CHAMBER
OF PROGRESS

November 14, 2023
Federal Trade Commission | Public Comment Submission for November 16, 2023
Open Commission Meeting
Submitted by: Jess Miers, Legal Advocacy Counsel, Chamber of Progress

Re: FTC Comment on Artificial Intelligence and Copyright

Good morning, Chair Khan and Commissioners,

I'm Jess Miers from Chamber of Progress, a center-left tech industry coalition. Our partners span various industries but they do not have a vote or veto over our positions. I'd like to address the FTC's recent comment submitted to the U.S. Copyright Office regarding generative AI and copyright policy, which we believe is inconsistent with the FTC's mission to promote more competition.

The Commission's remarks imply that misusing copyrighted materials could be deemed unfair per Section 5 of the FTC Act, and they further assert that behavior *consistent* with copyright law might still violate Section 5. This stance leads the Commission to erroneously support a licensing framework for using publicly available works to train AI models.

Contrary to this view, the rightful interpretation of copyright law is the jurisdiction of the courts, not within the scope of Section 5's enforcement. Accordingly, copyright law has traditionally recognized the fair use of intermediate copying for activities such as search indexing or web browsing, a principle that should logically extend to using such materials for AI model training. With that said, AI outputs that are substantially similar to the existing works used for training will not be considered fair use. The Courts have made this painstakingly clear.

The doctrine of fair use closely aligns with the FTC's goal to encourage competition and consumer choice. It avoids the monopolization of creative ideas, fostering a conducive environment for innovation and emerging talents. Yet, the FTC's suggestion of a content-licensing regime for AI training data will

disproportionately benefit established entities, potentially hindering new entrants and, consequently, detrimentally impacting consumer welfare.

Finally, it is imperative to highlight that when evaluating the market impact factor in the context of fair use, copyright law specifically focuses on the influence on an artist's ability to market an individual work. This approach does not consider the broader impact of competition on the artist's ability to develop new and competing works. A broad assessment of Generative AI's influence on a human artist's ability to compete with a machine, falls outside the purview of copyright discussions. Recognizing this subtlety is crucial for the FTC and consumers alike, as they both benefit from the increased availability of a wide range of creative works, irrespective of whether they are created by humans or AI.

Ultimately, we believe that current legal challenges against Generative AI underscore the adequacy of existing copyright law in this new context.

Thank you for considering our perspective on these evolving issues.