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Beyond ChatGPT: Best Practices to Evaluate & Manage Antitrust & Data Privacy Risks

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1

Introductions

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2

Agenda

- Understand existing regulations which apply to new and evolving technologies
- Develop solutions to ensure compliance with laws and regulations
- Avoid costly and disruptive enforcement action
  - How the FTC is addressing complaints of unfair competition
- Anonymized data and re-identification – how to mitigate risks

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3

What is AI?

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Computer systems or software applications designed to perform tasks typically requiring human intelligence.

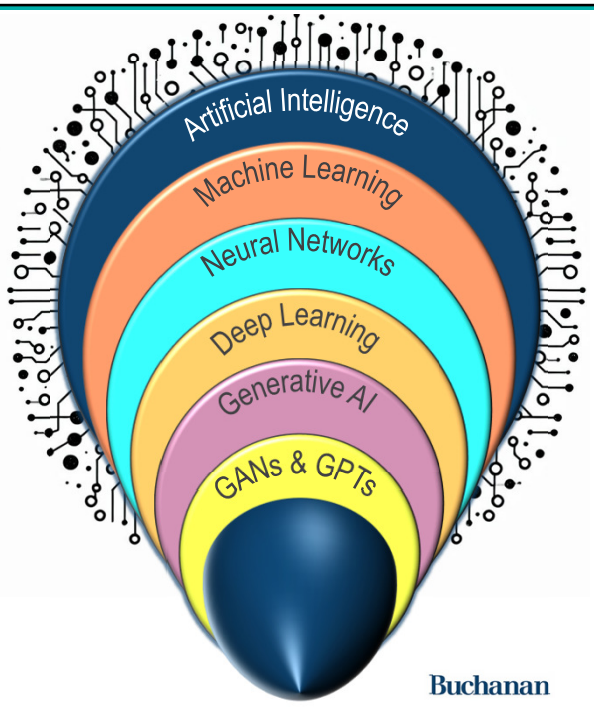
Subsets:

- Machine Learning (ML)
  - Neural Networks
  - Reinforcement Learning
  - Deep Learning
  - Generative AI
- Predictive Analysis
- Natural Language Processing (NLP)
- Computer Vision
- Robotics

4

Artificial Intelligence Primer

- **AI**: Complex field enabling machines with human-like cognitive abilities
- **ML**: Deciphers patterns in datasets, adapts to evolving circumstances
- **DL**: Uses intricate neural networks, excels in image, speech, and language tasks
- **Gen AI**: DL subset generating text, images, or code
- **GANs and GPTs**: Frameworks for generative AI tasks



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5

Collusion in the Digital Age

- AI tools can enable algorithmic price fixing and collusion.
- Businesses, agencies, legislators, lawyers, and antitrust enforcers are grappling with the challenges posed by AI in this context.
- Predictive Analysis:
  - Use of historical data and statistical techniques to make predictions about future outcomes.
  - Shared use of predictive analysis tools can lead to collusion as competitors align pricing strategies based on shared insights.
- Neural Networks and Deep Learning:
  - Training complex networks to learn from vast amounts of data.
  - Competitors utilizing similar neural networks and deep learning models may arrive at similar pricing recommendations, potentially leading to collusion.
- Generative Pre-trained Transformers (GPTs):
  - AI models that generate human-like text based on given prompts.
  - Competitors using similar GPT models and sharing generated content may facilitate collusion by aligning pricing strategies.

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6

What are Pricing Algorithms?

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Another type of AI

Intended to help companies determine optimal prices on a near real-time basis

- Rideshare price surging

Used for decades, sometimes face customer backlash

- Coca Cola's experiment to increase prices at vending machines when temps increased in the 90s

7

Competition Risks in the Market for Generative AI

- Section 2 Sherman Act claims for monopolization
- Section 7 Clayton Act where M&A harms competition or tends to create a monopoly
  - Large firms buying nascent competitors is a focus of the FTC
- Data is a key input to these tools, but also a barrier to entry
  - Especially in regulated industries where data is difficult to obtain, e.g. healthcare
  - Requires large amount of computing power, meaning access is available to only large firms and not nascent competitors

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8

Competition Risks in the Use of Pricing Algorithms

- Competitors using the same pricing algorithms can easily fix prices
  - Especially where identical software is offered by third parties
- Disclosing pricing to the market through the algorithm can signal pricing plans to competitors
  - In 2015, the DOJ criminally prosecuted online sellers who were using the same pricing algorithm to fix the prices of posters sold online

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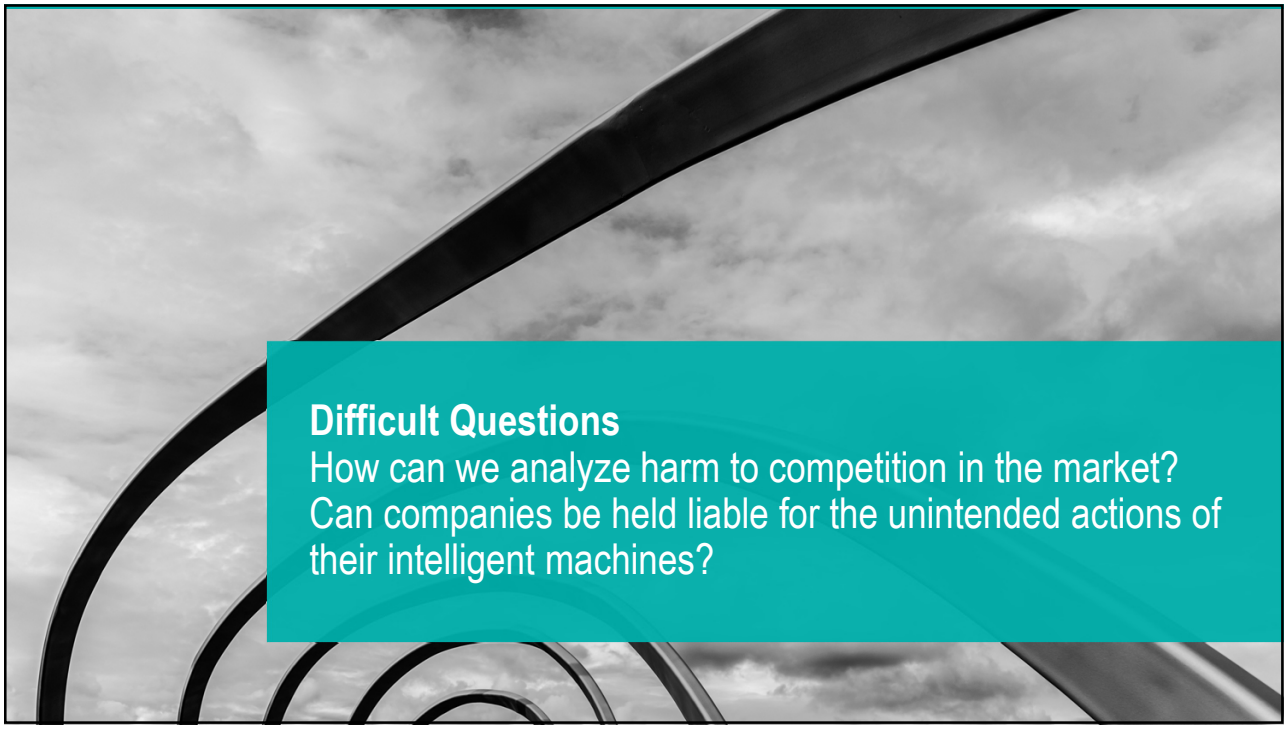
9



10

Enforcement Tools

- Section 5 of the FTC Act
  - Enforcers only
- Section 1 of the Sherman Act
  - Enforcers and private plaintiffs
- State antitrust and unfair competition laws
  - Enforcers and private plaintiffs

11

2024 Prediction = **AI competition enforcement ramps up**

12

Alphabet, Amazon and Microsoft

- On Jan 25, received inquiries from the US Federal Trade Commission on their investments and partnerships with AI startups Anthropic and OpenAI
  - Part of a study on how AI is impacting competition in the technology industry
- Probe focuses on more than $19 billion in investments by the companies, a series of transactions that cemented alliances between the world's cloud-services giants and the leading developers of AI software
- Antitrust enforcers become concerned as many of the most promising AI startups now depend heavily on the old guard of dominant tech companies for financing and infrastructure needs

See Addendum for Full Cases

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13

FTC Chair Lina Kahn Warns AI Companies

"Cannot use claims of innovation as cover for law breaking.

There is no AI exemption from the laws on the books."

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14

15


Case Study
In re RealPage, Inc., Rental Software Antitrust Litig., No. 3:23-md-03071 (M.D. Tenn. Sept. 7, 2023)

16

In Re RealPage

- Multi District Litigation (MDL) alleging Defendants engaged in a nationwide conspiracy to fix and inflate the price of multifamily rental housing across the country
- RealPage offered software that would use a database of rental prices in the area (including competitors' prices) and provide the optimal price to charge prospective tenants, with both short-and-long-term goals of increasing revenues by raising rents.
- RMS used non-public data from other RealPage clients. In fact, RealPage touted its use of non-public data as a competitive differentiator from other revenue management service providers in its marketing material.

17

In Re RealPage

- Software updates "tracked not only a client's acceptance rate, but also the identity of the client's staff that requested a deviation from RealPage's price. Additionally, to discourage any "temptation to override the [RealPage pricing] algorithm if rents appear too aggressive."
- "Vacancy rates rose because each Owner, Owner-Operator, and Managing Defendant could (and did) allow a larger share of their units to remain vacant, thereby artificially restricting supply, while maintaining higher rental prices across their properties. This behavior is only rational if Defendants know that their competitors are setting rental prices using RealPage's RMS and thus would not attempt to undercut them."

18

Other Examples

- *United States v. Topkins* (2015) co-conspirators agreed to fix the prices of posters sold through Amazon and implemented their arrangement by purchasing certain price-fixing algorithms.
- *United States v. Airline Tariff Publ'g Co.* (1993) alleged that defendants conspired through defendant ATP's fare dissemination services.

"Today's announcement represents the division's first criminal prosecution against a conspiracy specifically targeting e-commerce.

We will not tolerate anticompetitive conduct, whether it occurs in a smoke-filled room or over the Internet using complex pricing algorithms"

-- DOJ

19

Other Examples

- *The New York Times v. Microsoft Corp.,* 1:23-cv-11195 (S.D.N.Y Dec 27, 2023)
- Times alleges OpenAI and Microsoft's large language models (LLMs), "can generate output that recites Times content verbatim, closely summarizes it, and mimics its expressive style."
- This "undermine[s] and damage[s]" the Times' relationship with readers, the outlet alleges, while also depriving it of "subscription, licensing, advertising, and affiliate revenue."
- Allege Defendants seek to free-ride on the Times' massive investment in its journalism by using it to build substitutive products without permission or payment.

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20

21

Mitigating AI Risk

- Legal team must be involved in use of AI and algorithms to assess and mitigate risk
- Catalogue and understand implication of pricing data disclosed to the market
- AI developers must consider antitrust risk at the design phase
- Understand limits of anonymized data and risk of re-identification
- Implement transparency and explainability mechanisms to enhance understanding and accountability for AI-generated pricing decisions0
- Foster collaboration and communication among legal, technical, and business teams to ensure a comprehensive understanding of AI risks and mitigation strategies

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22

Mitigating AI Risk

- AI offers improved tools for threat actors to streamline and improve attacks
- Implement robust data privacy and security measures to protect sensitive pricing data from unauthorized access or misuse.
- Review the published literature on the issue
  - *Executive Order on the Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence*
  - *The White House's Blueprint For An AI Bill of Rights*
  - *NIST's Artificial Intelligence Risk Management Framework*
- Ensure unstructured data are organized in manageable ways
- Develop an AI policy that sets forth employees' use of AI tools

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23

AI is Not Inherently "Bad!"

Strengthen Response to Cybersecurity Threats

Handle Large Data Sets Faster

Interpret Data and Strengthening Defenses

24

Questions?

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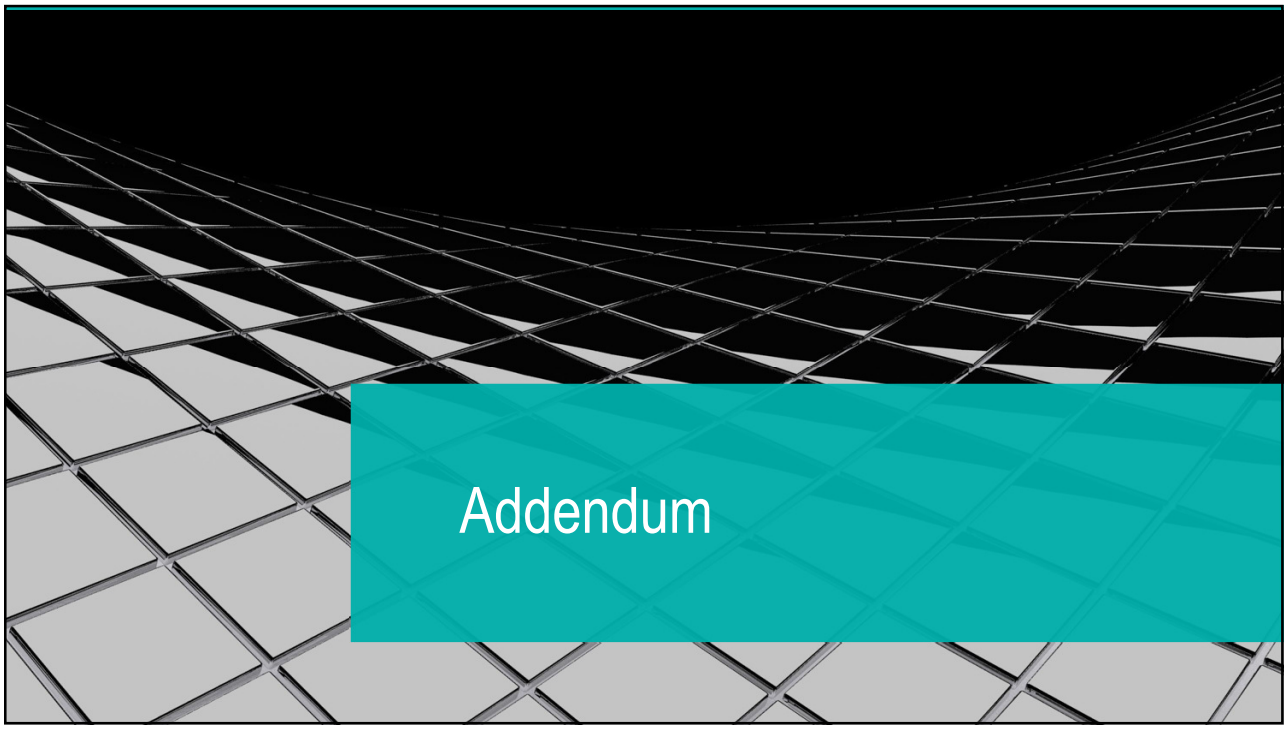
Thank You!



27

Case Studies

- Resolution Directing the Use of Compulsory Process Regarding the Investments and Partnerships Involving Generative AI Companies, Federal Trade Commission, January 24,2024
- *In re RealPage, Inc., Rental Software Antitrust Litig.,* No. 3:23-md-03071 (M.D. Tenn. Sept. 7, 2023)
- *U.S. v. Airline Tariff Publishing Co.*, 836 F. Supp. 9 (D.D.C. 1993)
- *The New York Times Co. v. Microsoft Corp.,* No. 1:23-cv-11195 (S.D. N.Y. 2023)

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28

Other Reference Materials

- *United States, Executive Office of the President [Joseph R. Biden Jr.]. Executive Order on the "Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence,"* October 30,2023. wh.gov.
- The White House's Blueprint For An AI Bill of Rights: A Vision for Protecting Our Civil Rights in the Algorithmic Age, October 4, 2022. wh.gov.
- National Institute of Standards and Technology (NIST)'s Artificial Intelligence Risk Management Framework (AI RMF), January 26, 2023. nist.gov.

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29