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FTC targets consumer tracker for violating own privacy policy

The Federal Trade Commission has sent companies an unequivocal message about consumer privacy: Keep the promises you make in your privacy policy.

In April, the FTC settled its privacy-related enforcement action against Nomi Technologies, a third-party service that uses mobile device tracking technology to provide analytics services to brick-and-mortar retailers.

The FTC filed a complaint against Nomi alleging the company misled consumers when it expressly promised in its privacy policy that consumers could opt out of the company's tracking services "at any retailer using Nomi's technology." The FTC claims that this misrepresentation violated Section 5 of the FTC Act.

The Nomi case is unique in several respects. The case is the first FTC action to address in-store tracking. The tracking and collection of consumer data was not the focus of the investigation, however.

Nomi's technology does not capture customers' personal identification information, but it does relay information to retailers about customers' movements inside their stores by tracking signals on their smartphones. The technology picks up media access control, or MAC, addresses that are broadcast by the Wi-Fi interface on customers' smartphones.

Through its Listen service, Nomi provides information to the retailer about customers' shopping patterns, such as how long a customer stayed in the store and whether a customer has visited another location. It also tracks people who pass by stores that were using the technology, even if they never entered. Retailers can use this data to improve the customer experience by changing store layouts and reducing customer wait times.

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Since Nomi's technology is not collecting personal data, the agency instead maintained that the company violated federal law by misleading consumers with express promises in its privacy policy — a policy that the company voluntarily drafted and adopted.

Nomi's privacy policy stated that consumers could opt out of the company's tracking services at any retailer using Nomi's tracking technology. The FTC maintained that Nomi never gave customers the means to opt out at retail locations.

According to the complaint, most retailers failed to notify customers in their stores that the Nomi technology was activated, and therefore, customers didn't know the tracking service was being used. Nomi also did not give consumers access to the list of the retailers that use or used the Listen service and did not require its retail clients to post disclosures or otherwise notify consumers that they use the service.

Under the terms of the FTC consent agreement, Nomi is prohibited from misrepresenting consumers' options for controlling whether information is collected, used, disclosed or shared about them or their devices. The company also must not misrepresent the extent to which consumers will be notified about information gathering practices.

Recently, the FTC has pursued several actions against companies that it alleges put consumers' personal data at unreasonable risk. For example, in 2014, the agency took action against Snapchat Inc. after hackers stole 4.6 million usernames and phone numbers.

The FTC alleged the company deceived consumers over the amount of personal data it collected and the security measures taken to protect that data from misuse and unauthorized disclosure.

The FTC also reached separate settlements last year with Fandango LLC and Credit Karma Inc. over charges the companies misrepresented the security of their mobile apps and failed to secure millions of consumers' personal information transmitted from the apps.

PRIVACY, TECHNOLOGY AND LAW

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The Nomi case is different, however, in that it does not involve the exposure of huge amounts of sensitive consumer data by a well-known company.

The defendant is a relatively unknown startup that did not collect any sensitive consumer data. The Nomi case indicates that the FTC will attempt to protect consumer's privacy on multiple fronts and that no defendant is untouchable if it misleads consumers about their privacy.

Opinions on the Nomi case are divided — even within the FTC. The five-member commission voted 3-2 to issue the complaint and accept the consent agreement.

The majority members said in their statement: "This case is simply about ensuring that when companies promise consumers the ability to make choices, they follow through on those promises. ... The order will also serve to deter other companies from making similar false promises and encourage them to periodically review the statements they make to consumers to ensure that they are accurate and up-to-date."

The majority rejected the two dissenting members' concerns that the FTC's enforcement action would discourage companies from voluntarily providing information and opt-out choices to customers and result in companies only doing the "bare minimum" to protect customers' privacy, countering that the agency must continue to take action when companies offer customers "deceptive" opt-out choices.

In particular, the majority noted that the $22.5 million FTC settlement against Google Inc., in which the Internet search giant offered an opt-out that failed to work on the Safari browser, has not pared down of opt-out choices.

"We do not believe that any of these actions — including the one announced today — have deterred or will deter companies from providing truthful choices," the majority said in its statement. "To the contrary, companies are voluntarily adopting enforceable privacy commitments in the retail location tracking space and in other areas."

A number of industry groups representing technology companies and app developers have criticized the proposed consent order, not only for what they believe is sending the wrong message to companies but also for using its enforcement powers in situations where consumers suffered no harm.

Groups including NetChoice and the Application Developers Alliance, as well as the U.S. Chamber of Commerce, have asserted that the alleged misrepresentations in Nomi's privacy policy were not material and that no consumers were actually harmed by the misstatements.

The groups also assert that the penalty against Nomi was heavy-handed, encouraging companies to do the bare minimum to make sure their privacy polices meet legal requirements, but otherwise provide little usable or protection to consumers.

While the opinions about the Nomi opinion vary, one thing is clear — the FTC will continue to protect consumers' privacy whether it is threatened by a small or large company or by a data breach or a misrepresentation in a privacy policy.

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