
Life Amidst the Lawyers: A Technologist's Year at the FTC

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Disclaimer

Everything I have to say is my opinion; I'm solely responsible for any errors, interpretations, jokes, and (possibly accidental) elements of truth. I am not expressing official FTC doctrine, and didn't even when I worked there.

Comparisons

Me

- Computer scientist
- 👉 Systems work better if interfaces and behavior are precisely defined
- Researcher; university
- Prefer to dress (very) casually
- Unix and/or MacOS; L^AT_EX

The FTC

- Lawyers and economists
- Primarily “common law” about antitrust and consumer protection
- Government
- Lawyers. . .
- Windows and Word (and WordPerfect!)

So why was I there?

The Federal Trade Commission



(Public domain photo)

The FTC



(Public domain photo)

- Created in 1914; building completed in 1938
- Its mission: dealing with “unfair” or “deceptive” trade practices
- A creation of the Progressive Era; the statues bracketing it are called “Man Controlling Trade”.

Why a Chief Technologist?

- Even many antitrust cases involve high-tech companies
- There are many online scams: “deceptive” trade practices with a high-tech twist
- Most important: many privacy breaches, whether intentional or due to a security breach, are considered unfair and/or deceptive
- 👉 The FTC is the closest thing the US has to a general privacy regulator—but it is *not* a European-style data protection authority; there is no statutory authority for such an agency here

The Commission

- An independent agency in the executive branch
- Five commissioners (no more than three from any one political party) appointed by the President and confirmed by the Senate
- Chair selected by the President
- I was appointed by Jon Leibowitz, the previous chairman, and finished my term under Edith Ramirez, the current chairwoman

Structure of the Agency

- The five commissioners
- ☞ Each has a small, personal staff, primarily “attorney-advisors”
- The chairwoman also runs the administrative aspects of the agency; the heads of the various offices (Congressional Relations, Public Affairs, General Counsel, etc.) report to her
- Most of the mission of the agency is carried out by the “staff”: they conduct investigations and negotiate settlements, under the authority of the Commission
- ☞ Three staff bureaus: Competition (BC), Economics (BE), Consumer Protection (BCP)

The FTC's Mission

- The FTC is primarily an enforcement body
- With a very few exceptions (in the tech space, COPPA, the Children's Online Privacy Protection Act), the FTC does not issue regulations
- As such, its work is primarily reactive
- It does not try to resolve individual consumer complaints, but uses them to find patterns of abuse by a company or industry
- Sometimes holds workshops or investigates industries
- 👉 New investigation on “patent assertion entities” (sometimes called “patent trolls”)

My Role

- I was part of the Office of the Chairwoman
- My primary role was to advise the Chair{man,woman} on any cases that involved technology
- ☞ This did include antitrust, (apparent) outright scams, and security and privacy cases
- As requested, I advised the other Commissioners
- I spent a lot of time working with the Division of Privacy and Identity Protection (DPIP), which is part of BCP, on security and privacy cases
- I often attended meetings with outsiders on any or all of these matters

What Specific Cases Did I Work On?

...and what specifically did I do or say?

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Sorry, I can't tell you... Everything is confidential except for officially released information.

Broadly Speaking...

- I helped analyze the causes and impact of certain security breaches
- I advised on market structure in the tech sector
- I did some data analysis (though I rarely worked on specific cases in any depth; that wasn't my role)

The FTC's Authority Over Privacy and Data Breaches

- There is no explicit statutory authority, but in 1995 Congress urged the FTC to get involved in privacy
- Easy situation: if a company doesn't follow its own posted privacy policy
- Some explicit authority for credit reporting, financial firms and COPPA
- Crucial assertion: if a company promises to keep data secure but has inadequate technical controls, the FTC has seen this as “deceptive and/or unfair”
- For more information, see “The FTC and the New Common Law of Privacy”, Daniel J. Solove and Woodrow Hartzog, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2312913

Does it Work?

- Most accused companies have signed consent orders
- 👉 The FTC can only fine companies if they violate a previous consent order, i.e., for a second offense
- One company is fighting back

The Wyndham Case

- The FTC alleges that due to inadequate data security, Wyndham was hacked three times in less than two years
- Hundreds of thousands of credit card numbers were allegedly stolen, leading to \$10.6 million in fraud losses
- The charge is that they “failed to use readily available security measures”, didn’t follow standard procedures, configured things poorly, didn’t close known holes, and more
- This is claimed to be “unfair” and “deceptive”
- Wyndham sued in Federal court, claiming that the FTC is overstepping its authority. Oral arguments are scheduled for November 7.
- Much of the FTC’s privacy authority may rest on the outcome of this case

Why a Chief Technologist?

- Often, policy decisions depend on understanding the underlying technology—and lawyers and economists are lawyers and economists; they're not computer scientists
- Example: When revised rules for COPPA were being drafted, the Chairman favored an approach that was inconsistent with how the web works
- I wrote a memo explaining the situation and the alternative
- The eventual rule got it right

My Impact

- Some things happened that I don't think would have happened without input from a high-level technical person
- I was able to provide guidance and some training to DPIIP, on things like cryptography, security practices, typical software development and operational environments, and more
- In a few cases, I could refer people from the technical community to the proper parties within the FTC

Limitations

- My job was primarily reactive; there were things I wanted to do that I couldn't accomplish
- In particular, my role was advisory; if I wanted to accomplish some things, I had to persuade someone else to act
- After being a professor, I was unused to having to watch what I say...

Personal Impact

- I had to maintain two residences; this is expensive
- No consulting, no summer money, etc.
- I couldn't neglect my PhD students; this chewed up my free time
- I learned a lot about antitrust law and regulatory law
- 👉 Towards the end of my tenure, I was asked about a particular proposal. A year ago, I'd have pointed out the technical flaws. I did that—but I also showed why it had antitrust implications
- I had to upgrade my wardrobe...

Am I Glad I Did It?

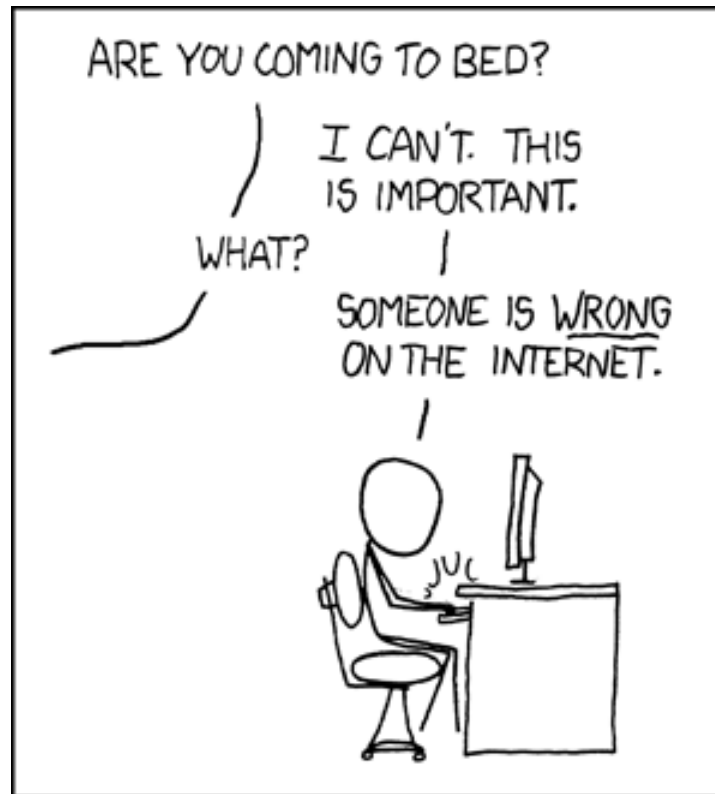
Am I Glad I Did It?

Yes, definitely, despite the limitations on what I could do. Even in hindsight, I made the right decision.

Should More Scientists and Engineers Go to Washington?

- **Absolutely**
- We're all part of this society (and planet)
- We understand things that they don't; if we're not on the inside, they'll have to learn the answers from the Internet. . .

Learning from the Internet



<http://xkcd.com/386/>

One Does Not Simply Walk into Washington

- Learn the agency
- Learn how to explain complex things to very, very smart people who happen to have studied something different
- Learn some of their language
- Don't assume that they have the same philosophical background
- Sample important question at the FTC: "What is the harm from this privacy breach?"

The old man leaned forward again. “Go, Tony! I throw the torch to you. Your place is the place I occupied. Lead my people. Fight! Live! Become glorious!”

Philip Wylie And Edwin Balmer, *After Worlds Collide* (1934)