



Podcast Transcript

AD Nauseam: AI – We Had to Discuss it Eventually

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Brave: Thank you for joining us for another episode of BakerHosts AD Nauseam, a podcast series focusing on new and trending advertising issues with an emphasis on the FTC and NAD. I'm Leah Brave, and you're listening to BakerHosts.

We are once again joined by Amy Mudge and Daniel Kaufman, two partners in BakerHostetler's Advertising, Marketing, and Digital Media team. Together, they have decades of advertising experience and approach advertising issues from multiple perspectives. And today, Amy and Daniel are joined by Nichole Sterling, a partner in BakerHostetler's New York office who specializes in compliance, data governance and AI. And on today's episode of AD Nauseam, which is the first of a two-part series, Amy, Daniel, and Nichole talk about AI and why it is such a broad, pressing concern. With that, welcome to AD Nauseam, and let's turn it over to Amy, Daniel, and Nichole.

Kaufman: And welcome back to AD Nauseam, everyone. And the only thing we love here more than 80s music and movies is special guests. And today we are delighted...

Mudge: Whoo!

Kaufman: ...to have with us Nichole Sterling, who is a partner from our New York office. And she has a practice that spans privacy, data protection, information governance, and emerging technologies. And she has been one our go-to persons to help with vexing issues involving the use of AI.

Sterling: Hi, super excited to be here today. And I'm going to quote my AI assistant on this one, since I asked, I feel like somebody who has miraculously stumbled upon what can only be described as the highlight of my career as a privacy lawyer by joining the two of you. Also, why did nobody tell me that talking about 80s movies was an option, because I could totally do that. Do we need another podcast?

Mudge: You are invited back all the time for that, although, I don't know, I think you're a little young to truly have lived it. But we'll put you to the test at some later date. The other thing we love more than the 80s and the special guests, and they're probably equal loves, are two-parters. Especially if there was a who-shot-JR type cliffhanger.

And today, Nichole is going to help us wrap our arms around everything we're hearing about AI and why it is so important. We're going to talk about common uses we're seeing for AI, many of which are of deep concern to advertisers. And then, in part two, we're going to have another special guest to help us dig deeper into this issue and really help hone in on why the use of AI does, should matter a great deal to advertisers and their ad agencies. And then delve into some contracting best practices to help navigate around or with these AI concerns.

Kaufman: So, since we are talking AI, I wanted to kick us off by thinking about movies and TV shows that represent advanced technologies. Over the years, we have seen so many really cool, fascinating depictions of how technology can impact us all. For the good, for the bad, for the ambivalent. So, the question for today, favorite or best movie or show that portrays future states of technology? And I'm going to start with Nichole.

Sterling: Alright, so this one was difficult for me because I have to admit that I'm a big fan of Wile E. Coyote and the Acme products. But I did not go there because they're

not exactly future technology. So instead, I'm going to go with the Jetsons today, and I'm going to talk about all of the video calls, smart watches, flat screen TVs, 3D printers. They could print 3D food in the Jetsons, I mean, come on. Personal assistants, voice assistants, the only thing I really want yet is Rosie, though. I really need a Rosie robot in my house.

Mudge: Amen, amen.

Kaufman: Any day now.

Mudge: Yeah, we all need a Rosie. That was awesome. Okay, this was just another opportunity for Daniel to geek out and I think he saw he found a kindred sister in you to talk about this sci-fi nonsense. When we had Randy Shaheen on, I could not get these two geeks to shut up. I think he thought you were going to go high, and you went beautifully low. I love the Jetsons. I have nothing, I don't really like sci-fi stuff. I love Terminator, just because that is a love story. I was thinking actually, this is the opposite, I was going to go Back to the Future. I guess they went backwards instead of forwards. But I'm throwing it out there.

Kaufman: So, I got to go with Minority Report. I always thought it was an amazing movie. And the way it showed how technology was being used, even for advertising purposes. There were some great scenes in there that are really future state predictions, the law. But all premised on technology and the use of algorithms at the end of the day. It's a really good movie.

Mudge: But actually, probably that movie is the most apt for today's discussion. I still remember the one where they're walking around somewhere, an airport or whatever, and being given ads personalized to each person walking by and I remember thinking, that is so cool and that is so freakish, but we're kind of here.

Alright so, we're really going to kick this off. We're really glad to have you here, Nichole. I have to say we go to a lot of conferences and for this past year every conference has dozens of panels with at least AI in the title. It is brought up in every panel discussion. It is part of the focus. So, Nichole, why are seeing this tremendous focus on AI by lawyers in particular?

Sterling: I mean, I think we could say that it is the new shiny toy, and everybody is very excited. But I actually do think that AI has more to do with the law than perhaps a lot of the changes that we've seen recently. I think that AI is really interesting in that it intersects with almost everything. For instance, everything our law firm does. If you look at everything that BakerHostetler does, there is a way in which AI will intersect with it. Either to make it better, or because people are going to have questions about it.

So, for instance, if we take something like IP, that is a pretty obvious one. A lot of the lawsuits that we're seeing related to AI are about core IP issues, copyright, trademark. But our IP team is also helping a lot of people across the board with protecting IP, protecting their data proprietary information, things like that in the Business Group.

We see it with M&A due diligence. What are you doing with data? How is data being used? Is AI being used on data? And how that all can play into the valuation of companies, type of due diligence that you need to do.

Labor and Employment, a lot of people interested in AI for figuring out, what are my employees doing with their time? How do they feel about work? Are they going to be good employees? We can see it in the hiring practices. So, it intersects with things we're advising on there.

Clearly with litigation, we've seen it for a long time in things like e-discovery, document review, legal research, that type of thing. We are seeing it of course, we've all heard about cases out there where there is like, fake cases that are embedded in court documents and people are getting in trouble, all of that kind of stuff. So, we have seen courts issuing lots of local orders about what you have to disclose if you're using AI to do research.

And finally, within our own practice group, since we are all within the Digital Assets and Data Management Practice Group, we see things increasingly coming up. We see them on the privacy side with what can you do and can't you do with personal data. A lot of the laws are evolving quickly. I think we see it, for instance, in the privacy practice because a lot of the laws that we do have are privacy focused. Privacy laws exist. They have pieces in them that are about, what can I do with AI? How can I use it to do automated decision making? They aren't AI laws, but they are aimed in ways that they can bring AI within it, so we do see it there. But I think we'll continue to see it building out there.

We see it with advertising. A lot of companies are reaching out and saying, hey, my advertising team has read about all these really cool new AI tools, and they want to use them. What can they do? It is a very common question that we're getting. And I think the advertising teams, maybe they're just very cutting edge in what they're doing, but this is an area that they really are interested in leveraging some of these tools.

Mudge: They want to do it better, faster, smarter, and cheaper. But that, you've teed up part two where we will get in the deep dive there.

Kaufman: So, Nichole, because I obsessively always turn things back to the FTC, I want to turn back eight years. So, 2016, the FTC puts out a significant report on big data. That was the big term that everyone was using eight, nine years ago. It focused on the potential for big data analytics to produce huge benefits, but also potentially outcomes, it could be discriminatory or exclusionary. And we're seeing a lot of those same themes today as we talk about AI. But from your perspective, how different is the AI that we are talking about today from what we were talking about with big data, eight or nine years ago?

Mudge: Good question. Good question.

Kaufman: Yeah, is it a natural evolution or have we truly, is this an explosion of something truly brand new?

Sterling: Can I say it is both? It is funny, because I was thinking about this last night, actually, because I was listening to another podcast which I shall not name because we don't need competitors. Thinking back to 80s, because I know you guys like the 80s, they were talking about Video Killed the Radio Star and all of this constant moving forward in technology. And the whole idea that we then got to in the 90s, that there was information overload, and the internet was going to overload us with us so much information we'd never be able to function again. And yet, how much more information do we have now? And I think in some ways, that sort of characterizes the shift.

So, at the point that that FTC report that you mentioned was published in 2016, what we saw then we were at this point with AI where we had a rise in what we referred to as natural language processing which is the ability of AI to understand natural language. You didn't need to know certain prompts, necessarily, to make AI work. As well as deep learning, which is basically a type of AI that is meant to mimic how the human brain functions. So, it was this moment when we were getting this breakthrough in human-like AI, I guess, if we want to think of it that way. Both of them require very large data sets and this is something where we get to that big data point and that has continued to expand, I think, over the course of the last decade. All of that movement we saw, though, around 2016 is really necessary for what we have now with generative AI.

The really important thing to know is that most of us have been using AI for a really long time. For instance, in your field, making customer recommendations or personalized marketing, profile building, and when we're profiling people and building those profiles; those have all relied on types of AI for a really long time. I think that we were already seeing those when that FTC report came out. But a lot of it was happening in the background. It wasn't as in our face. Right now, people got very excited around this generative AI stuff. It is a publicly available tool. Everybody can use it. And it's really become part of our consciousness in a way, I think, over the course of the last year that maybe it hadn't been. And I think that the AI that we have now is growing faster in the sense that it is faster. The tool works faster. It is almost simultaneous in a way. It is smarter. It is better at complex tasks, problem solving, learning. It feels realer, I guess, in a way. I've heard people explain it that way. So, I think that is one of the key differences over the last decade.

Mudge: Can you walk us through some of the overall regulatory landscapes as it comes to AI? I mean at a very high level. We're reading articles every day about new EU regulations and a lot of state proposals to regulate the use of AI on this issue. I know it's been bouncing around federally and there's been a call to regulate AI, but I don't think any one of us thinks anything is going to happen. On the federal level these days, where should we be looking to see what the future is going to look like as far as how and if AI is regulated?

Sterling: So, I think AI regulation has a few issues right now. One is that there is lots of ideas. Tons of ideas. Everybody's got ideas. There is lots of proposed regulation. We have seen a lot of movement on just people talking about what they think should be regulated.

I think one of the more interesting things is that if you look at some of the studies that have come out, is that the average person's concerns about the use of AI and this generative AI stuff are somewhat different than what we see the regulators really focused on and I don't know how much that is going to end up dividing where things go. But if you look at it, for instance, more than half of Americans right now are reporting that they're more concerned about AI than excited about AI. But the things that they're concerned about are things like losing their job to AI. The quality of customer service is one thing that people talk about, like, I don't know how to get past the robot talking to me on the customer service line. That is a major concern. People are also concerned about things like driverless cars and autonomous weapons.

Regulators, on the other hand, and I know that Daniel always loves to talk about the FTC, and we'll get there in a second, I swear. The regulators are really concerned about things like bias and access to services and things that maybe aren't on the top of the list of things that consumers are really concerned about. Interesting side point here, and is this the point where I get to talk about Taylor Swift for a bit?

Mudge: Oh, please do. Please.

Kaufman: I'd be miffed if you didn't.

Mudge: Yes, bring on the Tay-Tay.

Sterling: So, I know that a lot of people have probably been following this whole what's been going on with Taylor Swift and the deep fake AIs on X and all of this stuff. Deep fakes, for anybody who doesn't really get into that, is basically just a photo or video or audio or something that has been manipulated, typically by AI, so that it appears real. So, you may think it is a real person. It is not a real person. Deep fakes, for the most part, all major social media platforms will say that deep fakes are not permitted. They're against whatever terms are in place for users. But are they actually illegal? Not really. I mean, under various theories of the law, you could probably get to a point where deep fakes were illegal. There is not really a lot of proactive legal stuff.

And I think one of, for me, the most interesting thing with the Taylor Swift issue has been this idea that it was really all of her fans that banded together to solve the problem. X could not solve the problem. They could not manage to take down these deep fakes fast enough and the law could not solve the problem. But a bunch of Swifties on X posting could manage to flip the algorithm in ways that actually helped to solve the problem. I don't know, is that emblematic of where we're going with regulations right now? Maybe.

Kaufman: Does that say something good about humanity in many respects? We defeat technology when we have to.

Mudge: The value of self-regulation. There is nothing more self-regulation than the Taylor Swift nation.

Kaufman: Good one, Amy. I think the beehive...

Mudge: Yeah.

Kaufman: ...might be able to outsmart as well.

Mudge: Alright. Knowing there probably is going to be regulation and certainly the FTC has been at least quite vocal about AI and that it's got plans and what it is going to do to address it. So, Daniel, fill us in there. What do you make of all that?

Kaufman: Look, I mean, the FTC is certainly making it very clear that, from their perspective, they are the leading federal regulator in this area. They are speaking a lot about AI. Last year there was blog after blog of the FTC talking about really, primarily the consumer side of AI and that's really been their primary focus. What are the consumer concerns about AI? And Nichole started getting to some of them, potential bias, inaccuracies, bad customer service. And they also started raising issues about how AI was being built. Copyright and IP issues, the use and collection and sharing of biometric and personal data. And then how is it being applied in the real world? The potential for turbocharged fraud has been the phrase that the FTC has used a lot.

So, a lot of thinking about the consumer impact. We know there are investigations that the FTC is doing into various uses of AI, a whole range of topics relating to that. And we're seeing, of course, on the competition side, the FTC is certainly using both sides of the House to look at AI issues and the impacts on the competition in the marketplace as well.

Mudge: They had that big AI pow wow. I think it, what, because I, workshop. Can we use the word workshop anymore? I don't know if that is back in...

Kaufman: We're back to using the word workshop.

Mudge: ...back in fashion?

Kaufman: We are.

Mudge: Okay. Alright.

Kaufman: Yeah.

Mudge: Okay. So, FTC AI workshop the other week. Nichole, tell us in a few short words everything we missed.

Sterling: I mean, they pretty much talked about what Daniel just mentioned. There were three panels, one on this whole competition issue. It was, of course, I'm sure, well timed that they came out with their investigation into a number of AI companies for competition issues just prior to the workshop that they had. So that is one space. They're very interested in chip developers, cloud service providers, and how that is going to impact innovation in the AI space and also consumers. The deceptive, ambiguous marketing piece that they're always liking

to talk about in the context of everything really crosses over into AI. There seems to be some focus there around consumer trust, transparency, and also the use of terms. What is privacy in the AI space and what is safety? Can you advertise yourself as a safe AI product? And then the third one really looked at the copyright law issues, but also privacy law and where AI should be regulated. Can copyright do enough? Is it privacy law that needs to step in to protect people? What is going to be effective in that space?

I will say the EU AI Act is close to finalized and we are expecting that, and I think that one will be a very interesting law in that it may then influence a lot of other laws similar to what we've seen with stuff like the general Data Protection regulation out of the EU which has been a driver for a lot of movement elsewhere. So, we could see quite a bit of regulation that follows on from that effect as well.

Mudge: Well, the FTC has brought at least a few lawsuits. The most recent one against Rite Aid seemed to touch upon a lot of these issues. While the technology that consumers didn't really necessarily know they were using, but it had an impact or allegedly cause some harm, particularly pronounced impact on people of color. So, what do you think are aspects of AI use that we will more likely see in FTC investigations?

Sterling: I'm like, let's see, I'm going to get out my crystal ball and guess what the FTC is going to be up to. I think in terms of risk, it is interesting with AI because you have these legal and regulatory risks. The things that the FTC is signaling its interest in. I do think it is very interested in things like the *Rite Aid* case dealt with biometric data, children's data. There are sensitive types of data and sensitive populations that the FTC is very interested in. They also seem to be very interested in just a general transparency, in the sense that you're telling people what is happening because they might not understand the technology. That, I think, can be a problem that the FTC is interested in. But alongside that, there is a lot of reputational risk.

I think with AI that even if we don't get to a point where we have a regulation or a law, even just having the FTC or some other regulator or bad press out there on whatever you're doing with AI that may seem less than transparent, maybe a little underhanded, maybe a misrepresentation in a way, all of that can be quite a big risk to certain companies as well. Even if it doesn't lead to a fine or some sort of an order.

Mudge: So, Nichole, I know one of the big issues, and we've touched on this, is the FTC concern about the use of AI to really hyper-target customers. Now obviously, advertisers are super jonesed about this, right? The smarter you can get about talking directly to the right people, you'd mentioned the word profiling, which sounds like creating individual user profiles. We all know that the act of profiling can be quite nefarious in some ways. Are you concerned about the ability of AI to really cause harm to some different subgroups, and is there any way that responsible marketers should be thinking about how to address these concerns?

Sterling: I mean, in an ideal world, I think a lot of people like ads that are relevant to them. I think what they don't like is not understanding how they're getting them. And I know this is something that gets talked about a lot. I hear it from my friends, I was talking to somebody about a product and then the next day it is all that I saw were ads for this product.

Mudge: The shoes that follow you around the Internet. Yep.

Sterling: Exactly. And I think it is that, I sometimes call it the creepy factor, I think it is that factor that people react to less than actually being shown an ad that is relevant to them. So, on the hyper-targeting thing though, because it is smaller groups, they become more identifiable as individuals. One of the things we look at with things like aggregate data and such is what is the size of the group you need to get to for people to be truly anonymous within a group? You're hyper-targeting, you're using a different blend of things in smaller groups. So people become more identifiable within that. It is easier to figure out who somebody is if they're clicking through on an ad when you know that it is only gone to a certain amount of people.

Depending on the data that is being used for that too, it is possible that you could get more inaccuracies, I think, in your segments and how you're driving that information, how you're targeting. And it is also possible, depending on who you're picking and how your segments are being organized, that you could be perceived as culturally insensitive in certain ways if you end up, as a brand, only targeting certain types or groups of people.

Kaufman: Nichole, we could totally spend a few more hours talking about this. I've got a list of other questions I would love to go with you.

Sterling: You'll have to invite me back.

Kaufman: I would, we would love to do that. That would be wonderful, and I will hold you to that. So, one thing I always want to do with our audience here is leave them with some practical tips and advice on the issues that we talked about. And actually, Amy is the one that forces me every time. She is like, Daniel, we need practical tips and advice. So, I was hoping you could provide those here and give us your top list of things that companies should be considering and avoiding as they increasingly use AI more broadly.

Sterling: The first one is just to know what you're doing with AI. What is your goal with the AI that you are using? A lot of the companies that we deal with, they are not out developing AI. They are using vendors providing the AI. What are you doing with it? Why, and how does it work? Can you explain how it works to somebody else? Because then you're on the way to transparency and really transparency is going to be key. You need to make sure that your employees know what is happening. Clients, customers, people that are interacting with the AI, they really need to understand that you are using AI, that they are interacting with an AI tool, if that is the case.

And then don't be scared to start small. We run into a lot of companies that just want to, one policy to rule them all, and we'll just cover everything with this one single policy. It is fine to cover what you know you're doing now, even if that is one tool that you're rolling out and to expect to revisit that practice regularly to update the policy as you implement new tools. It doesn't need to be the policy that will fix everything and that, I guess, is the main tips.

Kaufman: Nichole, thank you so much and we hope you will join us for a future episode. We're going to talk more about AI and what advertisers and ad agencies should be thinking about. So, thank you for joining us at AD Nauseum.

Brave: Thank you, Amy, Daniel, and Nichole. If you have any questions for Amy, Daniel, or Nichole, their contact information is in the show notes. For more information on the latest developments in ad law, visit our ADventures in Law Blog at www.adventures-in-law.com and check out all AD Nauseum episodes by subscribing to BakerHosts wherever you get your podcasts. As always, thanks for listening to BakerHosts.

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