

fake and distressing anonymous messages to minors to sell those minors a paid membership that would supposedly allow them to see who was behind those very same messages.³ That kind of conduct preys on and manipulates vulnerable teenage consumers—it is reprehensible, and it is unfair under the FTC’s consumer protection law. I voted in favor of the enforcement action, but warned in a concurrence that the Commission should not use its consumer protection authority to declare the offering of any and all anonymous messaging to teenagers an inherently unfair practice.⁴ Online anonymity for teenagers, I argued, can have real benefits—for example, encouraging at-risk teens to seek help and protecting teens from cancel culture’s ruin.⁵ But there is another reason why the Commission should not declare an entire category of product or service unlawful because we think it is more harmful than useful: it is outside of our remit as consumer protection enforcers. Rather than being about the impropriety of a particular commercial transaction—deception or other unfairness in the sale and discharge of the service—it would be the Commission making value judgments about the desirability or undesirability of a mode of communication altogether.

To appreciate the distinction I am making, fast forward about two months. The Commission just this week settled a case against Rytr for offering a generative AI service capable of generating consumer reviews based on a user prompt.⁶ The Commission took the view that such a service is nothing but a means and instrumentality for generating fake reviews to be used to deceive consumers in violation of the FTC Act.⁷ I disagreed.⁸ A review generator has obvious, and lawful utility for consumers who want help drafting a real consumer review. I don’t know about you, but I can see why someone would want to use an AI service to help them generate a first draft of a review. My staff’s first drafts are incredibly useful to me, even if I discard every word they’ve written—if only to get past a dreadful case of writer’s block staring at a blank page. Our authority does not allow us to ban products just because someone might use them for false advertising.⁹ But I do not think I could have further faulted the complaint as venturing outside of our consumer protection jurisdiction, since false advertising is exactly the kind of conduct that hurts people in their capacity as consumers.

Staying true to our enforcement directive is especially important when it comes to new, potentially revolutionary technology. We must resist the impulse to stretch our consumer protection authority to regulate AI, for example. Avoiding mission creep requires discernment. Deepfakes, for example, can cause real harm to individuals, but not necessarily in their capacity as consumers. If a deepfake is used falsely to claim that someone has endorsed a product, or if a company uses AI to generate a video that misrepresents the functionality of its product, then the FTC should

³ *Id.* at ¶¶ op/618

pursue those cases. But defamatory deepfakes, for example, have nothing to do with consumer protection in and of themselves, and are more properly the domain of other areas of law or of legislative action by the people's representatives. Similarly, the question of how to compensate intellectual property owners whose work is used to train AI models is generally a matter of intellectual property law, not consumer protection.

The Commission recently released a monumental report on social media¹⁰—a project begun during the Trump Administration nearly four years ago. In my concurrence,¹¹ I took issue with the report's view that the law should prohibit targeted advertising in part on the basis of the emotional response it may generate in the viewer.¹² To be sure, the law must confront the mass *gathering* and *sharing* of private data.¹³ But I do not believe the government should get into the business of policing the emotional harms that come from *seeing* an advertisement. American law has long avoided imposing liability purely because an emotional injury for an obvious reason: almost any act can trigger emotional trauma in somebody.¹⁴ Society would come to a standstill if we tried to hold people liable every time they caused a negative emotional reaction in someone else.

Pertinent to today's discussion, if the Commission tried to hold businesses liable for people's emotional reactions to their advertisements, it would be exceeding its consumer protection authority. Our interest in advertising should be in its commercial content, not its other expressive content.

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of legal clarity is fundamentally unfair. Some modicum of ambiguity is unavoidable in any legal system. But the rule of law requires that people be able to conform their actions to the requirements of the law. Anything short of that begins to look like tyranny.

The legal uncertainty created by the abuse of consumer protection law can also have a chilling effect on innovation and investment. When businesses are unsure of their legal rights—when they fear they might be held liable for actions they reasonably believed were legal—they become more hesitant to invest in new products, technologies, or ventures. Economic prosperity, which contributes to human flourishing, depends on a regulatory environment that fosters confidence and predictability.

Finally, relying too heavily on consumer protection laws to address broader political or societal issues can cause other departments of the government to atrophy. In the United States, for example, Congress has increasingly left complex national problems unresolved, in part because