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Client Alert
Commentary

FTC Refines Road Map for AI Enforcement

The agency's latest report and recent statements indicate its potential enforcement and regulatory priorities regarding artificial intelligence.

On December 18, 2023, the Federal Trade Commission (FTC) released a report detailing its key takeaways regarding the use of artificial intelligence (AI) following an October 4, 2023, roundtable with professionals in music, filmmaking, software development, and other creative fields. The report is the latest development from the FTC, one of many regulators that is closely looking at AI. The agency, which is charged with protecting consumers and enforcing antitrust laws, spent the second half of 2023 shaping the outlines of its regulatory and enforcement agenda for AI through public statements and fact-finding sessions.

The report and roundtable follow a June 29, 2023, blog post discussing how the FTC believes generative AI raises competition concerns, and an October 3, 2023, blog post describing concerns the FTC says it is hearing from consumers regarding AI. It also follows President Biden's Executive Order on the Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence, which directed the FTC to explore its authority to protect the public from AI harms.

Taken together, these reports and statements provide insight into the current FTC commissioners' potential enforcement and regulatory priorities. For competition enforcement, gatekeeping and algorithmic collusion theories of harm as well as labor market issues may feature prominently. For consumer protection, the FTC highlighted potential unfair or deceptive practices at the training, processing, and output stages of the AI lifecycle. Notably, while the FTC has no jurisdiction over copyright matters, that has not prevented it from remarking on creator-rights issues customarily governed by and addressed through the Copyright Act.

This Client Alert summarizes some implications for competition, consumer protection, and copyright law.

Key Priorities for Competition Enforcement

Gatekeeping: The FTC has stated it is concerned that a select number of firms may control the vast amounts of data necessary to train generative AI models and be able to unlawfully leverage a dominant position. The FTC's June 29 blog post notes:

> If a single company or a handful of firms control one or several of [AI's] essential inputs, they may be able to leverage their control to dampen or distort competition in generative AI markets. And if

generative AI itself becomes an increasingly critical tool, then those who control its essential inputs could wield outsized influence over a significant swath of economic activity.

In recent years, the FTC has propounded theories of harm based on the idea that firms with control over key inputs in digital ecosystems might use their position to disadvantage rivals. While these "gatekeeper" theories of harm are largely untested in the US court system, the theories can be expected to play an important role in the FTC's merger reviews and conduct investigations of firms developing AI.

Algorithm collusion: In addition to a focus on generative AI, the FTC also continues to raise concerns about "algorithmic collusion." Algorithmic collusion refers to the idea that competitors may, for example, employ AI-powered pricing algorithms that effectively sustain or reach coordinated equilibriums akin to anticompetitive agreements on price. This has also been an active area for private plaintiffs who have been alleging algorithmically facilitated price coordination in violation of Section 1 of the Sherman Act for years. The December 18, 2023, report reflects a sustained interest in identifying potential enforcement opportunities in this space. As the report states, "AI tools can be used to facilitate collusive behavior that unfairly inflates prices, precisely target price discrimination, or otherwise manipulate outputs."

Labor: A key focus of the current FTC administration has been on labor. From a planned [ban on non-competes](#) to an intensified focus on labor effects in merger reviews, the agency's attention to issues potentially affecting workers is at play in most aspects of the FTC's competition policy. This focus continues with AI. To date, the FTC has expressed two primary concerns.

First, the agency says it is concerned that companies working on generative AI will use restive conduct (e.g., non-competes) to deny rivals in the AI space access to innovative human capital. As a result, the agency theorizes, competing firms will lack the necessary means to compete. The FTC's June 29, 2023, blog post explains, "Since requisite engineering talent is scarce, powerful companies may be incentivized to lock-in workers and thereby stifle competition from actual or would-be rivals. To ensure a competitive and innovative marketplace, it is critical that talented individuals with innovative ideas be permitted to move freely, and, crucially, not be hindered by non-competes."

Second, the December 18, 2023, report describes several ways it sees that "generative AI could be an avenue for their exploitation." The concerns expressed include AI outputs may compete with and impact the livelihoods of human creative professionals.

Consumer Protection

The FTC used the December 18 report to highlight enforcement priorities throughout the AI product lifecycle including collection, processing, and use. The FTC emphasized that conduct may violate the FTC Act even if permitted under other bodies of law (e.g., copyright).

Collection: The FTC expressed concern that the collection of data for training may result in unfair or deceptive practices and highlighted similar concerns from roundtable members. In particular, the FTC aired complaints about scraping works from the internet to train AI without the awareness or consent of creators — and, as discussed below, indicated current notice and consent flows are inadequate.

Processing: The FTC stressed that collecting data for one purpose and then processing it for AI models may be an unfair or deceptive practice. The FTC highlighted two complaints in 2023 that alleged consumer deception about the use of children's data and video data for model training. The FTC conditioned settlement on restrictive remedies, in one case requiring the deletion of the collected data and any algorithms derived from it, and in the other case prohibiting data use in future algorithms.

The FTC also challenged existing notice and consent approaches to AI processing.

- **TOS disclosures:** The FTC noted that the decision by several tech companies to update their terms of service to reference building AI with user data elicited backlash from creators, suggesting that the FTC does not view such general disclosures as sufficient before processing data for AI.

- **Opt-out consent:** The FTC highlighted several creator complaints about "opt-outs" for use of data in future training models: they are burdensome to creators because new AI models are emerging every day; creators cannot easily know if their data is used by a model; and opt-outs do nothing about models already trained on the creator's data.

Use: The FTC highlighted three key ways that the use of AI can lead to consumer harms.

- **Misleading use of AI:** The FTC highlighted a recent complaint and recent injunction against companies that allegedly misrepresented that they use AI for stock trading tips and to enhance the profitability of an e-commerce venture, respectively. The report echoes a recent FTC blog post emphasizing that companies should not misrepresent how they use AI.

- **Perpetrating fraud:** The FTC warned that selling output from an AI tool that mimics a creator's style, performance, or likeness may be unfair or deceptive, particularly when used to deceive consumers about the authenticity of the work. The FTC's warning reinforces concerns it has expressed in blog posts recently and as far back as 2020 regarding deepfakes.

- **Biased outcomes:** The FTC also stated that a business relying on algorithmic decision-making must ensure the use of the tool does not result in bias. This echoes the FTC's April 2023 joint statement on AI with the Department of Justice, the Consumer Financial Protection Bureau, and the Equal Employment Opportunity Commission, and an enforcement action in December 2023 prohibiting a company from using facial recognition for surveillance. In that case the FTC alleged the AI-powered surveillance misidentified shoplifters and the company failed to consider racial, gender, and demographic biases when developing and deploying the AI-based system.

Copyright

Although the FTC does not have jurisdiction over copyright disputes, it has been active in expressing its views on the relationship between AI and creator rights. For example, in its October 3, 2023, blog post, the Commission reported its awareness of consumer concerns about "copyright & IP," including purported concerns regarding how creative content might be used in training generative AI models, and how much the output of such models might supplant human-made works. The December 18, 2023, report similarly gives voice to particular creators' concerns regarding the use of copyrighted content in training AI models, though the Commission expressly acknowledged that "many of the concerns raised at the [October 4] roundtable lay beyond the scope of the Commission's jurisdiction."

However, the FTC also recently submitted a comment to the Copyright Office in which it stated that "under certain circumstances, the use of pirated or misuse of copyrighted materials could be an unfair practice or unfair method of competition under Section 5 of the FTC Act." The Commission further opined in the same comment that "conduct that may be consistent with the copyright laws nevertheless may violate Section 5."

Latham & Watkins will continue to report on the FTC's focus on AI issues and other developments in this area.

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