the best technologists in the country.

- A software engineer and journalist who built an open source Tor browser for iPhone
- An investigative data journalist who covered algorithmic discrimination and the gig economy
- A mathematician who has focused on debunking the digital ad tech ecosystem
- A civic technologist who streamlined the income verification process for the food stamps program

In the spirit of incentives, the Office of Technology's bottom line is not a big tech acquisition or an IPO. It's not publishing papers. And it's not amassing more users to make money off ads. It is protecting the American public, its workers, and its businesses from unfair and deceptive acts and unfair methods of competition.

²⁹ https://www.ftc.gov/ news-events/ news/ press-releases/ 2022/ 02/ new-data-shows-ftc-received-28-million-fraud-reports-consumers-2021-0

³⁰ https://www.ftc.gov/system/files/ftc_gov/pdf/2024.05.21-remarks-by-chair-khan-at-the-aelp-anti-monopoly-summit.pdf

As part of our mandate, we want to meaningfully engage to better strengthen and support our law enforcement work.

- We want to listen and learn. I'm excited about the work here. I read through the paper topics accepted and was excited to see topics with such a wide range and overlap with our work.
- We want to share what we're doing.
- We want to find intersections and new ways to engage with you in a timely way.

We've covered that transparency through notice and choice is broken. We've highlighted this is a key inflection point as a new technologies through generative AI take shape. We've covered a bit about our team and what we do.

Now we're diving into *how* we do this work. I'm going to outline a framework that illustrates how we work toward our north star of anchoring our work on business model incentives.

There are 3 key pieces to this framework:

- Peel back the layers of the tech stack
- Examine hidden middleman layers
- Crackdown on mass data collectors

3.2. We peel back the layers of technology

One way to examine foundational business incentives is to peel back the layers of technology that make up a product or service and go more upstream to "pinpoint which actor(s) [are] driving or enabling the lawbreaking," as Chair Khan stated in her principles on AI.³¹

Beyond the user-facing layer that may be most transparent to a consumer, we can peel back and examine the layers of technology. I'm going to talk through 3 layers we've explored: Chips, Cloud Computing, and AI partnerships and investments.

3.2.1. Semiconductor Chips

Semiconductor chips are essential components for laptops, mobile devices, MRI machines, navigation systems, and kitchen appliances. Chips and access to GPUs are one of the bedrock components for generative AI products.³²

According to experts.³³ at The FTC's Tech Summit on AI,³⁴ several areas to explore in this layer include security risks due to single points of failure, and competition concerns including self-preferencing, tying, and other barriers to compete.

For example, one chip startup founder said he faced challenges staying afloat, explaining to investors: "We're going to compete with the largest companies in the world, and we're not sure if

³¹ https://www.ftc.gov/system/files/ftc gov/pdf/2024.01.25-chair-khan-remarks-at-ot-tech-summit.pdf

³² https://www.ftc.gov/policy/advocacy-research/tech-at-ftc/2024/03/semiconductor-chips-cloud-computing-quote-book#ftn4

³³ https://www.ftc.gov/policy/advocacy-research/tech-at-ftc/2024/03/semiconductor-chips-cloud-computing-quote-book#ftn4

³⁴ https://www.ftc.gov/news-events/events/2024/01/ftc-tech-summit

they're ever going to buy our chips because they're making their own chips." ³⁵ Regulation from agencies can continue to bolster innovation to ensure that more founders can compete on a more level playing field.

Back in 2021, the FTC blocked Nvidia's attempted acquisition of Arm -- which would have been the "largest semiconductor chip merger in history." ³⁶ Despite the regulatory action, Nvidia has remained the leading chip maker in the AI arms race, with a surging stock valuation [and] Arm "ended up going public and has forward earnings multiple that is more than double Nvidia's." ³⁷

3.2.2. Cloud computing

Cloud computing has grown significantly over recent decades and is a central part of the economy. Thus far, the agency has released a Request for Information, ³⁸ spotlighted an expert panel for discussion, ³⁹ and released analysis of what we learned from our comments. ⁴⁰

Commenters pointed to software licensing practices that can limit the ability to use certain software in other cloud provider environments. 41

They highlighted egress fees – where it is easier to transfer into a cloud environment but more expensive to transfer data out of certain cloud environments – which can discourage customers from switching providers. 42

Lastly, some argued that minimum spend contracts can act as a lock-in mechanism – pushing customers to use one cloud provider for all their needs, even if other providers provide better services. ⁴³

2.2.3. AI partnerships and investments

Another key input of the tech stack, especially for AI model development, is to look at how partnerships and investments are structured.⁴⁴

https://assets.publishing.service.gov.uk/media/661e5a4c7469198185bd3d62/AI_Foundation_Models_technical_upd ate_report.pdf

³⁵ https://www.ftc.gov/system/files/ftc gov/pdf/ftcotstaffreport-techaisummitquotebook.pdf

³⁶ https://www.ftc.gov/legal-library/browse/cases-proceedings/2110015-nvidiaarm-matter

³⁷ https://www.ftc.gov/policy/advocacy-research/tech-at-ftc/2024/03/semiconductor-chips-cloud-computing-quote-book

³⁸ https://www.ftc.gov/policy/advocacy-research/tech-at-ftc/2023/03/inquiry-cloud-computing-business-practices-federal-trade-commission-seeking-public-comments

³⁹ https://www.ftc.gov/news-events/events/2023/05/cloud-computing-taking-stock-looking-ahead

⁴⁰ https://www.ftc.gov/policy/advocacy-research/tech-at-ftc/2023/11/cloud-computing-rfi-what-we-heard-learned

⁴¹ FTC-2023-0028-0043, FTC-2023-0028-0051, FTC-2023-0028-0062, FTC-2023-0028-0069, FTC-2023-0028-0091

⁴² FTC-2023-0028-0048, FTC-2023-0028-0081, FTC-2023-0028-0085, FTC-2023-0028-0089, FTC-2023-0028-0090

⁴³ FTC-2023-0028-0024, FTC-2023-0028-0068, FTC-2023-0028-0085, and FTC cloud panel transcript (page 19)

In January, the FTC issued orders.⁴⁵ to five companies: Microsoft, Amazon, Google, Anthropic, and OpenAI requiring them to "provide information regarding recent investments and partnerships involving generative AI companies and major cloud service providers." ⁴⁶

Our 6(b) authority.⁴⁷ is a unique tool we have at the agency – which allows us to conduct wideranging studies by sending mandatory questions to companies to learn information that is inaccessible to the public. Here, the agency is scrutinizing information as it relates to the core agreements, the implications of the partnerships, and the competitive impacts and the competition for AI inputs and resources.

3.3. We examine hidden middleman layers

One way to approach core business incentives is to expand our understanding of harms, especially through the hidden middle layers of the economy that are not transparent to people.

3.3.1. Investigating pixel tracking

The agency recently brought enforcement actions against GoodRx⁴⁸ and BetterHelp.⁴⁹ – two digital health platforms – for allegedly sharing user health data with third parties for advertising.

Both cases alleged "the use of third-party tracking pixels which can enable platforms to amass, analyze, and infer information about user activity." ⁵⁰

Staff have highlighted in a blog post that invisible pixels are unavoidable for consumers, lack clarity around data collection and use, and may involve personal information that may not be effectively removed.51

3.3.2. Crackdown on mass data collectors

Earlier this year, staff highlighted three matters.⁵² that reflect a heightened focus on pervasive extraction and mishandling of personal data that directly stem from business models that monetize people's personal information.

⁴⁵

https://www.ftc.gov/system/files/ftc_gov/pdf/P246201_AI_Investments_6%28b%29_Order_and_Resolution.pdf

⁴⁶ https://www.ftc.gov/news-events/news/press-releases/2024/01/ftc-launches-inquiry-generative-ai-investments-partnerships

⁴⁷ https://www.ftc.gov/about-ftc/mission/enforcement-authority

⁴⁸ https://www.ftc.gov/news-events/news/press-releases/2023/02/ftc-enforcement-action-bar-goodrx-sharing-consumers-sensitive-health-info-advertising

⁴⁹ https://www.ftc.gov/news-events/news/press-releases/2023/03/ftc-ban-betterhelp-revealing-consumers-data-including-sensitive-mental-health-information-facebook

⁵⁰https://www.ftc.gov/policy/advocacy-research/tech-at-ftc/2023/03/lurking-beneath-surface-hidden-impacts-pixel-tracking

⁵¹ https://www.ftc.gov/policy/advocacy-research/tech-at-ftc/2023/03/lurking-beneath-surface-hidden-impacts-pixel-tracking

 $[\]frac{52}{https://www.ftc.gov/policy/advocacy-research/tech-at-ftc/2024/03/ftc-cracks-down-mass-data-collectors-closer-look-avast-x-mode-inmarket}$

After several data.⁵³ brokers.⁵⁴ and software services.⁵⁵ were alleged to have extracted, shared, and sold sensitive data to entities (including private government contractors and advertisers) without obtaining their consent, the FTC secured stipulated orders that imposed data-use restrictions and limitations on sensitive information. These cases included remedies such as banning the sharing or selling of sensitive data including browsing and location data for advertising.

One data broker.⁵⁶ was banned from sharing any products or services that would categorize or target customers based on that sensitive location data.

Through these 3 hidden middlemen cases, staff highlighted that:

- 1. Browsing and location data are sensitive.
- 2. Purpose matters: Firms do not have free license to market, sell, and monetize people's information beyond purposes to provide their product or service.
- 3. Firms should not let business model incentives that focus on the bottom line outweigh the need for meaningful privacy safeguards.

3.3.3. Price fixing by algorithms

One final example to highlight the hidden interlayers of the economy is when landlords and property managers use software to collude on rental pricing.⁵⁷

Rent is up nearly 20% since 2020, ⁵⁸ with the largest increases concentrated on apartments rented by lower-income consumers. ⁵⁹ Landlords and property management companies have outsized leverage over their tenants and can fix their final prices to drive up rent prices – all which would be obfuscated from a consumer's apartment search.

The FTC and the Department of Justice filed a joint legal brief.⁶⁰ that explained concretely that "price fixing through an algorithm is still price fixing."

3.3. We look at remedies that go more upstream to prevent harms

Another way we highlight our understanding of core business models is through our cases and investigations -- especially through remedy design. When I say "remedy" here I am referring to the changes that companies are required to make either due to an FTC settlement or a litigated judgment.

 $^{^{53} \, \}underline{\text{https://www.ftc.gov/policy/advocacy-research/tech-at-ftc/2024/03/ftc-cracks-down-mass-data-collectors-closer-look-avast-x-mode-inmarket}$

⁵⁴ https://www.ftc.gov/policy/advocacy-research/tech-at-ftc/2024/03/ftc-cracks-down-mass-data-collectors-closer-look-avast-x-mode-inmarket

 $^{^{55}\} https://www.ftc.gov/policy/advocacy-research/tech-at-ftc/2024/03/ftc-cracks-down-mass-data-collectors-closer-look-avast-x-mode-inmarket$

 $[\]frac{56}{https://www.ftc.gov/news-events/news/press-releases/2024/01/ftc-order-will-ban-inmarket-selling-precise-consumer-location-data}$

⁵⁷ https://www.ftc.gov/business-guidance/blog/2024/03/price-fixing-algorithm-still-price-fixing

⁵⁸ https://fred.stlouisfed.org/series/CUUR0000SEHA

⁵⁹ https://www.jchs.harvard.edu/sites/default/files/reports/files/Harvard_JCHS_Americas_Rental_Housing_2024.pdf

⁶⁰ https://www.ftc.gov/system/files/ftc_gov/pdf/YardiSOI-filed%28withattachments%29 0.pdf

3.3.1. Algorithm & Models: Bans and Deletion

The agency issued a series of orders highlighting how to get more upstream at the root cause of harm by addressing how to ban, disgorge, or delete ill-gotten data that powers models or algorithms.

Ban on use of facial recognition technology: In its action against Rite Aid, the Commission alleged that Rite Aid's facial recognition technology falsely tagged consumers, particularly women and people of color, as shoplifters. In settling the case, the agency banned the company from using its technology for surveillance purposes for five years.

The agency also required data deletion of biometric information, and mandated surveillance system monitoring which requires the company to test, assess, measure, document, and inquire about the accuracy of any system before deploying it.

The order also prevents the use of low-quality data and images to reduce the likelihood of false-positive match. ⁶¹

Model and algorithmic deletion: ⁶² In another recent action, the Commission alleged that photo app developer Everalbum deceived consumers about its use of facial recognition technology and retention of photos and videos of users who deactivated their accounts. The FTC order required the company to delete the photos and videos and destroy the models and algorithms it developed using its ill-gotten data. ⁶³ More recently, the FTC has brought nearly a dozen actions which required firms to delete algorithms which were trained on illegally collected data including RiteAid, ⁶⁴ Amazon Ring, ⁶⁵ Edmodo, ⁶⁶ X-Mode Social, ⁶⁷ InMarket Media, ⁶⁸ Avast, ⁶⁹ Kurbo formerly known as Weight Watchers, ⁷⁰ Monument, ⁷¹ and CRI Genetics. ⁷²

Ban on using ill-gotten data to train or improve algorithms: The Commission alleged that Amazon violated the Children's Online Privacy Protection Act Rule (COPPA Rule) and deceived parents and users of its data deletion practices through their voice assistant, Alexa. A FTC-DOJ order mandated deletion for inactive users and banned the company from using ill-gotten location and children's voice information to train or improve its algorithms.⁷³

⁶¹ https://www.ftc.gov/news-events/news/press-releases/2023/12/rite-aid-banned-using-ai-facial-recognition-after-ftc-says-retailer-deployed-technology-without

⁶² https://www.ftc.gov/news-events/news/press-releases/2022/03/ftc-takes-action-against-company-formerly-known-weight-watchers-illegally-collecting-kids-sensitive

⁶³ https://www.ftc.gov/news-events/news/press-releases/2021/05/ftc-finalizes-settlement-photo-app-developer-related-misuse-facial-recognition-technology

⁶⁴ https://www.ftc.gov/system/files/ftc gov/pdf/2023190 riteaid stipulated order filed.pdf

⁶⁵ https://www.ftc.gov/system/files/ftc gov/pdf/proposed stipulated order ring.pdf

⁶⁶ https://www.ftc.gov/legal-library/browse/cases-proceedings/202-3129-edmodo-llc-us-v

⁶⁷ https://www.ftc.gov/legal-library/browse/cases-proceedings/2123038-x-mode-social-inc

⁶⁸ https://www.ftc.gov/system/files/ftc_gov/pdf/InMarketMedia-DecisionandOrder.pdf

 $^{^{69}\} https://www.ftc.gov/system/files/ftc_gov/pdf/202_3033_-_avast_final_consent_package.pdf$

 $^{^{70}\} https://www.ftc.gov/system/files/ftc_gov/pdf/wwkurbostipulatedorder.pdf$

⁷¹ https://www.ftc.gov/legal-library/browse/cases-proceedings/2323043-monument-inc-us-v

⁷² https://www.ftc.gov/system/files/ftc_gov/pdf/crigeneticsstipulatedorder.pdf

⁷³ https://www.ftc.gov/news-events/news/press-releases/2023/05/ftc-doj-charge-amazon-violating-childrens-privacy-law-keeping-kids-alexa-voice-recordings-forever

3.3.2. Data-use restrictions on sensitive information

The FTC has also issued a series of orders highlighting data use-restrictions for sensitive data.

Ban on sharing sensitive <u>health data</u> for ads: The Commission alleged that telehealth and prescription drug provider GoodRx failed to notify consumers of its unauthorized disclosures of consumers' personal health information to Facebook, Google, and other companies. In response, the FTC took enforcement action to ban the company from sharing or selling sensitive health data for advertising.

Ban on selling sensitive <u>browsing data</u> for ads: The Commission alleged that software provider Avast said they would protect the privacy of user browsing data, but instead sold such information to third parties. The FTC's order banned the company from selling browsing data to third parties for advertising purposes.

Ban on selling sensitive <u>location data</u> for ads: The Commission alleged that data broker X-Mode Social failed to obtain informed consent when collecting precise location data from consumers' phones through their mobile apps and from third parties. ⁷⁴ In response, the FTC secured an order prohibiting the companies from selling sensitive location data. ⁷⁵

Prohibition on sharing products that categorize or target based on sensitive data. With nearly 2,000 audience segment lists including categories such as "parents of preschoolers," "Christian church goers," and "wealthy and not healthy," the FTC's enforcement action against InMarket prohibited the company from sharing any products or services *that categorize or target consumers* based on that sensitive location data.⁷⁶

Mandated data retention limits: In settlements with CafePress, ⁷⁷ Weight Watchers, ⁷⁸ Blackbaud, ⁷⁹ Chegg, ⁸⁰ and Drizly, ⁸¹ the FTC required the companies minimize the amount of data they collect and retain, including through data retention schedules.

2.3.3. Product defaults

The agency has challenged product design decisions with harmful defaults.

⁷⁴ https://www.ftc.gov/news-events/news/press-releases/2024/01/ftc-order-prohibits-data-broker-x-mode-social-outlogic-selling-sensitive-location-data

⁷⁵ https://www.ftc.gov/news-events/news/press-releases/2024/01/ftc-order-will-ban-inmarket-selling-precise-consumer-location-data

⁷⁶ https://www.ftc.gov/news-events/news/press-releases/2024/01/ftc-order-will-ban-inmarket-selling-precise-consumer-location-data

⁷⁷ https://www.ftc.gov/news-events/news/press-releases/2022/06/ftc-finalizes-action-against-cafepress-covering-data-breach-lax-security-0

⁷⁸ https://www.ftc.gov/news-events/news/press-releases/2022/03/ftc-takes-action-against-company-formerly-known-weight-watchers-illegally-collecting-kids-sensitive

⁷⁹ https://www.ftc.gov/system/files/ftc_gov/pdf/2023181_blackbaud_final_consent_package.pdf

⁸⁰ https://www.ftc.gov/system/files/ftc_gov/pdf/Chegg-DecisionandOrder.pdf

⁸¹ https://www.ftc.gov/news-events/news/press-releases/2023/01/ftc-finalizes-order-online-alcohol-marketplace-security-failures-exposed-personal-data-25-million

Epic Games, the maker of Fortnite, enabled voice and text chat by default, which the Commission alleged was an unfair practice that put kids and teens in risky contact with strangers. ⁸² The FTC prohibited Epic from enabling voice and text communications without affirmative consent through a default privacy setting. ⁸³

In a series of actions, most recently against Amazon and its top executives, the FTC charged that the use of dark patterns to trap people in subscriptions is unlawful, as the BCP Director recently said.⁸⁴

Part 4: Our work: some substantive areas of interest

I'd like to now move to my final segment on our work and how it relates to core business incentives.

4.1. Smoke, Mirrors, and Veneers

Marketing and advertising are directly tied to a company's business model. Examples include: advertising, franchising, retail, freemium, or subscriptions. With hands on technical experience, it is common for our team to be called on to decipher whether claims may be inaccurate – and are equipped to ask the right questions to get at the root cause of harm.

In 2012, FTC Chief Technologist Ed Felten outlined a blog post called, "Does Hashing Make Data 'Anonymous'?". ** "Hashing is a vastly overrated 'anonymization' technique," Felten said and continued to explain why hashing often fails to provide effective anonymity. Even a decade later after this was written, we still continue to hear similar claims.

More recently the Office of Technology has written about "privacy enhancing technologies (PETs) such as end-to-end encryption, which are a broad set of tools and methods aimed at providing ways to build products and functionality while protecting the privacy of user data." ⁸⁶ A key point is that privacy practices exist on a spectrum of data access. Not all implementations of PETs reach the fully private end of the spectrum. And thus, companies making representations to consumers about their use of PETs must follow the law and ensure that any privacy claims or representations are accurate.

Beyond hashing and PETs – the term artificial intelligence may be used to exaggerate a product's capabilities or justify a higher price. ⁸⁷ What about claims of achieving full safety, security, or transparency? While tech evolves quickly, companies cannot make baseless marketing claims. It is imperative that we have people who can assess these claims and hold companies accountable.

 $^{{}^{82}\ \}underline{https://www.ftc.gov/business-guidance/blog/2022/12/245-million-ftc-settlement-alleges-fortnite-owner-epic-games-used-digital-dark-patterns-charge}$

⁸³ https://www.ftc.gov/news-events/news/press-releases/2022/12/fortnite-video-game-maker-epic-games-pay-more-half-billion-dollars-over-ftc-allegations

⁸⁴ https://www.ftc.gov/news-events/news/press-releases/2023/06/ftc-takes-action-against-amazon-enrolling-consumers-amazon-prime-without-consent-sabotaging-their;

 $[\]underline{https://www.ftc.gov/business-guidance/blog/2023/06/ftc-alleges-amazon-enrolled-people-prime-without-consent-thwarted-members-attempts-cancel;}$

⁸⁵ https://www.ftc.gov/policy/advocacy-research/tech-at-ftc/2012/04/does-hashing-make-data-anonymous

⁸⁶ https://www.ftc.gov/policy/advocacy-research/tech-at-ftc/2024/02/keeping-your-privacy-enhancing-technology-pet-promises

⁸⁷ https://www.ftc.gov/business-guidance/blog/2023/02/keep-your-ai-claims-check

4.2. Integrating consumer protection and competition

It is possible that there may be ways in which privacy and security can impact competition and vice versa. We outline three examples of this overlap, and how these efforts aim to acknowledge upstream business incentives.

4.2.1. Open models x Competition

One core piece of the agency's mission is to ensure open and fair competition, including at key inflection points as technologies develop. The high cost of entry for AI model developers may lead to a market where "the highest quality pre-trained models are controlled by a small number of incumbents." 88

Open weights models (OWMs) have a strong potential to be a positive force for innovation and competition. Practitioners and companies can adopt and incorporate open-weight foundation models into their software projects, giving them the freedom to use and modify them to cater to their needs. At the same time, the capabilities and conditions attached to using open-weight models can vary significantly, which may change how the models effect competition. For example, restrictions on who can use models, and how the models can be used – including commercial use by large companies – may lower the competitive value of open models.

In parallel, there are current day risks and harms that consumers face with open models – where malicious actors can more easily conduct spam, scam, and disinformation campaigns, and spread horrifying nonconsensual intimate imagery (NCII). The White House's Office of Science & Technology Policy recently announced a call to action to combat image-based sexual abuse. ⁸⁹ Agency staff is paying close attention to how AI-enabled technology is impacting consumers and competition.

4.2.2. Interoperability, privacy, and security

A similar area of overlap is on interoperability weighed against privacy and security.

In the face of concerns about anticompetitive conduct, companies may claim privacy and security reasons as justifications for refusing to have their products and services interoperate with other companies' products and services. 90

Interoperability brings us benefits like being able to use a keyboard or monitor that plugs into most computers, regardless of the manufacturer.

At the same time, the agency has brought hundreds of enforcement actions against companies for privacy and security violations that involve sharing data with third parties and failure to implement reasonable security measures.

While certain safeguards for privacy and security can impede interoperability, interoperability can coexist with privacy and security—and even enhance them—in various contexts.

⁸⁸ https://www.ftc.gov/policy/advocacy-research/tech-at-ftc/2023/06/generative-ai-raises-competition-concerns

⁸⁹ https://www.whitehouse.gov/ostp/news-updates/2024/05/23/a-call-to-action-to-combat-image-based-sexual-abuse/

⁹⁰ https://www.ftc.gov/policy/advocacy-research/tech-at-ftc/2023/12/interoperability-privacy-security

And for security more generally, we are emphasizing that systemic approaches to security "can either entirely prevent many classes of vulnerabilities or dramatically reduce the likelihood of them occurring." This approach can also be beneficial to competition by allowing upstream developers to shoulder more responsibility than downstream actors.

4.2.3. AI & the Creative Economy

Last November, our Office led a virtual roundtable.⁹² inviting creative professionals across music, filmmaking, software development, and other fields to discuss the ways that generative AI is reshaping their respective industries.⁹³

In a comment submitted 94 to the U.S. Copyright Office, the FTC identified:

"Conduct that may violate the copyright laws ... may also constitute an unfair method of competition or an unfair or deceptive practice, especially when the copyright violation deceives consumers, exploits a creator's reputation or diminishes the value of her existing or future works, reveals private information, or otherwise causes substantial injury to consumers." ⁹⁵

In addition, from a competition perspective – some large technology firms have extensive resources that enable them to protect the users of their generative AI tools or exclusive licenses to copyrighted proprietary data, potentially further entrenching the market power of these dominant firms.

4.3. The new old ways

Finally, another way to ensure we are anchoring on business model incentives is to look at how companies adapt to and leverage new technologies over time. The common thread is that while companies can leverage new tools, the same incentives and laws on the books continue to apply.

4.3.1. AI-enabled Voice Cloning

In November, the FTC announced an exploratory Voice Cloning Challenge.⁹⁶ to prevent the harms of AI-enabled voice cloning. ⁹⁷ Much of this work builds from years of work ⁹⁸ in addressing the robocall context a decade ago, ⁹⁹ which spurred innovators. ¹⁰⁰ to develop call blocking technology.

⁹¹ Security Principles: Addressing Vulnerabilities Systematically | Federal Trade Commission (ftc.gov)

⁹² https://www.ftc.gov/news-events/events/2023/10/creative-economy-generative-ai

⁹³ https://www.ftc.gov/news-events/news/press-releases/2023/12/ftc-staff-report-details-key-takeaways-ai-creative-fields-panel-discussion

⁹⁴ https://www.ftc.gov/news-events/news/press-

 $[\]underline{releases/2023/11/InCommentSubmitted to USCopyright OfficeFTCRaises A Irelated Competition and Consumer Protection Issues Stressing That It Will Use Its Authority to Protect Competition and Consumers in AIM arkets In the Irelated Competition and Consumers in AIM arkets In the Irelated Competition and Consumers in AIM arkets In the Irelated Competition and Consumers In the Irelated Competition In the Irelated Competi$

⁹⁵ https://www.ftc.gov/news-events/news/press-

 $[\]underline{releases/2023/11/InCommentSubmitted to USCopyright OfficeFTCR a is esAI related Competition and Consumer Protection IssuesStressingThatItWillUseItsAuthority to Protect Competition and Consumers in AIMarkets
\underline{releases/2023/11/InCommentSubmitted to USCopyright OfficeFTCR a is esAI related Competition and Consumer Protection IssuesStressingThatItWillUseItsAuthority to Protect Competition and Consumer Submitted to USCopyright OfficeFTCR a is esAI related Competition and Consumer Protection IssuesStressingThatItWillUseItsAuthority to Protect Competition and Consumer Submitted to USCopyright OfficeFTCR a is esAI related Competition and Consumer Protection IssuesStressingThatItWillUseItsAuthority to Protect Competition and Consumer Submitted to USCopyright OfficeFTCR a is established to the USCopyright OfficeFTCR$

⁹⁶ https://www.ftc.gov/news-events/contests/ftc-voice-cloning-challenge

⁹⁷ https://www.ftc.gov/news-events/news/press-releases/2023/11/ftc-announces-exploratory-challenge-prevent-harms-ai-enabled-voice-cloning

⁹⁸ https://www.ftc.gov/news-events/events/2020/01/you-dont-say-ftc-workshop-voice-cloning-technologies

⁹⁹ https://www.ftc.gov/policy/advocacy-research/tech-at-ftc/2023/11/preventing-harms-ai-enabled-voice-cloning

¹⁰⁰ https://www.ftc.gov/news-events/news/press-releases/2013/04/ftc-announces-robocall-challenge-winners

Since then, speech synthesis has significantly advanced. And with advancements of technology, everyday people can be targeted with fraudulent extortion scams and have their voices misappropriated in ways that could jeopardize their ability to earn income. The incentives for these bad actors are financial gain through anonymity - they will continue to commit frauds and scams, extort, and target vulnerable people to make money.

The FTC has shown that it is prepared to use all of its tools to hold bad actors accountable – including law enforcement actions under the FTC Act, the Telemarketing Sales Rule, ¹⁰² and the Impersonation Rule. ¹⁰³

4.3.2. Cars and consumer data

Today, some cars are digitally connected and can allow consumers to play their favorite music or be unlocked with an app. Connected cars can also collect a lot of data about people and can do so through tracking mechanisms used on various other devices...¹⁰⁴ The FTC has raised awareness on these issues through a 2017 workshop,...¹⁰⁵ flagging unexpected secondary uses of data, security risks, and overcollection of vast amounts of data including location, video, and other biometric information.

Similar to digital health platform apps and data brokers, the FTC has warned against the overcollection, use, and disclosure of sensitive data such as biometrics and location data. ¹⁰⁶

4.3.3. Back to basics with notice and choice

We know data is the new oil - companies want more data to fuel AI products, and also need to protect their users' privacy. Companies might use dense legalese to quickly change course and modify their terms of service or privacy policies... ¹⁰⁷

It may be unfair or deceptive for a company to adopt more permissive data practices — for example, to start sharing consumers' data with third parties or using that data for AI training — and to only inform consumers of this change through a surreptitious, retroactive amendment to its terms of service or privacy policy.

Part 5: The path ahead

The goal of this session was to share what we are doing and how we approach this work, and to spark potential areas of overlap to continue how the agency engages with people like you. We recently

¹⁰¹ https://en.wikipedia.org/wiki/Speech synthesis

¹⁰² https://www.ftc.gov/legal-library/browse/rules/telemarketing-sales-rule

 $[\]frac{103}{https://www.ftc.gov/news-events/news/press-releases/2024/04/ftc-announces-impersonation-rule-goes-effect-today}$

https://www.ftc.gov/policy/advocacy-research/tech-at-ftc/2024/05/cars-consumer-data-unlawful-collection-use https://www.ftc.gov/news-events/events/2017/06/connected-cars-privacy-security-issues-related-connected-automated-vehicles

¹⁰⁶ https://www.ftc.gov/policy/advocacy-research/tech-at-ftc/2024/05/cars-consumer-data-unlawful-collection-use

 $[\]frac{107}{https://www.ftc.gov/policy/advocacy-research/tech-at-ftc/2024/02/ai-other-companies-quietly-changing-your-terms-service-could-be-unfair-or-deceptive}$

published a list of questions. 108 for the research community on topics that range from AI-enabled fraud and scams, algorithmic pricing, and open weights models that we would encourage you to use in your work.

To recap today's session:

I outlined the limitations of transparency with a focus on the failures of the notice and choice regime. I underscored our north star – to anchor our work by scrutinizing how business models drive incentives through our approach and a sampling of our work. I presented a framework that highlights how our team approaches its work:

- Peeling back the layers of technology
- Examining hidden middleman layers
- Designing remedies that go more upstream at harm

And finally, I sampled a set of harms and challenges our team is working through which includes topics that involve:

- Smoke, mirrors, and veneers
- Balancing consumer protection and competition
- The new old ways

The establishment of the Office of Technology is now a notch on the FTC's 114+ year historical timeline. Our mission and our remit is expansive, but we have shown our capabilities from a small, but mighty team. If we meet our mandate, regardless of who is in the building, academics and practitioners around the world will continue to engage and push the boundaries of knowledge, of remedies, and ways to better hold unchecked companies accountable.

Finally, I will leave you with these words: Sunshine and transparency is a powerful disinfectant but why let corrosion take hold in the first place?

Thank you.

I am grateful to Amritha Jayanti, Alex Gaynor, Noam Kantor, Wells Harrell, Sam Levine, Bikram Bandy, and Team OT. Thank you for your thoughtful contributions and feedback on these remarks. Working with this team and at this agency has been one of the most rewarding experiences of my career.

 $[\]frac{108}{\rm https://www.ftc.gov/policy/advocacy-research/tech-at-ftc/2024/05/p-np-not-exactly-here-are-some-research-duestions-office-technology}$