

UNITED STATES COPYRIGHT OFFICE

Artificial Intelligence and Copyright

Docket No. 2023-6

COMMENT OF
THE UNITED STATES FEDERAL TRADE COMMISSION

October 30, 2023

October 30, 2023

I. Introduction

The United States Federal Trade Commission (FTC) commends the Copyright Office's ongoing efforts to examine the copyright law and policy issues raised by artificial intelligence (AI) technology, including the scope of copyright in works generated using AI tools and the use of copyrighted materials in AI training. The FTC submits this comment to: (1) explain its interest and expertise in promoting fair competition and protecting Americans from unfair or deceptive practices in an economy in which AI is being rapidly deployed; (2) identify several issues raised by generative AI that implicate competition and consumer protection policy, as well as copyright policy; and (3) augment the record in this proceeding with a brief summary and full transcript of an October 4, 2023 FTC roundtable at which creative professionals described the effects of generative AI on their work.

II. The FTC's Interest in AI

The FTC is an independent federal agency charged with promoting competition and protecting consumers. Our authority derives primarily from the FTC Act, which prohibits unfair or deceptive acts or practices, as well as unfair methods of competition, as well as a host of other related statutes. The FTC's economy-wide mission has, over its century long history, adapted to the development and deployment of new technologies, many of which pose novel and important challenges to the consumers, workers, and honest businesses who depend on our markets being free and fair. AI is the latest of such challenges.

AI-enabled systems are being deployed across a wide range of industries—including entertainment, healthcare, finance, advertising, and transportation. Although policymakers have debated the disruptive potential of AI for decades, the pace of the technology's development and rollout has accelerated in recent years, and many generative AI tools have been made available to companies and to the public. For example, some of the largest companies in the world have used machine learning to process user inputs, identify fraud, and target advertising, while AI chatbots and other applications have publicly launched and reached hundreds of millions of people. As AI increasingly becomes a larger part of daily life, the technology could transform the way we live, work, and interact.

The manner in which companies are developing and releasing generative AI tools and other AI products, however, raises concerns about potential harm to consumers, workers, and small businesses.¹ The FTC has been exploring the risks associated with AI use, including

¹ See, e.g., Lina M. Khan, *We Must Regulate A.I. Here's How*, N.Y. Times (May 6, 2023), <https://www.nytimes.com/2023/05/03/opinion/ai-lina-khan-ftc-technology.html>; Fed. Trade Comm'n, *Combatting Online Harms Through Innovation*, Rep. to Cong. at 9-37, 56, (June 16, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/Combatting%20Online%20Harms%20Through%20Innovation%3B%20Federal%20Trade%20Commission%20Report%20to%20Congress.pdf.

October 30, 2023

violations of consumers' privacy,² automation of discrimination and bias,³ and turbocharging of deceptive practices,⁴ imposter schemes,⁵ and other types of scams.⁶

From an enforcement perspective, the FTC has been using its existing legal authorities to take action against illegal practices involving AI. For instance, the FTC alleged that Amazon and Ring used highly private data—voice recordings collected by Amazon's Alexa voice assistant and videos collected by Ring's internet-connected home security cameras—to train their algorithms while violating customers' privacy.⁷ The Alexa matter, in particular, underscored that the Children's Online Privacy Protection Act Rule's prohibition on the indefinite retention of children's data and similar legal rules are not superseded by claims from businesses that data must be indefinitely retained to improve machine learning algorithms.⁸ In recent months, the

² See Elisa Jillson, *Hey, Alexa! What are you doing with my data?*, Fed. Trade Comm'n (June 13, 2023), <https://www.ftc.gov/business-guidance/blog/2023/06/hey-alexa-what-are-you-doing-my-data>.

³ See Elisa Jillson, *Aiming for truth, fairness, and equity in your company's use of AI*, Fed. Trade Comm'n, (Apr. 19, 2021), <https://www.ftc.gov/business-guidance/blog/2021/04/aiming-truth-fairness-equity-your-companys-use-ai>; see also Rohit Chopra, Dir., Consumer Financial Protection Bureau, et al., *Joint Statement on Enforcement Efforts Against Discrimination and Bias in Automated Systems* (Apr. 25, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/EEOC-CRT-FTC-CFPB-AI-Joint-Statement%28final%29.pdf.

⁴ See Michael Atleson, *Keep your AI claims in check*, Fed. Trade Comm'n (Feb. 27, 2023), <https://www.ftc.gov/business-guidance/blog/2023/02/keep-your-ai-claims-check>; Michael Atleson, *The Luring Test: AI and the engineering of consumer trust*, Fed. Trade Comm'n (May 1, 2023), <https://www.ftc.gov/business-guidance/blog/2023/05/luring-test-ai-engineering-consumer-trust>; Michael Atleson, *Watching the detectives: Suspicious marketing claims for tools that spot AI-generated content*, Fed. Trade Comm'n (July 6, 2023), <https://www.ftc.gov/business-guidance/blog/2023/07/watching-detectives-suspicious-marketing-claims-tools-spot-ai-generated-content>; Michael Atleson, *Can't lose what you never had: Claims about digital ownership and creation in the age of generative AI*, Fed. Trade Comm'n (Aug. 16, 2023), <https://www.ftc.gov/business-guidance/blog/2023/08/cant-lose-what-you-never-had-claims-about-digital-ownership-creation-age-generative-ai>; Lesley Fair, *For business opportunity sellers, FTC says "AI" stands for "allegedly inaccurate,"* Fed. Trade Comm'n (Aug. 22, 2023), <https://www.ftc.gov/business-guidance/blog/2023/08/business-opportunity-sellers-ftc-says-ai-stands-allegedly-inaccurate>.

⁵ In 2020, long before the public release of large language models, the FTC held a workshop highlighting the risks of voice cloning technology that could supercharge imposter schemes. See Fed. Trade Comm'n, *You Don't Say: An FTC Workshop on Voice Cloning Technologies* (Jan. 28, 2020), <https://www.ftc.gov/news-events/events/2020/01/you-dont-say-ftc-workshop-voice-cloning-technologies>. Since then, the FTC has proposed a trade regulation rule entitled "Rule on Impersonation of Government and Businesses," which would prohibit the impersonation of government, businesses, or their officials, including by the use of generative AI. See 87 Fed. Reg. 62741 (Oct. 17, 2022).

⁶ See Michael Atleson, *Chatbots, deepfakes, and voice clones: AI deception for sale*, Fed. Trade Comm'n (Mar. 20, 2023), <https://www.ftc.gov/business-guidance/blog/2023/03/chatbots-deepfakes-voice-clones-ai-deception-sale>.

⁷ Press Release, Fed. Trade Comm'n, *FTC and DOJ Charge Amazon with Violating Children's Privacy Law by Keeping Kids' Alexa Voice Recordings Forever and Undermining Parents' Deletion Requests* (May 31, 2023), <https://www.ftc.gov/news-events/news/press-releases/2023/05/ftc-doj-charge-amazon-violating-childrens-privacy-law-keeping-kids-alexa-voice-recordings-forever>; Press Release, Fed. Trade Comm'n, *FTC Says Ring Employees Illegally Surveilled Customers, Failed to Stop Hackers from Taking Control of Users' Cameras* (May 31, 2023), <https://www.ftc.gov/news-events/news/press-releases/2023/05/ftc-says-ring-employees-illegally-surveilled-customers-failed-stop-hackers-taking-control-users>.

⁸ See Statement of Commissioner Alvaro M. Bedoya, Joined by Chair Lina M. Khan and Commissioner Rebecca Kelly Slaughter, In the Matter of Amazon Alexa (*United States v. Amazon.com, Inc.*), at 1 (May 31, 2023),

October 30, 2023

FTC secured a temporary restraining order against a business-opportunity seller that claimed to use AI to make clients profitable and successful.⁹ The FTC has also made clear that a business that relies on algorithmic decision-making must ensure that the algorithm is not resulting in unlawful bias.¹⁰ Furthermore, the FTC charged WealthPress with using deceptive claims to sell consumers investment-advising services—often claiming that the services’ recommendations were based on an algorithm created by a purported expert.¹¹

The rapid development and deployment of AI also poses potential risks to competition. The rising importance of AI to the economy may further lock in the market dominance of large incumbent technology firms.¹² These powerful, vertically integrated incumbents control many of the inputs necessary for the effective development and deployment of AI tools, including cloud-based or local computing power¹³ and access to large stores of training data. These dominant technology companies may have the incentive to use their control over these inputs to unlawfully entrench their market positions in AI and related markets, including digital content markets. In addition, AI tools can be used to facilitate collusive behavior that unfairly inflates prices, precisely target price discrimination, or otherwise manipulate outputs.¹⁴ The FTC is empowered under Section 5 of the FTC Act to protect the public against unfair methods of competition, including when powerful firms unfairly use AI technologies in a manner that tends to harm competitive conditions.¹⁵ Enforcers must be vigilant to protect the public from the potential

https://www.ftc.gov/system/files/ftc_gov/pdf/Bedoya-Statement-on-Alexa-Joined-by-LK-and-RKS-Final-1233pm.pdf.

⁹ Press Release, Fed. Trade Comm’n, *FTC Action Stops Business Opportunity Scheme That Promised Its AI-Boosted Tools Would Power High Earnings Through Online Stores* (Aug. 22, 2023), <https://www.ftc.gov/news-events/news/press-releases/2023/08/ftc-action-stops-business-opportunity-scheme-promised-its-ai-boosted-tools-would-power-high-earnings>.

¹⁰ Press Release, Fed. Trade Comm’n, *FTC Chair Khan and Officials from DOJ, CFPB and EEOC Release Joint Statement on AI* (Apr. 25, 2023), <https://www.ftc.gov/news-events/news/press-releases/2023/04/ftc-chair-khan-officials-doj-cfpb-eec-release-joint-statement-ai>.

¹¹ Press Release, Fed. Trade Comm’n, *FTC Suit Requires Investment Advice Company WealthPress to Pay \$1.7 Million for Deceiving Consumers* (Jan. 13, 2023), <https://www.ftc.gov/news-events/news/press-releases/2023/01/ftc-suit-requires-investment-advice-company-wealthpress-pay-17-million-deceiving-consumers>.

¹² See Staff in the Bureau of Competition & Office of Technology, *Generative AI Raises Competition Concerns*, Fed. Trade Comm’n (June 29, 2023), <https://www.ftc.gov/policy/advocacy-research/tech-at-ftc/2023/06/generative-ai-raises-competition-concerns>.

¹³ The FTC has taken enforcement action to protect competition and innovation in markets for computer processors with potential AI applications. See Complaint, *In the Matter of Nvidia/Arm*, Docket No. 9404, Comm’n File No. 2110015 (Dec. 2, 2021), https://www.ftc.gov/system/files/documents/cases/d09404_part_3_complaint_public_version.pdf.

¹⁴ See, e.g., Khan, *supra*, note 1 (discussing algorithmic price collusion and price discrimination); see also *Huskey v. State Farm Fire & Cas. Co.*, No. 22 C 7014, 2023 WL 5848164, at *9 (N.D. Ill. Sept. 11, 2023) (discussing discriminatory insurance claim processing algorithm).

¹⁵ See Fed. Trade Comm’n, Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act, Comm’n File No. P221202 (Nov. 10, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/P221202Section5PolicyStatement.pdf.

October 30, 2023

dangers of novel AI technologies while helping to foster competitive and innovative AI markets that benefit the economy and consumers.

Although AI-based technology development is moving swiftly, the FTC has decades of experience applying its authority to new and rapidly developing technologies. Vigorously enforcing the laws over which the FTC has enforcement authority in AI-related markets will be critical to fostering competition and protecting developers and users of AI, as well as people affected by its use. Firms must not engage in deceptive or unfair acts or practices, unfair methods of competition, or other unlawful conduct that harms the public, stifles competition, or undermines the potentially far-reaching benefits of this transformative technology. As we encounter new mechanisms of violating the law, we will not hesitate to use the tools we have to protect the public.

III. Copyrights and AI-generated Content

The FTC has an interest in many of the difficult questions with which the Copyright Office has been grappling about where to draw the line between human creation and AI-generated content. For instance, not only may creators' ability to compete be unfairly harmed, but consumers may be deceived when authorship does not align with consumer expectations, such as when a consumer thinks a work has been created by a particular musician or other artist, but it has been generated by someone else using an AI tool.

The FTC is also concerned with questions surrounding liability issues arising from the development or deployment of generative AI. How should liability principles apply to harm caused by AI tools trained on creative work that are used to generate new content? How should liability be apportioned among users, developers of AI tools, and the developers of the training dataset? How should this analysis take into account that training data is often scraped from sources hosting pirated content? Should the availability of disclosures regarding training materials or the lack of such disclosures affect liability? How would such liability principles apply to open-source AI models? These liability questions implicate consumer protection and competition policy. For instance, under certain circumstances, the use of pirated or misuse of copyrighted materials could be an unfair practice or unfair method of competition under Section 5 of the FTC Act.

The use of AI technology raises significant competition and consumer protection issues beyond questions about the scope of rights and the extent of liability under the copyright laws. As the courts apply the doctrine of fair use to the training and use of AI,¹⁶ the evolution of the doctrine could influence the competitive dynamics of the markets for AI tools and for products with which the outputs of those tools may compete. Conduct that may violate the copyright laws—such as training an AI tool on protected expression without the creator's consent or selling output generated from such an AI tool, including by mimicking the creator's writing style, vocal or instrumental performance, or likeness—may also constitute an unfair method of competition or an unfair or deceptive practice, especially when the copyright violation deceives consumers,

¹⁶ See, e.g., *Thomson Reuters Enter. Ctr. GmbH v. Ross Intel. Inc.*, No. 1:20-CV-613-SB, 2023 WL 6210901, at *6-11 (D. Del. Sept. 25, 2023) (fair use defense in a case involving scraping content for training a generative AI tool).

October 30, 2023

exploits a creator's reputation or diminishes the value of her existing or future works, reveals private information, or otherwise causes substantial injury to consumers. In addition, conduct that may be consistent with the copyright laws nevertheless may violate Section 5.¹⁷ Many large technology firms possess vast financial resources that enable them to indemnify the users of their generative AI tools or obtain exclusive licenses to copyrighted (or otherwise proprietary) training data, potentially further entrenching the market power of these dominant firms.¹⁸ These types of issues not only touch on copyright law and policy but also implicate consumer protection and competition concerns across a wide range of industries.¹⁹

IV. FTC Roundtable on the Creative Economy and Generative AI

To assist the Copyright Office in assessing the harms generative AI systems pose to creative professionals, the FTC has appended to this Comment the transcript of its October 4, 2023, "Creative Economy and Generative AI" roundtable. The roundtable explored how the development and deployment of AI tools that generate text, images, and audio is impacting open and fair competition. The session included musicians, authors, actors, artists, software developers, and other creative professionals who discussed the ways that emerging AI tools are reshaping each of their respective industries and how they are responding to the development and use of AI to generate new content. Some of the views shared by participants directly implicate the work of the FTC; other concerns are outside the scope of our agency's authorities.

Although the participants covered a wide range of experiences with and concerns about the transformative and disruptive nature of generative AI, a few themes emerged from the roundtable:

1. Participants said that their work has been used to train generative AI models without their consent. In some instances, participants said that work was taken from sources that themselves have pirated content, circumventing copyright protections. Scraping work from public websites without consent particularly harms creative professionals whose businesses depend on having public portfolios to attract customers. In the long term, fear about having creative work scraped and used in unauthorized and potentially repugnant or displacing ways could disincentive creators from sharing their work online. Participants were further concerned that consent they have provided in the past in a different context will be used to justify the unanticipated use of their work for AI training. In particular, creators expressed the desire to avoid having their work collected,

¹⁷ See *FTC v. Real Prods. Corp.*, 90 F.2d 617, 619 (2d Cir. 1937) ("A copyright is not a license to engage in unfair competition.").

¹⁸ See, e.g., Steve Lohr, *IBM Tries to Ease Customers' Qualms About Using Generative A.I.*, N.Y. Times (Sept. 28, 2023), <https://www.nytimes.com/2023/09/28/business/ibm-ai-data.html>.

¹⁹ See, e.g., Alvaro M. Bedoya, *Your Body, Your Work? Hollywood Is Scanning Actors' Moves. What That Could Mean for the Rest of Us*, LA Times (Sept. 4, 2023), <https://www.latimes.com/opinion/story/2023-09-04/writers-strike-artificial-intelligence-actors-body-scans-chatgpt-jet-li> (discussing competition concerns related to the use of AI) (further noting that "[l]ater cases make clear that the FTC Act may prevent a powerful market participant from forcing a weaker one to act against its interests, particularly when it significantly reduced competition").

October 30, 2023

used, and shared for purposes beyond the scope of the original agreement (e.g., data collected with consent for research purposes that is subsequently used for commercial purposes). In addition, many creative professionals do not own the rights to the work they create, further limiting their ability to control whether their work is used by AI tools.

2. Participants stated that, even when some mechanisms have been implemented to offer creators consent and control over whether their work is used in AI training, these measures have been insufficient and ineffective. Participants described “opt-out” frameworks as an example of such measures and said that an opt-out default puts the burden on creators to police an ever-changing marketplace. Participants said that they are often unable to tell whether their work has been included in AI training, in part because many AI model developers have chosen not to disclose what is in their training data. Even if creators were able to determine that their work has been included in AI training, participants said there is no easy way to remove data from a trained model without retraining. Participants expressed desire for opt-in frameworks, where AI developers seek authorial consent and clearly explain how they intend to use their work, ideally with appropriate credit and compensation.
3. Participants expressed concerns about transparency and disclosure with respect to both the data used to train AIs and the provenance of new works generated by AI tools. On the input side, as noted above, participants said it is difficult for them to tell whether their work has been included in AI training. Participants asked for mandatory disclosure of the content of training data sets. Participants also expressed desire for clear and specific disclosures about the intended uses of their work. On the output side, AI-generated content can easily flood markets, making it difficult for customers and other stakeholders to discern whether content is AI generated. AI-generated content can mimic the style of specific creators, and users of generative AI tools can exploit the name and reputation of the creator to gain sales and potentially compete with the creator. Participants said that when generative AI tools use artists’ faces, voices, and performances without permission to make digital impersonations, it can not only create consumer confusion, but it also can cause serious harm to both fans and artists.
4. Participants stated that they are not intrinsically opposed to AI and that they have already seen how in certain instances these technologies can prove fruitful to creative professionals. Participants said that AI-enabled tools and technology could have the potential to assist the creative community and consumers but that guardrails, including strong defaults to minimize data collection and ensure consent, are desperately needed. Participants said that, when used ethically and in a manner that recognizes intellectual property rights, AI could potentially further opportunities for artists, including by creating access to employment for people with disabilities and those who would otherwise be prevented from pursuing work in the entertainment industry. For example, one participant said that he was working on developing a synthetic version of his voice that would allow him to perform work he would not otherwise be able to do, like read a newspaper cover-

October 30, 2023

to-cover every morning. This participant emphasized that not only was this being done with his consent, control, and compensation, but more generally that generative AI tools should enhance and not replace the work of creative professionals.

5. Participants described a great power imbalance between those whose data is being used and those who are using the data. Certain types of creative professionals are particularly vulnerable to exploitation involving generative AI, especially those who lack awareness or leverage in negotiating contract terms or the resources to enforce their rights. Participants said most creative professionals do not have access to unions to protect their interests. Writers and other artists basically operate as small businesses, each competing in the marketplace to sell their work. They develop a unique style, voice, and brand to distinguish themselves. Participants stated that generative AI fundamentally disrupts that market in ways that could be devastating to the creative economy.

V. Conclusion

AI, in particular generative AI, is still evolving rapidly, but it already has the potential to transform many industries and business practices. Notably, there is no AI exemption from the laws on the books. Accordingly, the FTC will vigorously use the full range of its authorities to protect Americans from deceptive and unfair conduct and maintain open, fair, and competitive markets. We look forward to collaborating with the U.S. Copyright Office as competition and consumer protection issues surrounding AI-enabled tools and technologies continue to develop.

Enclosure:

Transcript from the FTC's October 4, 2023, roundtable on the Creative Economy and Generative AI