



November 4, 2024

The Honorable Lina M. Khan
Chair
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, D.C. 20580

Re: Rytr LLC; File No. 232 3052

Dear Chair Khan:

On behalf of the Software & Information Industry Association (SIIA), we appreciate the opportunity to provide comments on the proposed consent order with Rytr LLC. As set out in this letter, we recommend that the Commission withdraw the proposed order because we believe it goes beyond the scope of the Commission's Section 5 authority and would represent a harmful extension of means and instrumentalities liability to providers of multi-use tools that are not designed or intended to enable unfair or deceptive acts or practices.¹

SIIA is the principal trade association for companies in the business of information. Our members include nearly 400 companies reflecting the broad and diverse landscape of digital content providers and users in academic publishing, education technology, and financial information, along with creators of software and platforms used by millions worldwide, and companies specializing in data analytics and information services. Our membership includes upstream and downstream AI designers, developers, and deployers of AI systems in myriad environments. On behalf of our members, we view it as our mission to ensure a healthy information ecosystem: one that fosters its creation, dissemination and productive use.

As an initial matter, we applaud the Commission's focus on AI as an area that warrants attention from the perspective of consumer protection. Four of the actions announced as part of the [Operation AI Comply](#) law enforcement sweep involve traditional deceptive schemes that fall well within the scope of the FTC's Section 5 authority, such as a "robot lawyer" that failed to deliver on lofty claims, and business opportunity schemes that made false promises about how AI could help consumers get rich. The Commission approved each of these on a unanimous 5-0 vote.

The action against Rytr is unique among the set of Operation AI Comply actions. We concur with concerns raised by Commissioners Holyoak and Ferguson about the propriety of the case against Rytr and believe, based on the facts presented by the Commission, that action exceeds the scope of the Commission's Section 5 authority.

First, we are concerned with the precedent that the Rytr action will set because it relies on speculative harm and lacks facts of any actual wrongdoing. As [Commissioner Holyoak explains](#), "the complaint does not allege that users actually posted any draft reviews. Since the Commission has no evidence that a single draft review was posted, the complaint centers on alleging speculative harms that may have come

¹ While we believe certain of the terms in the proposed order, such as its 20-year term and 5-year recordkeeping obligations, are onerous, our comments do not address the specific terms of the proposed order.

from subscribers with access to unlimited output from across Rytr's use cases, which included draft reviews." (Holyoak at 2.) Speculative harms of this sort do not satisfy the Section 5 requirement that "the act or practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition." (*Id.*)

Second, we are concerned by the impact of the unprecedented extension of means and instrumentalities liability reflected in the Rytr case. Means and instrumentalities is a form of direct liability, which requires active participation and knowledge of wrongfulness, as distinct from secondary theories of liability, which are not available to the FTC for Section 5 claims. (*See, e.g.*, FTC, [Trade Regulation Rule on Impersonation of Government or Businesses, Supplemental Notice of Proposed Rulemaking](#), at 15077, 15082 n.94 (Mar. 1, 2024).) Traditionally, the FTC has applied means and instrumentalities liability narrowly in two situations. As explained by [Commissioner Ferguson](#), the first is when a product or service "is inherently deceptive" or "has no purpose apart from facilitating" a violation of Section 5. (Ferguson at 3.) This theory has been used "to pursue makers of push cards and punch boards custom-made for retailers to use in illegal marketing schemes" as well as "suppliers of mislabeled art." (*Id.* at 3-4.) The second situation involves "suppliers of misleading marketing materials that someone down the supply chain uses to deceive consumers," such as in a pyramid scheme. (*Id.*)

While the FTC has recently explored extending means and instrumentalities liability in connection with the Impersonation Rule, it has recognized the necessity for a clear nexus between the actions of an intermediary and any downstream unfair or deceptive conduct. For example, [FTC Chair Khan stated](#) that means and instrumentalities liability in the Impersonation Rule context would enable liability for "a developer who knew or should have known that their AI software tool designed to generate deepfakes of IRS officials would be used by scammers to deceive people about whether they paid their taxes." Notably, this hypothetical involves an AI tool *designed to enable deception*. That is consistent with how the FTC has traditionally invoked means and instrumentalities, as Commissioner Ferguson explains in his dissent.

This approach, however, is at odds with the thrust of the Rytr action, which appears to be the first time the Commission has invoked means and instrumentalities to pursue a product or service that is not "necessarily deceptive like mislabeled art, or useful only in facilitating someone else's section 5 violation like lottery punch boards." (Ferguson at 5.) Indeed, the Rytr tool "has both lawful and unlawful potential uses. A consumer could use it to draft an honest and accurate review. Or a business could use it to write a false review." (*Id.*) We agree with Commissioner Ferguson's view of this action as "a dramatic extension" of the doctrine that treats the "sale of a product with lawful and unlawful potential uses as a categorical Section 5 violation because someone *could* use it to write a statement that *could* violate Section 5." (Ferguson at 5.) The same could be said, he continues, "of an almost unlimited number of products and services: pencils, paper, printers, computers, smartphones, word processors, typewriters, posterboard, televisions, billboards, online advertising space, professional printing services, etc. On the Commission's theory, the makers and suppliers of these products and services are furnishing the means or instrumentalities to deceive consumers merely because sometime might put them to unlawful use." (*Id.*)

Third, we are concerned about the consequences and, indeed, the chilling effect this enforcement action could have on the entire AI industry.



Policymakers in the United States and abroad are grappling with how to advance innovation of inherently multi-use generative AI technologies while building guardrails to mitigate the risk of misuse and malicious activity. Despite differences of opinion among policymakers, there is near consensus that the right way to proceed with regulation is to focus on high-risk applications of AI, and to advance measures around transparency, testing, and evaluation to mitigate risks associated with low-risk applications. Reflecting this, legislative approaches to liability have focused squarely on those who use AI in ways that create harm, or those that develop AI tools that are intended to do so. No one in any jurisdiction has gone as far as to effectively ban generative AI because it *could* be used to generate speech that *could* be used to deceive a third party.

Although the Commission chose to pursue only a sliver of the capabilities of Rytr’s generative AI tool, under the logic underlying this case, it is not clear what ultimately separates the one problematic use case – “Testimonial & Review” – from the others. One could just as easily use a function for generating “Email” to prepare a fictitious review. The specter of potential FTC enforcement for making a generative AI tool available has significant consequences for the entire industry and for the continued development of AI tools that are intended to help address a range of individual and organizational needs - from streamlining mundane tasks to healthcare research to content creation to exploring the possibilities of human creativity.

Until now, the FTC’s attention to AI as an emerging area² has nonetheless led to enforcement based on fact patterns typical of Section 5 – the FTC Act authority that governs unfair or deceptive acts or practices and is used to protect consumers from fraud, schemes, and lax business practices.³ This is consistent with the April 2023 [joint statement](#) of FTC Chair Lina Khan and heads of three other federal agencies that affirmed “[e]xisting legal authorities apply to the use of automated systems and innovative new technologies just as they apply to other practices.”

We urge the FTC to remain steadfast in this approach. We believe the FTC *should* be going after schemes and deception and misrepresentations of the sort represented in the other Operation AI Comply cases. But, as stated well by Commissioner Holyoak, the Rytr action will set a harmful precedent, one that “suggests to all cutting-edge technology developers that an otherwise neutral product used inappropriately can lead to liability—even where, like here, the developer neither deceived nor caused injury to a consumer.” (Holyoak at 5.)

² Since 2020, the FTC has devoted considerable resources to the AI space. It has issued staff guidance on [privacy](#), [misuses of personal information](#), [deepfakes](#), [algorithmic bias and transparency](#), [deceptive claims involving AI](#), and more. It has weighed into the debate on copyright and AI and prioritized inquiries into AI industry competition. And it has begun to advance enforcement actions involving AI or AI-adjacent technologies, including, among others, [deceptive use of facial recognition technology](#) (FRT), [discriminatory use of FRT](#), and [improper collection of children’s data](#).

³ Section 5 of the FTC Act prohibits “unfair or deceptive acts or practices in or affecting commerce.” 15 USC 45(a). In applying this standard, the Act provides that “[t]he Commission shall have no authority...to declare unlawful an act or practice on the grounds that such act or practice is unfair unless the act or practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition.” 15 USC 45(n).



Thank you for considering our views. We stand committed to working with the Commission to advance consumer protection and the responsible development and use of AI technologies. Please feel free to reach out to me at plekas@siia.net.

Respectfully submitted,



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