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

Office of Commissioner
Andrew N. Ferguson

Dissenting Statement of Commissioner Andrew N. Ferguson
Joined by Commissioner Melissa Holyoak
In the Matter of Rytr LLC
Matter Number 2323052

September 25, 2024

The Commission today issues an administrative complaint and accepts a proposed consent agreement with Rytr LLC ("Rytr").[1] Rytr has created and markets a package of over 40 generative artificial intelligence ("AI") tools with a variety of uses, from writing essays to creating poetry and music lyrics. One of these tools allowed users to generate consumer reviews based on prompts provided by the user. For having offered this tool, the Commission accuses Rytr of violating Section 5 of the Federal Trade Commission Act[2] by furnishing its users with the "means and instrumentalities" to deceive consumers.[3] The Commission reasons that a business could use Rytr's tool to create false or deceptive consumer reviews that the business could then pass off as authentic reviews in violation of Section 5. Rytr has agreed to settle the case by promising not to offer similar functionality in the future.

I dissent[4] from the filing of the complaint and consent agreement because I do not have reason to believe that Rytr violated Section 5, and because I do not believe filing is in the public interest. The Commission's theory is that Section 5 prohibits products and services that could be used to facilitate deception or unfairness because such products and services are the means and instrumentalities of deception and unfairness. Treating as categorically illegal a generative AI tool merely because of the possibility that someone might use it for fraud is inconsistent with our precedents and common sense. And it threatens to turn honest innovators into lawbreakers and rco lis enrd gw as2 (o)2 (s)1 (sn)7 (t w)4 ()5 (a)1 ( )5 (il)Tc 0 Tw 20.65 11.6[(fa)1 (s)-1 (r)-2 (voa)-1 (u5 (fo- (

circumstances, and [3], the representation, omission, or practice is material."[16] Although the Commission need not show that the challenged representation or omission in fact deceived a particular consumer,[17] the Commission must show that the defendant made a material misrepresentation or omission that was likely to mislead consumers.[18]

The Commission does not allege that Rytr made a misleading statement or omission of any kind, much less Comm3-2 (s)-1 (s)4 (i)-2 (ss)]TJ0 Tw (ki)-2 s(a)4 (t)-2 (2 (t-1 (td ( )]TJ6.725-3 -1.24 Tdp (

boards custom-made for retailers to use in illegal lottery marketing schemes.[24] It has also relied on this theory to pursue suppliers of mislabeled art, which retailers then sold to deceived consumers.[25]

The second type of means-and-instrumentalities case involves suppliers of misleading marketing materials that someone down the supply chain uses to deceive consumers. In these cases, the defendant makes false or misleading statements to someone further down the supply chain, who then repeats the misstatements to deceive consumers.[26] If the repeated statement does not satisfy the three-part test for deception under Section 5, however, it cannot give rise to means-or-instrumentalities liability.[27] The classic example of this case involves deceptive marketing materials for multilevel-marketing businesses and "pyramid" schemes. The participants at the top of the pyramid do not interact with consumers; they instead convey false statements to others further down the pyramid who in turn use those materials to deceive consumers. The Commission has used the means-and-instrumentalities theory against the orchestrators of deception who sit at the top of the pyramid.[28]

This categorization seems straightforward at first blush, but the means-and-instrumentalities doctrine becomes less coherent the closer one looks. On the one hand, we have described "'means and instrumentalities' liability [as] a form of direct liability,"[29] that is, as a way of holding someone "directly liable for violating"[30] Section 5 "distinct from 'aiding and abetting' liability and 'assisting and facilitating' liability, both of which are secondary forms of liability."[31] That appears to be true when the Commission uses this theory against the orchestrator of a pyramid scheme, who makes misrepresentations to someone other than a consumer but which misrepresentations are repeated to consumers by people further down the pyramid.[32] When applying means-and-instrumentalities liability against defendants who supplied the component parts of someone else's Section 5 violation, however, courts have described the theory as a species

[24] See, *e.g.*, *Gellman v. FTC*, 290 F.2d 666, 667–68 (8th Cir. 1961) (collecting cases); *Peerless Prods., Inc. v. FTC*, 284 F.2d 825, 826 (7th Cir. 1960); *James v. FTC*, 253 F.2d 78, 80 (7th Cir. 1958); *Globe Cardboard Novelty Co. v. FTC*, 192 F.2d 444, 446 (3d Cir. 1951); *Chas. A. Brewer & Sons v. FTC*, 158 F.2d 74, 77 (6th Cir. 1946); *FTC v. F.A. Martoccio Co.*, 87 F.2d 561, 564 (8th Cir. 1937).

[25] See, *e.g.*, *Magpui*, 1993 WL 430102, at *4; *Int'l Art Co. v. FTC*, 109 F.2d 393, 397 (7th Cir. 1940).

[26] See, *e.g.*, *Regina Corp. v. FTC*, 322 F.2d 765, 768 (3d Cir. 1963) (supplier's conveying of a deceptive list prid w 1.437 0 Td[(,)0.5 (

of substantial noninfringing uses," it did not violate the copyright laws even if it is also capable of committing countless acts of infringement.[36] Similarly, patent law does not treat as infringement the sale of an unpatented part of a patented machine that could be used to infringe the patent, so long as the part is capable of some noninfringing uses.[37]

Aiding-and-abetting liability, which bears many similarities to means-and-instrumentalities liability,[38] also does not punish conduct merely because it facilitated the commission of a tort or crime. Liability for aiding and abetting under federal criminal law requires "that the accused ha[d] the specific intent to facilitate the commission of a crime by another" as well as "the requisite intent of the underlying substantive offense."[39] And in tort law, one is liable for the torts of another "if he *knows* that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other."[40]

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The Commission tries to diminish the grandiosity of its theory by alleging that Rytr's tool "has no or *de minimis* legitimate use."[41] If this were true, then I might agree with the Commission's decision to file this complaint. Courts have for decades interpreted Section 5 to prohibit the sale of products with no reasonable uses other than facilitating an unfair or deceptive act or practice.[42] But the Commission's conclusory description of the Rytr tool's plausible uses is pure *ipse dixit*. The complaint contains no factual allegations lending plausibility to its conclusion that the tool has no, or only *de minimis*, legitimate uses.[43] Nor I have seen any evidence giving me reason to believe that the allegation is true.

Indeed, the complaint's conclusion is entirely implausible. For one thing, if the Rytr tool's exclusive use were to generate false consumer reviews in violation of Section 5, one would expect the complaint to contain allegations that someone used it to violate Section 5, at least once.

The Rytr tool's legitimate utility to consumers is obvious: to assist them in writing reviews. Writing a succinct and thoughtful review can be difficult and time-consuming,[44] and a tool that produces a well-written first draft of a review based on some keyword inputs can make the task much more accessible.

The Commission describes the Rytr tool's only use as "generating written content for a review" that a user would then "manually select and copy … to post reviews elsewhere online."[45] But consumers do not have to use generative AI as a replacement for their own thoughts and ideas. Consumers can use AI-generated first drafts of documents in much the same way they would use a human-generated first draft—as a starting point from which the user can work to convey accurately and clearly the idea in the user's mind. A consumer would not violate Section 5 by using a generative AI tool to write a first draft of a review, even if that first draft contained inaccuracies that the user then removed.

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instrumentalities doctrine that “the originator” of a false or misleading representation “is liable if it passes on a false or misleading representation *with knowledge or reason to expect* that consumers may

copyrighted music and films without authorization.[60] Although the copyright laws do not prohibit

power to regulate AI. It has tasked us with enforcing the prohibition against unfair or deceptive acts and practices. If our enforcement incidentally captures some AI-generated conduct, so be it.[67] But we should not bend the law to get at AI. And we certainly should not chill innovation by threatening to hold AI companies liable for whatever illegal use some clever fraudster might find for their technology.

Second, the complaint implicates important First Amendment interests. The First Amendment constrains the government's authority to regulate the inputs of speech.[68] The Commission today holds a company liable under Section 5 for a product that helps people speak, quite literally. The theory on which the complaint rests would permit the Commission toTT0 1 Tf0.065 T3-1 (d (