



Office of Commissioner
Andrew N. Ferguson

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

**Concurring Statement of Commissioner Andrew N. Ferguson
In the Matter of IntelliVision Technologies Corp.
Matter Number 2323023**

December 3, 2024

Today, the Commission approves a complaint and settlement against IntelliVision, a developer of facial recognition software.¹ Count I charges IntelliVision with misrepresenting the efficacy of its software. IntelliVision claimed that its software had one of the highest accuracy rates in the world, but in reality it was not even among the top hundred best performing algorithms tested by the National Institute of Standards and Technology.² Count I further accuses IntelliVision of claiming that its software was trained on “millions” of faces, when the software was in fact trained on only 100,000 faces.³ Count III accuses IntelliVision of claiming that its software could not be fooled by photo or video images even though it had insufficient evidence to support that categorical claim.⁴ I support these counts without reservation.

I write briefly to explain why I also support Count II, which accuses IntelliVision of misrepresenting that its software performs with “zero gender or racial bias” when in fact its software exhibits substantially different false-negative and false-positive rates across sex and racial lines.⁵ Treating IntelliVision as having committed a deceptive act or practice in these circumstances could lead one to believe that the Commission is taking the position that to be “unbiased,” a software system must produce equal false-negative and false-positive rates across race and sex groups.

I do not read the complaint that way, and I today do not vote to fix the meaning of “bias.” Statistical disparity in false-positive and false-negative rates is not necessarily the only or best definition of what it means for an automated system to be “biased.” The question is open to philosophical and political dispute. Other definitions might consider the discriminatory intentions of the developers, the developers’ diligence in avoiding artificial disparities while training the automated system, or whether any statistical disparities reflect the underlying realities the system is designed to reflect or epistemological limitations in that underlying reality that are impossible or uneconomical to overcome. This complaint does not choose from among these competing definitions and considerations.

But IntelliVision used the word “bias.” If it intended to invoke a specific definition of “bias,” it needed to say so. But it did not say so; it instead left the resolution of this ambiguity up

¹ Complaint, *In re IntelliVision Technologies Corp.*

² *Id.* ¶ 11.

³ *Id.* ¶ 14.

⁴ *Id.* ¶ 13.

⁵ *Id.* ¶ 11.

to consumers. IntelliVision must therefore bear the burden of substantiating all reasonable interpretations that consumers may have given its claim that its software had “zero gender or racial bias.”⁶ A reasonable consumer could interpret “zero gender or racial bias” in this context to mean equal rates of false positives and false negatives across those lines. I therefore have reason to believe that IntelliVision’s claims were false or unsubstantiated because its software did not have equal false-positive and false-negative rates across those lines.

Pursuant to that understanding, I concur in the filing of the complaint and settlement.

⁶ FTC Policy Statement on Deception, 103 F.T.C. 174, 178 (1984) (“When a seller’s representation conveys more than one meaning to reasonable consumers, one of which is false, the seller is liable for the misleading interpretation”); FTC Policy Statement Regarding Advertising Substantiation, 104 F.T.C. 839, 840 (1984) (“Although firms are unlikely to possess substantiation for implied claims they do not believe the ad makes, they should generally be aware of reasonable interpretations and will be expected to have prior substantiation for such claims. The Commission will take care to assure that it only challenges reasonable interpretations of advertising claims.”).