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 risks strangling a potentially revolutionary technology in its cradle.

I

Rytr is a generative AI toolkit designed to help users write and edit text. Rytr markets its offering as including more than 40 different tools, which it calls “use cases,” that generate draft emails, text messages, letters, advertisements, product descriptions, blogs, articles, poems, song lyrics, business pitches, and job descriptions.[5] To generate content, the user selects a use case and

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[1] *In re Rytr LLC*, Complaint (“Complaint”) & Decision and Order (“Order”).
[2] 15 U.S.C. § 45(a).
[3] Complaint ¶ 15–16.
[4] In this statement, I discuss the Commission’s charge of deceptive conduct against Rytr. I also join Commissioner Holyoak’s dissent ably disposing of the Complaint’s charge of unfair conduct. Dissenting Statement of Commissioner Melissa Holyoak, *In re Rytr, LLC* (Sept. 25, 2024).
[5] Complaint ¶ 4; *Use Cases*, Rytr (last visited Sept. 11, 2024), https://rytr.me/use-cases/.

fills out a form asking for the parameters of the text to be generated, such as the language, tone, creativity level, and the basic idea governing the document (depending on the use case, the business idea, the idea for a song, a description of the job role, and so forth).[6] Rytr's generative AI system processes the information and produces a document in the number of variants requested by the user.

Rytr offers both free and paid versions of its writing tool. The free version substantially limits the monthly character count.[7] For $9 per month (or $90 per year), a user can generate up to 100,000 characters.[8] For $29 per month (or $290 per year), the user can generate unlimited content.[9] A user does not purchase subscriptions for particular use cases. Rather, a single subscription gives the user access to all of Rytr's use cases.[10]

Until recently, one of Rytr's use cases was "Testimonial & Review." This use case permitted a user to generate product reviews by entering a description, some keywords, or a product title.[11] Nothing prevented a user with a full subscription from using the tool to generate unlimited reviews of multiple products, or of a single product.

The Commission alleges that this use case "generates detailed reviews that contain specific, often material details that have no relation to the user's input"; that such reviews "would almost certainly be false"; and that, if such a review were "publish[ed] … online," it "would deceive potential consumers deciding to purchase the service or product described" in violation of Section 5.[12] The Complaint does not identify a single Rytr-generated review published anywhere by anyone, much less a false review that violates Section 5. It nevertheless concludes that Rytr "has furnished its users and subscribers with the means to generate written content for consumer reviews that is false and deceptive."[13] "[F]urnishing others with the means and instrumentalities to engage in" deception, the Commission declares, is a Section 5 violation.[14]

II

A

Section 5 prohibits "deceptive acts or practices."[15] "The [Commission] must show three elements to prove a deceptive act or practice in violation of Section 5(a)(1): [1] a representation, omission, or practice, that [2] is likely to mislead consumers acting reasonably under the

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[6] The complaint contains a screenshot of the form for the Testimonial & Review use case. Complaint ¶ 6. The Rytr website also shows what the forms for the various use cases look like. *Use Cases*, Rytr (last visited Sept. 11, 2024), https://rytr.me/use-cases/ (click on a use case to see the form for that use case).
[7] Complaint ¶ 4.
[8] *Ibid*.
[9] *Ibid*.
[10] *Id.* ¶ 5.
[11] *Id.* ¶ 6.
[12] *Id.* ¶ 8.
[13] *Id.* ¶ 15.
[14] *Id.* ¶ 16.
[15] 15 U.S.C. § 45(a).

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 one that was material or likely to mislead consumers. The Commission instead pleads that Rytr furnished the "means and instrumentalities" by which someone else could make false statements in violation of Section 5.

Means-and-instrumentalities liability arises from a century-old case involving not "unfair or deceptive acts or practices," but "unfair methods of competition." In *FTC v. Winsted Hosiery Co.*, the Supreme Court considered an unfair-method-of-competition claim against a clothing company that falsely labeled its clothing as being made of wool.[19] The company defended on the ground that the retailers to whom it sold its clothing were fully aware that the labels were false, and therefore the company did not deceive anyone.[20] The Court rejected this defense, holding that the clothier was a "wrongdoer" because it "furnishe[d]" retailers "with the means of consummating a fraud" against consumers, who were not aware that the labels were false.[21] Courts and the Commission have since relied on *Winsted Hosiery* to hold that a person "who puts into the hands of others the means by which such others may deceive the public is equally responsible for the resulting deception."[22] This theory of liability has come to be known as "means-and-instrumentalities" liability, and "is intended to apply in cases … where the originator of the unlawful material is not in privity with consumers."[23]

Means-and-instrumentalities liability has traditionally been confined to two types of cases. The first involves a defendant who supplies someone other than a consumer—ordinarily a retailer—with a product or service that is unlawful because it is inherently deceptive, or because it has no purpose apart from facilitating a Section 5 violation. The recipient of that product or service then passes it on to consumers in violation of Section 5. *Winsted Hosiery* was such a case. The Commission relied on this theory for many decades to pursue makers of push cards and punch

[16] *FTC v. Moses*, 913 F.3d 297, 306 (2d Cir. 2019) (quotation marks omitted); accord *FTC v. Stefanchik*, 559 F.3d 924, 928 (9th Cir. 2009) (similar); *POM Wonderful, LLC v. FTC*, 777 F.3d 478, 490 (D.C. Cir. 2015) (similar); *FTC v. Freecom Commc'ns, Inc.*, 401 F.3d 1192, 1203 (10th Cir. 2005) (similar).
[17] *FTC v. Cyberspace.com*, 453 F.3d 1196, 1201 (9th Cir. 2006).
[18] *FTC v. Tashman*, 318 F.3d 1273, 1277 (11th Cir. 2003).
[19] 258 U.S. 483, 490–91 (1922).
[20] *Id.* at 492–93.
[21] *Ibid.*
[22] *In re Litton Indus., Inc.*, 97 F.T.C. 1, 46–47 (1981); see also, *e.g.*, *FTC v. Magui Publishers, Inc.*, 9 F.3d 1551, 1993 WL 430102, at *4 (9th Cir. 1993) (unpublished) ("It is well established that one who puts into the hands of others the means by which such others may deceive the public is equally as responsible for the resulting deception."); *C. Howard Hunt Pen Co. v. FTC*, 197 F.2d 273, 281 (3d Cir. 1952) ("One who places in the hands of another a means of consummating a fraud or competing unfairly in violation of the Federal Trade Commission Act is himself guilty of a violation of the Act."); *Waltham Watch Co. v. FTC*, 318 F.2d 28, 32 (7th Cir. 1963) ("Those who put into the hands of others the means by which they may mislead the public, are themselves guilty of a violation of Section 5 of the Federal Trade Commission Act.").
[23] *In re Shell Oil Co.*, 128 F.T.C. 749, 764 (1999).

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

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[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 price to retailers, which was repeated to consumers).
[27] *FTC v. Innovative Designs, Inc.*, No. 20-3379, 2012 WL 3086188, at *4 n. 11 (3d Cir. July 22, 2021).
[28] See, *e.g.*, *FTC v. Noland*, 672 F. Supp. 3d 721, 786 (D. Ariz. 2023); *FTC v. Fin. Educ. Servs., Inc.*, No. 2:22-CV-11120, 2022 WL 19333298, at *1 (E.D. Mich. May 24, 2022); *FTC v. Neora LLC*, 552 F. Supp. 3d 628 (N.D. Tex. 2021); *FTC v. Vemma Nutrition Co.*, No. 15-cv-1578, 2015 WL 11118111, at *7 (D. Ariz. Sept. 18, 2015); *FTC v. Skybiz.com, Inc.*, No. 01-CV-396-K(E), 2001 WL 1673645, at *1 (N.D. Okla. Aug. 31, 2001); *FTC v. Five-Star Auto Club, Inc.*, 97 F. Supp. 2d 502, 530–31 (S.D.N.Y. 2000).
[29] FTC, SNPRM: *Trade Regulation Rule on Impersonation of Government and Businesses* ("SNPRM"), 89 Fed. Reg. 15072, 15077 n.94 (Mar. 1, 2024).
[30] *FTC v. Magui Publishers, Inc.*, No. Civ. 89-3818, 1991 WL 90895, at *14 (C.D. Cal. Mar. 28, 1991), *aff'd*, 9 F.3d 1551 (9th Cir. 1993).
[31] SNPRM, 89 Fed. Reg. 15077 n.94.
[32] See *Shell Oil*, 128 F.T.C. at 766 (dissenting statement of Commissioner Swindle) ("Means and instrumentalities is a form of primary liability, and a respondent is primarily liable only for *its own* misrepresentations to consumers.").

of aiding-and-abetting liability.[33] We have also told Congress that our means-and-instrumentalities theory is an "alternative theor[y]" to aiding-and-abetting liability by which we can "reach secondary actors."[34] Means-and-instrumentalities liability therefore sometimes functions as a form of direct liability (when deployed against the orchestrator of a pyramid scheme, for example) and sometimes as a form of aiding-and-abetting liability (when deployed against the makers of punch boards and push cards, for example).

The complaint against Rytr falls into neither category. The Commission does not accuse Rytr of making any statements, much less false statements. Nor is Rytr's tool necessarily deceptive like mislabeled art, or useful only in facilitating someone else's Section 5 violation like lottery punch boards. Rytr's 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.

B

1

The Commission's complaint is a dramatic extension of means-and-instrumentalities liability. The Commission treats Rytr's 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. But that is true 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 someone might put them to unlawful use.

This theory is incorrect. Section 5 does not categorically prohibit a product or service merely because someone might use it to deceive someone else. Interpreting Section 5 to prohibit products and services with conceivable illegal uses would prohibit an infinite variety of innocent and productive conduct. Congress cannot have intended to capture such conduct in the phrase "deceptive acts and practices."

Not only is the Commission's theory a departure from Section 5 precedents, but it is also inconsistent with how other areas of the law deal with the same issue. In *Sony Corp. of America v. Universal City Studios, Inc.*, for example, the Supreme Court considered whether a product capable of facilitating *en masse* copyright infringement—Betamax video recorders capable both of lawfully playing Betamax tapes and of unlawfully recording copyrighted television broadcasts—violated the copyright laws.[35] The Court concluded that so long as a product is "merely … capable

[33] See, *e.g.*, *Chas. A Brewer & Sons*, 158 F.2d at 77 (describing "furnishing the means of consummating a fraud" as "aiding and abetting" another's "unfair or deceptive acts or practices"); *Gay Games, Inc. v. FTC*, 204 F.2d 197, 199 (10th Cir. 1953) (similar); *Consol. Mfg. Co. v. FTC*, 199 F.2d 417, 418 (4th Cir. 1952) (per curiam) (similar); see also *Deer v. FTC*, 152 F.2d 65, 66 (2d Cir. 1945) ("[I]t was not necessary to prove that the petitioners actually participated in the operation of the bingo game or the club plan conducted by their customers; it is enough that they aided and abetted in such" games by furnishing the paraphernalia for the game.).
[34] *Federal Trade Commission Reauthorization: Hearing Before the S. Comm. on Com., Sci., and Transp.*, S. Hrg. 110-1148, p. 21 n.56 (2008) (Prepared Statement of the Federal Trade Commission).
[35] 464 U.S. 417, 419–20, 421–23 (1984).

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]

2

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. But the Commission does not allege a single example of a Rytr-generated review being used to deceive consumers in violation of Section 5, nor am I aware of any.

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[36] *Id.* at 442.
[37] See, e.g., *Dawson Chem. Co. v. Rohm & Hass Co.*, 448 U.S. 176, 198 (1980) (holding that the patent laws do not forbid the sale of "unpatented articles that were essential to … patented inventions" unless those unpatented articles "were unsuited for any commercial noninfringing use"); *Henry v. A.B. Dick Co.*, 224 U.S. 1, 48 (1912) ("[A] sale of an article which though adapted to an infringing use is also adapted to other and lawful uses, is not enough to make the seller a contributory infringer. Such a rule would block the wheels of commerce.")
[38] See supra n. 29–34 and accompanying text.
[39] U.S. Department of Justice, Criminal Resource Manual, § 2474. Elements of Aiding and Abetting (synthesizing federal appellate precedent).
[40] Restatement (Second) of Torts § 876(b) (1979) (emphasis added).
[41] Complaint ¶ 14.
[42] See supra n. 24–25 and accompanying text (discussing courts of appeals precedents sustaining Commission orders prohibiting the sale of push cards and punch boards).
[43] *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) ("Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice" for a complaint to survive a motion to dismiss.).

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.

I do not doubt that some people use generative AI tools to accomplish fraud. Almost every technology since the first time a human being sharpened a stick can be put to some illegal use. But that does not mean that those tools are the means and instrumentalities to deceive consumers. Section 5 does not prohibit the sale of any product that someone *could* use to violate Section 5.

C

The question, then, is whether the Commission may ever treat a product or service with lawful and unlawful potential uses as the means and instrumentalities to violate Section 5. The law is clear that it may, but only if the provider of the product or service knows, or has reason to know, that the person to whom the product or service was supplied will use it to violate Section 5. A knowledge requirement avoids treating innocent and productive conduct as illegal merely because of the subsequent acts of independent third parties.

Courts have required knowledge in similar means-and-instrumentalities cases for decades. In *Waltham Watch Co. v. FTC*, for example, a clockmaker granted a license to use the clockmaker's famous trademark in the sale of clocks.[46] The licensee then used the trademark to deceive consumers and other dealers into believing that clocks had been manufactured by the clockmaker.[47] The clockmaker was liable for the deception, the court of appeals reasoned, because the clockmaker in fact knew that the licensee was using the license to commit fraud and took no action to prevent it.[48] That knowledge transformed an otherwise neutral license agreement into the "means and instrumentalities by which many people had been hoodwinked, defrauded, and misled."[49] Similarly, in one of the Commission's most important statements of the scope of means-and-instrumentalities liability, we explained that "[i]t is well settled law" under the means-and-

[44] See Blaise Pascal, *Letter XVI*, Lettres Provinciales (1657) ("I would have written a shorter letter, but I did not have the time.").
[45] Complaint ¶ 6; see also *id.* ¶ 8 ("Respondent's service generates reviews that would almost certainly be false for the users who copy the generated content and publish it online.").
[46] 318 F.2d 28, 30 (7th Cir. 1963).
[47] *Ibid.*
[48] *Ibid.*
[49] *Ibid.*

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 possibly be deceived as a result."[50]

The Commission recently acknowledged that Section 5 requires proof of knowledge before treating products and services with lawful and unlawful potential uses as the means and instrumentalities to violate Section 5. Earlier this year, the Commission promulgated the Trade Regulation Rule on Impersonation of Government and Businesses (Impersonation Rule).[51] The rule treats the impersonation of a government official or business as an unfair or deceptive act or practice.[52] Our Notice of Proposed Rulemaking (NPRM) for the Impersonation Rule proposed treating the provision of "the means and instrumentalities for" impersonation as a Section 5 violation.[53] But we received a host of comments warning that imposing means-and-instrumentalities liability without a scienter requirement would "impos[e] strict liability on unwitting third-party providers of services or products."[54] We therefore removed the mean-and-instrumentalities provision from the Impersonation Rule and issued a supplemental NPRM on the same topic.[55] The supplemental NPRM proposes treating the provision of "goods or services" as a Section 5 violation only if "a party knew or had reason to know that the goods or services they provided will be used for the purpose of impersonations.[56]

Section 5 also requires proof of knowledge of third-party behavior in other, similar contexts. For example, a defendant is liable for the deceptive acts of its third-party affiliates only if the defendant has actual knowledge of the affiliates' ongoing deception and "either directly participates in that deception, or has the authority to control" it and "allows the deception to proceed."[57] And Section 5 imposes liability on an individual officer for the violations of a corporate entity only if "the individual had 'some knowledge of the practices' and … either 'participated directly in the practice or acts or had the authority to control them.'"[58] These knowledge requirements implement a common sense principle: Section 5 does not hold people liable for innocent conduct that may have unwittingly facilitated someone else's violation.

Other areas of the law abide by the same common-sense principle. In *Metro-Goldwyn-Mayer Studios Inc. v. Grokster*, for example, the Supreme Court again confronted the question of whether a product with both infringing and noninfringing uses violated the copyright laws.[59] In that case, the product was peer-to-peer file sharing software that was commonly used to share

[50] *Shell Oil*, 128 F.T.C. at 764.
[51] 89 Fed. Reg. 15017 (Mar. 1, 2024) (to be codified at 16 C.F.R. pt. 461).
[52] 16 C.F.R. §§ 461.2, 461.3.
[53] 87 Fed. Reg. 62741, 62751 (Oct. 17, 2022).
[54] 89 Fed. Reg. at 15022.
[55] 89 Fed. Reg. at 15023.
[56] SNPRM, 89 Fed. Reg. 15072, 15077 (Mar. 1, 2024); see also *id.* at 15083 (text of proposed rule).
[57] *FTC v. LeadClick Media, LLC*, 838 F.3d 158, 170 (2d Cir. 2016).
[58] *FTC v. On Point Capital Partners LLC*, 17 F.4th 1066, 1083 (11th Cir. 2021) (quoting *FTC v. Gem Merch. Corp.*, 87 F.3d 466, 470 (11th Cir. 1996)); *FTC v. Moses*, 913 F.3d 297, 306–07 (2d Cir. 2019); *FTC v. Com. Planet, Inc.*, 815 F.3d 593, 600 (9th Cir. 2016) (similar); *FTC v. Freecom Commc'ns, Inc.*, 401 F.3d 1192, 1203–04 (10th Cir. 2005) (similar); *FTC v. Amy Travel Serv., Inc.*, 875 F.2d 564, 573 (7th Cir. 1989) (similar).
[59] 545 U.S. 913 (2005).

copyrighted music and films without authorization.[60] Although the copyright laws do not prohibit a product "capable of commercially significant noninfringing uses" even if it were also capable of substantial infringement,[61] the makers of the peer-to-peer filesharing software distributed their product with the intention of promoting infringement.[62] Imposing copyright liability on a party who distributed a product with the intention of facilitating infringement was consistent with "principles recognized in every part of the law."[63]

The point here is not to identify exhaustively the circumstances in which the provision of a product or service with lawful and unlawful potential uses may violate Section 5. I instead argue only that, at the very least, precedent and common-sense "principles recognized in every part of the law" require that the government must show that a defendant knew that he was participating in someone else's unfair or deceptive act or practice when he provided that product or service.

III

I dissent from the filing of this complaint for an additional reason. We may file an administrative action alleging a Section 5 violation only if such an action "would be to the interest of the public."[64] I do not believe this action is in the public interest for two reasons.

First, the Commission's aggressive move into AI regulation is premature. AI is the subject of heated rhetoric. Doomsayers warn that AI will take our jobs, hopelessly blur the distinction between fact and fiction, and maybe even threaten the survival of human civilization. AI companies do not forcefully resist all these claims, given that predictions about the incredible potential for AI may be useful as these companies compete for investment dollars and engineering talent. But the Commission should not succumb to the panic or hype. Generative AI technology is impressive, but it is also nascent. Neither its naysayers nor its cheerleaders really understand its potential, or whether it represents substantial progress toward "artificial general intelligence" (AGI)—machine intelligence matching both the breadth and power of the human mind, the holy grail of AI research.[65] That ignorance is not a reason to plunge headlong with aggressive regulation. It is a reason to stay our hand.

As our country has always done, we should give this industry the space to realize its full potential—whatever that turns out to be. America is the greatest commercial power in the history of the world in no small part because of its tolerant attitude toward innovation and new industry. There has never been a better place in the world to have a new idea than the United States. We should go to great lengths to ensure that remains the case.

When people use generative AI technology to lie, cheat, and steal, the law should punish them no differently than if they use quill and parchment.[66] But Congress has not given us the

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[60] *Id.* at 919–20.
[61] *Id.* at 931–32.
[62] *Id.* at 934–35.
[63] *Id.* at 935 (quoting *Kalem Co. v. Harper Bros.*, 222 U.S. 55, 63 (1911)).
[64] 15 U.S.C. § 45(b).
[65] Concurring and Dissenting Statement of Commissioner Andrew N. Ferguson, A Look Behind the Screens: Examining the Data Practices of Social Media and Video Streaming Services, at 11 n.44 (Sept. 19, 2024).
[66] *Id.* at 10–11.

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 to proscribe Microsoft Word merely because someone may use it to create a fake review, or Adobe Photoshop merely because someone used it to create a false celebrity endorsement. The danger this theory poses to free speech is obvious. Yet because the technology in question is new and unfamiliar, I fear we are giving short shrift to common sense and to fundamental constitutional values.

I respectfully dissent.

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[67] I support, for example, the complaint and settlement that we announce today against DoNotPay for deceiving consumers about the capabilities of its generative AI service. Concurring Statement of Commissioner Andrew N. Ferguson, In the Matter of DoNotPay, Inc. (Sept. 25, 2024).

[68] See, *e.g.*, *Buckley v. Valeo*, 424 U.S. 1, 16, 19–20 & n.18, 44–45 (1976) (per curiam) (striking down federal limitations on political expenditures on the ground that such expenditures are a necessary ingredient to the sort of mass political communication protected by the Speech Clause); *McConnell v. FEC*, 540 U.S. 93, 251 (2003) (Scalia, J., concurring in part, concurring in the judgment in part, and dissenting in part) ("To a government bent on suppressing speech, this mode of organization presents opportunities: Control any cog in the machine, and you can halt the whole apparatus."). See also *Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575, 591–93 (1983) (striking down a tax on paper and ink as an unconstitutional restriction of the freedom of speech and of the press); *Grosjean v. Am. Press Co.*, 297 U.S. 233, 250–51 (1936) (striking down statute taxing the sale of advertisements in publications with a weekly circulation greater than 20,000 copies).