Podcast Transcript

2023 DSIR Deeper Dive: FTC Update

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Kattman: Managing digital assets requires the efforts of the whole enterprise. The 2023 issue of the Data Security Incident Response report, or the DSIR, includes more content than ever regarding the data ecosystem and how companies can best manage their digital assets as they move through the life cycle of data. The DSIR, of course, dives deep into the annual incident response trends and analytics our clients and friends depend on. It also covers topics such as global privacy, ad tech, the increase in litigation, healthcare privacy and compliance, and the latest in emerging technology. I'm Amy Kattman, and you're listening to BakerHosts.

We're back with the Deeper Dive series, covering key topics in this year's DSIR. On today's episode, we discuss hot topics at the FTC, now two years into the Khan administration. Our guest today is Daniel Kaufman, a partner in our Advertising, Marketing, and Digital Media team and former acting director of the FTC's Bureau of Consumer Protection. Welcome to the show, Daniel.

Kaufman: Thank you so much, Amy. I'm really glad to be here today.

Kattman: Daniel, it's been nearly two years since Lina Khan was designated the new Federal Trade Commission chair, and it's been an eventful two years. So, where do things stand at the FTC on privacy?

Kaufman: So, the first year was really interesting at the FTC. There was a heavy focus on the competition mission, and there was a little bit less of a focus on privacy issues. There were some occasional big announcements in year one, that commercial surveillance privacy rulemaking was a particularly significant thing in the first year. But year two, we're definitely seeing the paces picking up. We're seeing a lot more cases, a lot more statements, and just generally a lot more focus on privacy issues. There is a lot more statements coming out about what privacy policies will be. There is the COPPA policy statement. There is the biometric policy statement. And we're also starting to see a lot more cases.

There was an interesting series of cases involving health privacy issues, where the FTC made it very clear they are deeply concerned about health privacy, particularly health privacy as it relates to advertising issues. We are starting to see more COPPA cases. We're also seeing a lot of statements about AI, how it is being used and also a lot of focus on kids and teens. Outside of COPPA, there is really a big focus on teens, the impact of being online, the impact of social media. Commissioner Bedoya at the FTC is particularly focused on this issue. And we're also more broadly starting to see where the FTC is going to take its unfairness authority to go after some of the really thorny privacy issues that the country and the world is addressing in 2023. So, I know we'll dig in a little more to some of these topics, but we're definitely seeing a lot more activity on privacy issues from the FTC in the last few months.

Kattman: Speaking of privacy, let's talk about the *Kochava* case. Can you give us a rundown of the complaint and some key takeaways that can be gleaned from it?

Kaufman: So, *Kochava* is a really interesting case. As someone who sort of lives FTC issues, it is a case I'm watching closely, and there are a lot of things going on in that case. But maybe I'll start at the outset, sort of explaining what the case is about. It is, at its core, about a data broker that the FTC alleges sold or shared with third parties precise geolocation data that, if you associate it with unique persistent identifiers, could then reveal consumers' visits to sensitive locations. It could be reproductive health facilities or houses of workshop. And the FTC is alleging that by selling or sharing this data, that is an unfair practice that violates the FTC Act. And that is the core issue here. Does unfairness allow the FTC to get at these practices? And unfairness is a decades-old tool that the FTC is using to address really modern issues. And it remains to be seen whether and how the agency can actually effectively use unfairness in this space.

So, there's been a lot of activity in the case recently. Most notably, several weeks ago the court dismissed the FTC's case in saying that the FTC had inadequately demonstrated that the practices at issue were likely to cause or cause substantial injury to consumers. The court did give the FTC the opportunity to amend their complaint, and they have just done that. So, we'll have another decision coming down from the court at some point, seeing whether the FTC has adequately pled injury to justify the case going forward. But it is a really important case because these are issues that the FTC wants to tackle, but they are using a lot of legal authority that is, you know, 40, 50 years old.

So, in some respects, you look at a case like *Kochava* and the challenges the agency is facing, and it does highlight the absence of federal privacy legislation. And certainly, a case like this would be much easier to bring if there was a comprehensive federal privacy legislation. But the FTC is doing what it can with the tools it has. But it is a really interesting case.

And the other really important thing to note there, although the court did dismiss the case and the FTC's refiled, the court did note that privacy intrusions can constitute significant harm under the FTC's unfairness authority. And that is a real significant accomplishment for the agency in this case. Again, not many privacy cases that the FTC has brought have litigated, so any sort of incremental step or statement like that is a notable add-on to the agency's authority.

Kattman: Daniel, what are some emerging concerns in respect to the Children's Online Privacy Protection Act, or COPPA, as you've talked about?

Kaufman: I think there are a few. COPPA was passed by Congress more than 20 years ago. So, there are real concerns that COPPA has not quite kept up with the times. And although the FTC has rulemaking authority under COPPA and there has been a rulemaking pending for several years now, there are limits to what the FTC can do in terms of such a rulemaking. So, COPPA itself is a bit of a dated statute and it has a limited applicability.

So, there is certainly discussion about should Congress amend COPPA? What are the changes? It applies to kids under 13. Well, how about the kids in the 13 to 16 or 17 category? How should they be treated online? I don't think folks necessarily think that COPPA should just be amended to cover a 17-year-old, that seems pretty unrealistic. But there is a lot of legislative discussion about how do you deal with the issues that we're seeing with teenagers and being safe online?

So, that is sort of one issue is, certainly, is COPPA doing what it needs to do? What is going on with the FTC's rulemaking? Are there changes Congress could do? But that said, the FTC is continuing to bring cases under COPPA, and why COPPA is important for the FTC is it is one of those areas where the FTC has the ability to get civil penalties. And given that there are some real limitations on the ability of the FTC to get money, COPPA is a really good privacy vehicle for the agency to use to get penalties from companies, and they are doing that.

There have been a number of significant COPPA cases brought recently, but COPPA is a very important tool at the FTC. But it does remain to be seen whether it is really enough for what we need in 2023. And kid-privacy issue and teen-privacy issues are also at play in the FTC commercial surveillance/privacy rulemaking that they kicked off last year. So, this is an area where we're going to continue to see FTC activity both on the enforcement front and also on the policy front.

Kattman: Switching gears, I'd like to talk about perhaps the hottest topic in the world right now, AI and how the FTC is involved in getting in on the fun. What can you tell us about the FTC's stance on AI so far?

Kaufman: You know, it is interesting. As someone who spent many, many years at the FTC, it is challenging when there are dramatic changes in the marketplace, and the agency has to make it clear that, look, they are watching the marketplace or looking at what is happening. And when the time is right, there will be law enforcement, and the FTC has been signaling that. Look, they haven't brought an AI case yet, or a sort of significant AI case in this space, but they certainly have signaled that they are looking closely at all of the explosive AI activity that we're seeing.

So, they issued a series of blogs. There are three different blogs they issued. And actually FTC blogs are pretty important for getting messages out to the public, and these blogs actually were quite well received. Well, not necessarily well received, but they were received loudly. And they made a number of different points in their blogs, and sort of, maybe, three primary points they made. Step one is really laying out there and explaining that look, whether it is AI or something else, the same rules of the road apply. You can't make deceptive claims about your product, and MTC sort of made that very clear. It is sort of FTC 101. General principles of consumer protection apply to AI as well as all sorts of other products. And the FTC also said look, when we come asking for questions about your AI, the response can't be it is just a black box, we don't know. They really expect people to understand what their technology is doing and how it is doing it.

So, the step two, the FTC started to go broader and make sure that companies are thinking about some of the broader ramifications of the AI products that are out there. Particularly, are some of the AI products being used for bad purposes? And there can be theories of liability under the FTC Act, if you find out and know that parties are using your technology for bad purposes, and you aren't doing anything about it. So, some of the examples they say too, you can have chat bots generating spear-phishing emails, fake websites, fake posts, fake profiles. I mean, there is a lot of malfeasance that one can do using all of the different AI tools that are out there. And the FTC is saying, look closely at what people are doing with your tools and if you're seeing bad conduct, see what action you can take. Otherwise, the FTC may come knocking.

And the third step, the FTC of course starts going a little bit even more broadly than that, really looking at how AI tools can start to influence people's beliefs, their emotions, their behavior. One of the examples they talk about is, you've got a chat bot that is confidently reporting responses to questions that you're asking, and consumers may be misinterpreting the responses from chat bots as being sort of neutral or impartial, and they may or may not be neutral or impartial. So, the FTC is really looking at, on this perspective, the interaction between humans and chat bots and AI tools, and what is the message, whether explicit or implicit, that is being conveyed. And are there potential AI tools that are steering

consumers into making harmful decisions in areas such as finances, health, education, housing?

So, it really just broadly, and the FTC indicates it is broadly looking at AI tools for sort of, from the basic FTC 101 to these much more broad concepts of how are people interacting with AI tools? What are the messages they're receiving, both implicitly and explicitly? And I can guarantee a year from now, if we're doing a podcast again, there certainly will be FTC enforcement in this area, and I'm sure there are a number of investigations actively underway in this space.

Kattman: Sounds like we have our next podcast. Daniel, as a final question, what do you see as the FTC's objectives for the rest of 2023 and moving into 2024?

Kaufman: So, I would say that there is sort of two big objectives. The first is certainly the commercial surveillance privacy rulemaking that they kicked off last year. I mean, that is a very big deal. People are looking closely at what the FTC is doing in this space, and I expect we'll see some progress on the rulemaking this year, whether it is further workshops, discussing some of the key issues, or perhaps a notice of proposed rulemaking where the FTC could issue some sort of proposed rule relating to the privacy rulemaking. Now, the rulemaking itself is so broad I can't imagine it would be sort of a broad, all-encompassing rulemaking, but they may choose specific topics to start to move forward with on some sort of notice of proposed rulemaking. So, I think the rulemaking is really a big deal, and the FTC will start making some progress on there. And to be clear, they're making progress in the building, I have no doubt. But externally I think we'll start seeing something about the rulemaking coming up.

The other thing, and I mentioned it a little bit talking about *Kochava*, is how the agency uses its unfairness authority. And unlike other areas like deceptive advertising, the FTC's authority is pretty clear and easy. But when you're using unfairness to challenge privacy practices, it is very challenging, and part of what the commissioners want to do is to expand the universe of cases where they can use their unfairness authority. So, whether it is a case like *Kochava* or whether it is sort of novel cases involving the use of biometric data, I think we're going to see more and more cases and activity of the FTC using this unfairness authority to bring some interesting and novel privacy cases. I'm sure there will be a lot of discussion as to whether it is an appropriate use of their unfairness authority, but that is something that I think we'll see a lot more of in both 2023 and 2024.

Kattman: Thanks so much for sharing this valuable information, Daniel.

Kaufman: Thank you, Amy. I always appreciate the chance to just talk about the FTC for a while.

Kattman: If you have any questions for Daniel, his contact information is in the show notes. As always, thanks for listening to BakerHosts.

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