



Office of Commissioner
Melissa Holyoak

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

Dissenting Statement of Commissioner Melissa Holyoak

Joined by Commissioner Andrew N. Ferguson

In re Rytr, LLC; Matter No. 2323052

Sept. 25, 2024

As I have suggested recently in other contexts, the Commission should steer clear of using settlements to advance claims or obtain orders that a court is highly unlikely to credit or grant in litigation.¹ Outside that crucible, the Commission may more readily advance questionable or misguided theories or cases.² Nevertheless, private parties track such settlements and, fearing future enforcement, may alter how they act due to a complaint’s statement of the alleged facts, its articulation of the law, or how a settlement order constrains a defendant’s conduct.³ In all industries, but especially evolving ones like artificial intelligence (AI), misguided enforcement can harm consumers by stifling innovation and competition. I fear that will happen after today’s case, which is another effort by the Majority to misapply the Commission’s unfairness authority under Section 5 beyond what the text authorizes. Relatedly, I believe the scope of today’s settlement is unwarranted based on the facts of this case. I respectfully dissent.

Some background first. Rytr provides AI products that generate draft written content for 43 “use cases,” which are tailored written outputs intended for specific purposes, like “Email,” “Product Description,” “Blogs,” “Articles,” or “Story Plot,” among others.⁴ Users can review and manually copy, paste, and modify the draft content Rytr’s products generate.⁵ Rytr gives all users access to outputs from all 43 types of use cases, but certain paying subscribers can generate

¹ See, e.g., Dissenting and Concurring Statement of Commissioner Melissa Holyoak, *In re Coulter Motor Company, LLC*, FTC No. 2223033, at 3 n.17 (Aug. 15, 2024) (“It is no coincidence that the Commission has asserted its novel ‘unfair discrimination’ authority only outside the scrutiny of courts and in the context of consent orders.”), https://www.ftc.gov/system/files/ftc_gov/pdf/commissioner-holyoak-statement-re-coulter-8-15-24.pdf; see also Statement of Commissioner Melissa Holyoak, *In re Asbury Automotive Group – McDavid Group*; Matter No. 2223135, at 1 n.1 (Aug. 16, 2024), https://www.ftc.gov/system/files/ftc_gov/pdf/commissioner-holyoak-statement-re-asbury8-16-24.pdf.

² See Dissenting Statement of Commissioner William E. Kovacic, *In re Negotiated Data Solutions, LLC*, File No. 051-0094, at 3 (Jan. 23, 2008) (“The prospect of a settlement can lead one to relax the analytical standards that ordinarily would discipline the decision to prosecute if the litigation of asserted claims was certain or likely.”), <https://www.ftc.gov/sites/default/files/documents/cases/2008/01/080122kovacic.pdf>.

³ Cf. Concurring and Dissenting Statement of Commissioner Melissa Holyoak, *Social Media and Video Streaming Services Staff Report*, Matter No. P205402, at 4 (Sept. 19, 2024), https://www.ftc.gov/system/files/ftc_gov/pdf/commissioner-holyoak-statement-social-media-6b.pdf.

⁴ Compl. ¶¶ 2, 4.

⁵ See *id.* ¶4. The complaint does not allege that Rytr tracks or knows whether or how user-directed draft content is ultimately used.

unlimited output from all of them.⁶ As alleged in the complaint, the “Testimonial & Review” feature, which Rytr has stopped offering,⁷ generated draft consumer reviews based on a user’s inputs. Subscribers would provide descriptive keywords, phrases, or titles, as well as choose the output’s “desired tone” and level of “creativity,” and which of dozens of languages to draft in.⁸ Subscribers could opt to receive up to three “variant” drafts at a time for comparison.⁹ The complaint assumes users mechanically posted consumer reviews from Rytr’s drafts without reviewing or modifying them for accuracy. In other words, the complaint effectively treats *draft* outputs as *final* reviews—reviews that users posted without scrutiny.¹⁰ The complaint suggests Rytr did not monitor, or provide feedback on, the content of automated drafts. The complaint quotes several draft reviews and describes others. Finally, the complaint alleges that 24 subscribers each generated over 10,000 draft reviews; 114 subscribers each generated over 1,000 draft reviews; and 630 subscribers each generated over 100 draft reviews.¹¹

Critically, the complaint does not allege that users actually posted any draft reviews.¹² Since the Commission has no evidence that a single draft review was posted, the complaint centers on alleging speculative harms that may have come from subscribers with access to unlimited output from across Rytr’s use cases, which included draft reviews.¹³ And the complaint asserts the review tool in particular had “no or *de minimis* reasonable, legitimate use,” and concludes that a function enabling unlimited reviews with limited user input, which could generate “detailed and genuine-sounding reviews,” was likely to “only . . . facilitate subscribers posting fake reviews . . . to deceive consumers.”¹⁴

Under the FTC Act, an act or practice is unfair if it “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 In relevant part, the complaint alleges that “[Rytr] offered a service intended to quickly generate unlimited content for consumer reviews”; that it “created false and deceptive written content for consumer reviews”; and that any injury from Rytr’s practices was “not outweighed by countervailing benefits to consumers or competition.”¹⁶

⁶ See *id.* ¶¶ 2, 5.

⁷ See *Use Cases*, Rytr, available at <https://rytr.me/use-cases/> (last visited Sept. 24, 2024).

⁸ Compl. ¶ 6; see also *Languages*, Rytr (“Rytr supports 30+ languages”), available at <https://help.rytr.me/knowledge-base/languages> (last visited Sept. 24, 2024).

⁹ See *id.* ¶ 6.

¹⁰ The complaint’s treatment of Rytr’s product seems implausible given Rytr’s product design. If Rytr’s intent was that drafts be posted blindly, why would Rytr have given users up to three “variant” drafts to consider and compare? See *id.*

¹¹ See *id.* ¶ 13. The complaint does not allege whether there were users that paid for Rytr’s “unlimited” draft outputs across all Rytr’s use cases but who generated comparatively fewer draft reviews than the volumes the complaint specifies. For example, it is unclear whether certain users with access to unlimited outputs generated high volumes of draft emails or blog posts, and also drafted some reviews.

¹² In general, the complaint also does not address exactly how much time passed as users generated drafts. *Id.* For example, for the 630 subscribers generating over 100 draft reviews, it is unclear whether those reviews were spaced out over months or years.

¹³ *Id.* ¶¶ 2, 5.

¹⁴ *Id.* ¶ 14.

¹⁵ 15 U.S.C. § 45(n).

¹⁶ Compl. ¶ 17.

As a threshold matter, I am skeptical there is a likelihood of substantial injury in this case, based on the facts pled, from Rytr’s offering unlimited drafts as part of a suite of over forty generative AI offerings. For one thing, there is no concrete allegation that any of the draft *content* generated in response to users’ prompts was itself false or inaccurate.¹⁷ And even if there were a question about the drafts generated by Rytr, the complaint makes no allegation that *any* drafts were ever posted online. To satisfy the substantial injury prong of unfairness therefore, the complaint assumes, but does not allege facts showing, that all users mechanically posted drafts without modifying them to refine potential inaccuracies regarding the underlying product and the user’s experience with the product. If there were in fact a likelihood of substantial injury, presumably the complaint could allege at least one example where particular content Rytr generated was untruthful and was actually posted to reach consumers. Yet it does not. Unfairness requires proof—not speculation—of harm.¹⁸

Most significantly, though, by banning Rytr’s user review service the complaint fails to weigh the countervailing benefits Rytr’s service offers to consumers or competition. To start with the obvious, and as the complaint itself describes, Rytr’s tool generated “reviews quickly and with little user effort.”¹⁹ It is generally a feature, not a bug, when a new tool helps users save time and achieve their goals with less work. Generative AI is no exception. In fact, much of the promise of AI stems from its remarkable ability to provide such benefits to consumers using AI tools. And as today’s complaint accurately acknowledges, consumers rely on reviews to make decisions in the marketplace.²⁰ If Rytr’s tool helped users draft reviews about their experiences that they would not have posted without the benefit of a drafting aid, consumers seeing their reviews benefitted, too. There would be similar benefit to competition.²¹

The complaint fails to account for other potential benefits that are less obvious. When it comes to AI, it is arguably a feature of the service that draft reviews may not fit the user’s experience in their *draft* form. As with any draft document, what’s not included in a final version can still create value if the initial draft prompts a new line of thought. For example, perhaps someone reviewing dog shampoo might not have thought to mention a shampoo’s effect on shedding absent the prompt of an AI-generated initial draft.²² But on reading that draft, perhaps the consumer recalls their pet’s shedding has actually *increased*, and they modify their review accordingly—helping to flesh out their review and better inform interested readers of downsides of the product. Part of generative AI’s promise is its ability to suggest new lines of thought that may never have occurred to a user in the first place. But recognizing such benefits here requires treating Rytr’s product accurately—as a *drafting* aid. The complaint also fails to grapple with how

¹⁷ Instead, the complaint alleges that drafts were “detailed” and contain “specific, often material details that have no relation to a user’s input,” making it almost certain the drafts would “be false for the users who copy the generated content and publish it online.” *Id.* ¶ 8. The complaint also provides several examples of users that generated high volumes of drafts, including (apparently) a business, that seem likely to have been fake if used. *Id.* ¶ 13. But again, the complaint alleges no facts showing *any* such draft—let alone an unmodified draft—ever reached consumers.

¹⁸ *Cf. In re International Harvester Co.*, 104 F.T.C. 949, 1070, 1073 (1984) (unfairness statement) (“First of all, the injury must be substantial. The Commission is not concerned with . . . merely speculative harms.”).

¹⁹ Compl. ¶ 7.

²⁰ *Id.* ¶ 14 (explaining “[c]onsumers rely on reviews for fair and accurate information about products and services”).

²¹ It is undoubtedly true that “[h]onest competitors who do not post fake reviews can lose sales to businesses that do” *Id.* But honest competitors, whose customers may have used this tool to post reviews they might not have otherwise, would also benefit from the additional reviews Rytr may have enabled.

²² *Id.* ¶ 10.

Rytr offered unlimited outputs *across a suite of over 40 products*. Given generative AI’s manifold applications, there may be significant benefit to consumers and competition when a company bundles its offerings and their features so that users do not bump up against word restrictions or character counts.²³ The complaint today does not account for or attempt to weigh such benefits. Instead, it baldly alleges there are “no legitimate benefits” from Rytr’s service.²⁴ That is mistaken based on the facts pled, and a misapplication of our unfairness authority.

Such observations about countervailing benefits lead to my concern with the scope of today’s order. Even if the Commission adequately pled a law violation here, the Commission’s order goes too far in its ban on Rytr’s providing *any* review or testimonial service. The complaint alleges that Rytr’s service was potentially misused by users to create misleading reviews—not that the neutral service itself is a source of harm. Banning products that have useful features but have the potential to be misused is not consistent with the Commission’s unfairness authority. Nor is it consistent with a legal environment that promotes innovation. AI is a developing industry. It has vast potential. We should take care not to squelch it by suggesting that merely providing *draft* content that *could* be used unlawfully is wrong.

Finally, I also share Commissioner Ferguson’s views regarding the complaint’s “means and instrumentalities” claim.²⁵ I write separately to emphasize my concerns for imposing primary liability under a means and instrumentalities claim, where there is no allegation that *Rytr itself* made misrepresentations. The “critical element” for primary liability “is the existence of a representation, either by statement or omission, *made by the defendant . . .*”²⁶ The complaint does not allege facts showing that the draft outputs were misrepresentations, much less that such draft outputs were *Rytr’s* misrepresentations.²⁷ Indeed, as the complaint alleges, a review can also be deceptive if the user represents they experienced the product when they never did.²⁸ But such “false” reviews would also not be misrepresentations made by *Rytr*.

In addition, the means and instrumentalities claim cannot be sustained on the theory that Rytr’s AI service was somehow inherently unfair or deceptive.²⁹ Treating Rytr’s neutral drafting

²³ Even if a subscriber only chose to use the drafting tool for reviews, there is no allegation that subscribers could buy access *only* to unlimited drafting for reviews—undercutting the complaint’s suggestion that Rytr “intended” this particular offering, on its own, “to quickly generate unlimited content for consumer reviews.” *See id.* ¶ 17.

²⁴ *Id.* ¶ 14.

²⁵ Dissenting Statement of Commissioner Andrew N. Ferguson, Joined by Commissioner Melissa Holyoak, *In the Matter of Rytr LLC*, Matter No. 2323052 (Sept. 25, 2024).

²⁶ *Cf. Anixter v. Home-Stake Production Co.*, 77 F.3d 1215, 1225 (10th Cir. 1996) (emphasis added); *see also In re Shell Oil Co.*, 128 F.T.C. 749, 764 (1999) (majority statement) (“It is well settled law that the originator 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.”) (citing *Regina Corp. v. FTC*, 322 F.2d 765 768 (3d Cir. 1963) (affirming liability under means and instrumentalities theory where defendant distributed its own misrepresentative price lists that were used, in turn, to deceive consumers)); *id.* at 766 (Commissioner Swindle, dissenting) (“Means and instrumentalities is a form of primary liability, and a respondent is primarily liable only for *its own* misrepresentations to consumers.”).

²⁷ Users, not Rytr, chose any given review’s tone (e.g., “critical” or “cautionary” or “convincing,” etc.). Compl. ¶ 6. Users, not Rytr, decided whether or not the draft review of a particular product would be favorable or not. *Id.* And users, not Rytr, decided whether to revise, or ultimately post, any given draft. *See id.*

²⁸ *See id.* ¶ 8.

²⁹ *Peerless Prods., Inc. v. FTC*, 284 F.2d 825, 826 (7th Cir. 1960) (affirming Commission’s findings that petitioners’ punchboard products were an unlawful “means of and instrumentalities for engaging in unfair acts” where the punchboards were “designed and used primarily for the distribution of merchandise by lottery”).

tool as inherently unfair or deceptive will have deleterious consequences for AI products generally. Today's complaint 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.

We must protect consumers through robust enforcement. Indeed, the Commission is at its best when it does so. But we must also think carefully about the potential harms to consumers and innovation that attend misguided enforcement.³⁰ Today's misguided complaint and its erroneous application of Section 5 will likely undermine innovation in the AI space. I therefore respectfully dissent.

³⁰ Cf. Concurring and Dissenting Statement of Commissioner Melissa Holyoak, *Social Media and Video Streaming Services Staff Report*, *supra* note 3, at 18-19.