



UNITED STATES OF AMERICA
Federal Trade Commission
WASHINGTON, D.C. 20580

Office of Commissioner
Andrew N. Ferguson

Concurring and Dissenting Statement of Commissioner Andrew N. Ferguson
In re Gravy Analytics, Inc. & In re Mobilewalla, Inc.
Matter Numbers 2123035 & 2023196

December 3, 2024

Today the Commission approves complaints⁴ against, and proposed consent orders with,^{4F}

Mobilewalla do not collect the data from consumers⁶. Those data are collected from applications⁵ that consumers use on their smartphones, and Gravy and Mobilewalla purchase or otherwise acquire those data after they are collected⁷. Gravy and Mobilewalla then sell those data to private firms for advertising, analytics, and other purposes⁸, as well as to the government⁸.

I

I concur entirely in two of the counts the Commission brings against both firms, and one

directly to him,

The violation of a private contract is not enough to establish a violation of Section 5.²¹ But these agreements protected more than just Mobilewalla's contractual counterparties. They also protected large numbers of consumers from the risk of having their private data aggregated, linked to their identity and sold without their consent, as Mobilewalla did. Mobilewalla's breach of its contractual obligations therefore exposed consumers to the same substantial risk of injury as collection of their data without consent, was not reasonably avoidable by consumers (as this conduct was far removed from their knowledge and control), and not outweighed by any countervailing benefits to consumers. It is therefore in the public interest to hold Mobilewalla liable for this conduct under Section 5, as it would be even if no contract governed Mobilewalla's obligations regarding the unconsented collection and retention of these precise location data.²²

II

I dissent from the Commission's counts against both firms accusing them unfairly categorizing consumers based on sensitive characteristics and of selling those categorizations to third parties.²³ The FTC Act prohibits the collection and subsequent sale of precise location data

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private and sensitive.²⁹ And if we did a full accounting of characteristics that someone, somewhere might consider sensitive, no useful categorizations would remain. What we are worried about is that the generation and sale of these categorizations will be a substitute for the sale of the user data from which they are derived. The correct approach is to treat conclusions derived from user data as no different than the underlying data. In either case, adequate consent is required for their collection, use, and sale.

Finally, I have doubts about the viability of a final charge levied against Mobilewalla indefinitely retaining consumer location information.³⁰ It is a truism that data stored indefinitely is at a greater risk of compromise than data stored for a short period. But nothing in Section 5 forms the basis of standards for data retention. The difficulty is illustrated perfectly by the proposed order we approve today. Rather than impose any particular retention schedule, it requires that Mobilewalla:

... document, adhere to, and make publicly available... a retention schedule ... setting forth: (1) the purpose or purposes for which each type of Covered Information is collected or used; (2) the specific business needs for retaining each type of Covered Information; and (3) an established timeframe for deletion of each type of Covered Information limited to the time reasonably necessary to fulfill the purpose for which the Covered Information was collected, and in no instance providing for the indefinite retention of any Covered Information....³¹

Given that Mobilewalla is in the business of selling user information, and that the marginal cost of data storage is low, the “specific business need” can be nothing more than the possibility in the future of some buyer willing to pay more than the lowest cost of storage to acquire the data. I see no reason why Mobilewalla could not set a retention period of decades based on this reasoning. In fact, while two-year-old location data is intuitively less valuable than one-year-old location data, it is quite plausible that twenty- or thirty-year-old location data is more valuable than location data that is only a few years old, as it may allow advertisers to tap into nostalgic sentiments.

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choices and tradeoffs. It did not do so when it adopted the general prohibitions of Section 5 nearly nine decades ago. And it has not adopted comprehensive privacy legislation since then. We must respect that choice.

Until Congress acts, we should vigorously protect Americans' privacy by enforcing the laws Congress has actually passed. But we must not stray from the bounds of the law. If we do, we will sow uncertainty among legitimate businesses, potentially disrupt the ongoing negotiations in Congress on privacy legislation, and risk damaging the Federal Trade Commission in court.