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The Future of the FTC: Part II

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A previous blog post discussed FTC Chairwoman Slaughter's first priority as the newly designated chairwoman – the COVID-19 pandemic. The FTC's second priority, racial equity, can be broken down into two sub issues. First, the FTC plans to investigate biased and discriminatory algorithms that target vulnerable communities. As the FTC acknowledges, the analysis of data can help companies and consumers, "as it can guide the development of new products and services, predict the preferences of individuals, help tailor services and opportunities, and guide individualized marketing." Nonetheless, the FTC cautions companies to consider the below before making decisions based on the results of big data analysis.

1. Whether data is inaccurate due to missing population information or hidden biases. For instance, if a company's algorithm to hire employees only considers applicants from "top tier" colleges, it may incorporate biases from the college admissions process into its hiring.
2. Whether discovered patterns and correlations are meaningful. For instance, companies should be weary of assuming a causal relationship between two factors, such as a certain income level and a particular ethnicity, merely because those factors occur together frequently in the companies' data analyses.
3. Whether fairness and ethical considerations advise against using big data in certain circumstances. For instance, a company that determined that members of a particular racial group have historically been more likely to default on their loans may decide to exclude race from an algorithm because of racial discrimination concerns.

Second, the FTC plans to double its efforts to identify law violations in the development and deployment of facial recognition technologies and mobile applications' use of location data that can exacerbate existing racial disparities. Facial recognition technologies are known to not be as accurate in identifying non-white individuals. Moreover, Chairwoman Slaughter expressed particular concern regarding the use of mobile application's location data to identify characteristics of Black Lives Matter protesters last summer.

The FTC's recent proposed settlement with Everalbum, a photo storage and organization application, highlights the FTC's concerns about facial recognition technologies. Among other things, the FTC alleged that Everalbum used millions of images from unwitting users, along with other images it received from publicly available datasets, to develop and market to other businesses a facial recognition technology. The proposed settlement requires Everalbum to delete all data reflecting facial features that can be used for facial recognition purposes that the company derived from its users without consent, as well as any facial recognition models or algorithms developed with users' photos or videos.

This settlement serves as a reminder that consumers' consent is critical to the use and development of facial recognition technologies. Moreover, app developers should not rely on Apple's new privacy label requirements to defend against FTC enforcement actions. Apple now requires new apps and app updates to outline in a nutrition label-type format the types of data the app collects, and whether that data is linked to users or used to track users. App developers must also provide information about their app's privacy practices. While these requirements are meant to protect consumers by providing privacy-related information in an easily accessible, standardized format, labels may still be considered misleading or inaccurate under the Federal Trade Commission Act. Watch this space for further developments.

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