April 30, 2024

Federal Trade Commission | Request for Public Comment on Supplemental Notice of Proposed Rulemaking on Artificial Intelligence and Impersonation
Impersonation SNPRM, R207000
Submitted by: Jess Miers, Senior Counsel, Chamber of Progress

Re: FTC Notice of Public Comment - Artificial Intelligence and Impersonation

Dear Chair Khan and Commissioners,

Chamber of Progress appreciates the opportunity to respond to your Request for Public Comment on the Proposed Amendments to Trade Regulation Rule on Impersonation of Government and Business, SNPRM, R207000. Our comments will focus on **Question 7** of the Request.

Chamber of Progress is a progressive tech industry group fighting for public policies that will build a fairer, more inclusive country in which all people benefit from technological leaps. Many of our partner companies currently develop, implement, and offer AI-driven services. However, none has a vote or veto over our positions.

While we recognize and appreciate the Commission's efforts to address concerns such as impersonation and fraud in the realm of Generative AI, it remains critical that regulatory measures support ongoing innovation and development. Therefore, Chamber of Progress urges the Commission to carefully revisit the Impersonation Rule, specifically the aspect of derivative liability for entities providing Generative AI technologies that could potentially be misused for fraudulent purposes.[1]

[1] Federal Trade Commission. § 461.5 Means and Instrumentalities: Provision of Goods or Services for Unlawful Impersonation Prohibited. In Part 461—Rule on Impersonation of Government, Businesses, and Individuals. (2024) Available at: https://www.ftc.gov/system/files/ftc_gov/pdf/r207000_impersonation_snprm.pdf.

Question 7: Should the Rule be revised to contain this prohibition against providing goods or services with knowledge or reason to know that those goods or services will be used to unlawfully impersonate a government, business, or individual? Why or why not? Is the standard "know or have reason to know," which reflects current law, sufficiently clear and understandable? Is it ambiguous in any way? How, if at all, should it be improved?

Excessively broad regulatory measures prohibiting the provision of goods or services that may be used for unlawful impersonation under a knowledgeable or reasonably knowledgeable standard threaten innovation. Firstly, such measures will impede positive societal advancements in employment, health, and research. Secondly, the emergence of Generative AI is revolutionizing education by enriching learning tools and expanding accessibility. Thirdly, the knowledge standard imposes a vague and overly broad requirement, compelling developers to foresee all potential misuses of their models or face steep financial penalties. Lastly, it is crucial to consider potential conflict with the First Amendment and Copyright law, as these laws often protect some impersonation-based uses, which are legitimate and valuable forms of expression, such as commentary and parody.

Any rule should focus on punishing the individuals that directly perpetuate consumer fraud. However, if the Commission aims to shift liability to the providers and developers of Generative AI technology, then Section 461.5 of the Rule must be amended to require actual knowledge of specific instances of fraudulently misuses. Without these considerations, overly broad regulatory measures will stifle innovation, deter investment in AI, and hinder substantive benefits across various sectors of society.

A. Generative AI has had a Transformative Impact on Society

The rapid progression of Generative AI technologies opens expansive opportunities across various societal sectors. As the Commission considers ways to address AI-related impersonation issues, it's essential to adopt a balanced regulatory strategy. Overly stringent regulations, particularly those that impose liability for third-party misuses on developers and providers of Generative AI, could dampen the burgeoning potential of these technological innovations.[2]

[2] As Santa Clara Law Professor, Eric Goldman, recently warned "the prevailing regulatory and legal responses to Generative AI will limit or even negate its benefits." Eric Goldman, "Generative AI is Doomed" Santa Clara Univ. Legal Studies Research Paper Forthcoming (April 16, 2024). Available at SSRN: https://ssrn.com/abstract=4802313.

Indeed, Generative AI tools have already delivered many benefits to society, including:

- **Enhanced Creativity and Innovation:** Generative AI tools are revolutionizing fields such as art, literature, and design by empowering creators to transcend traditional boundaries and explore new forms of expression.[3] Individual artists in support of Generative AI submitted comments to the Copyright Office for its study of copyright policy issues raised by artificial intelligence. One such artist, Matthew Wright, commented that copyright law should give equal protection for using AI tools in the creative process.[4]
- **Enhanced Job Prospects:** Generative AI is poised to transform the job market by creating new career opportunities in tech-driven sectors and enhancing job efficiency. AI can automate mundane tasks, allowing employees to focus on more complex and creative work.[5] This shift not only increases job satisfaction but also necessitates new skills, thereby encouraging a more dynamic and continually evolving workforce. And despite concerns about AI displacing jobs, this evolution will lead to the *creation* of jobs in AI maintenance, development, and policy regulation, further enriching the job market.[6]
- **Advanced Healthcare:** AI-driven diagnostics and personalized medicine are making healthcare more accessible and effective, particularly in detecting

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[3] Ziv Epstein, et al., "Art and the science of generative AI" Science (2023). Available at: https://www.science.org/doi/10.1126/science.adh4451; Tojin T. Eapen, et al., "How Generative AI Can Augment Human Creativity" Harvard Business Review (2023). Available at: https://hbr.org/2023/07/how-generative-ai-can-augment-human-creativity; Kishor K., "How Generative AI is Revolutionizing Drawing and Art" Medium (2023). Available at: https://medium.com/@Nontechpreneur/how-generative-ai-is-revolutionizing-drawing-and-art-6c4e99e67ba9.

[4] Chamber of Progress., "Artists Speak Up in AI Copyright Comments" Chamber of Progress (2023). Available at: https://progresschamber.org/artists-speak-up-in-ai-copyright-comments/.

[5] James Manyika, et al., "Jobs lost, jobs gained: What the future of work will mean for jobs, skills, and wages," McKinsey Global Institute (2017). Available at: https://www.mckinsey.com/featured-insights/future-of-work/jobs-lost-jobs-gained-what-the-future-of-work-will-mean-for-jobs-skills-and-wages.

[6] Huang, Q., Shen, Y., Sun, Y., & Zhang, Q. "The Layoff Generation: How Generative AI will Reshape Employment and Labor Markets." (2023). Available at SSRN: https://ssrn.com/abstract=4534294 (Contrary to fears of increased layoffs, the data shows that higher AI Augmentation correlates with lower layoff rates, suggesting that AI integration may enhance job security and create new opportunities).

diseases at early stages and tailoring treatments to individual genetic profiles.[7]

- **Advanced Scientific Research and Development:** Generative AI accelerates the pace of research by analyzing vast datasets faster than humanly possible, leading to quicker scientific discoveries and innovations.[8]
- **Enhanced Accessibility:** AI technologies are breaking down barriers for people with disabilities by providing more accessible communication tools, adaptive learning software, and personalized user interfaces.[9]

Given the transformative impact of Generative AI—especially in enhancing employment opportunities for Americans—it is imperative that the Commission encourage rather than inhibit AI's growth.

B. AI Advancements, like Algorithms and Tools Capable of Generating Digital Replicas, are Essential to Education

Generative AI is revolutionizing the educational landscape. Schools and universities are increasingly adopting AI across the board, from streamlining administrative tasks like admissions and financial aid processes to enriching classroom learning through personalized instruction and automated grading systems.[10] This trend is supported by projections indicating that the AI in education market is expected to grow to approximately $3.68 billion by 2025.[11] As the U.S. Department of Education Office of Educational Technology has emphasized, AI not only enables new forms of interaction but also supports

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[7] Matthew Huddle, et. al., "Generative AI Will Transform Health Care Sooner Than You Think" BCG, (2023). Available at: https://www.bcg.com/publications/2023/how-generative-ai-is-transforming-health-care-sooner-than-expected.

[8] Insilico Medicine. "Using Generative AI, Insilico Medicine Discovers New Class of Polo- Inhibitors for BRCA-Deficient Cancers" Insilico, (2024). Available at: https://insilico.com/news.

[9] Cristina Fonseca, "The role of AI in making CX more accessible and inclusive" Zendesk Blog, (2023). Available at: https://www.zendesk.com/blog/ai-cx-accessible/.

[10] Inside Higher Ed. "AI, VR, and techy classrooms: What's next for ed tech in 2024." (Jan. 4 2024). Available at: https://www.insidehighered.com/news/tech-innovation/teaching-learning/2024/01/04/ai-vr-and-techy-classrooms-whats-next-ed-tech.

[11] MathAware. (n.d.). "Discover the game-changing AI statistics for 2024: A must-have tool for success." Available at: https://www.mathaware.org/discover-the-game-changing-ai-statistics-for-2024-a-must-have-tool-for-success/.

diverse learning needs, including those of students with disabilities.[12] This technology helps educators tailor their approaches to meet the varied learning styles and needs of their students.[13]

One of the most captivating innovations is the use of AI to create immersive historical experiences. For instance, AI-driven tools like ChatGPT allow students to "travel back in time" and interact directly with historical figures. This interactive approach deepens students' engagement by enabling them to ask questions and receive responses as if they were conversing with the figures themselves, thus enriching their understanding of historical events and perspectives.[14]

Additionally, Virtual Reality (VR) technology, combined with AI, is used to transport students to simulated historical settings, such as battlefields or ancient cultural sites. This method not only makes learning more engaging but also improves the retention of historical facts and deepens students' comprehension of historical contexts.[15]

Furthermore, educational applications like "Hello History" leverage AI to facilitate conversations between students and AI versions of major historical figures across various disciplines. This tool not only enhances the interactivity of history lessons but also introduces an element of fun and exploration, allowing students to engage in discussions with icons like Albert Einstein or Cleopatra.[16]

These advanced technologies not only transform history lessons into dynamic and interactive learning experiences but also cater to different learning preferences, making education more accessible and effective for all students, especially for

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[12] Office of Educational Technology, “Artificial Intelligence” Office of Educational Technology, (2023). Available at: https://tech.ed.gov/ai/.
[13] Herriman Journal. “AI provides real-life experiences in the classroom.” (Mar. 1 2024). Available at: https://www.herrimanjournal.com/2024/03/01/483026/ai-provides-real-life-experiences-in-the-classroom#:~:text=%E2%80%9CStudents%20research%20a%20historical%20figure,opposing%20perspectives%20of%20an%20event.
[14] Sherbert Learning. “Revolutionizing history lessons with AI: Using ChatGPT for interactive learning.”(Jul. 7, 2023). Available at: https://www.sherbertlearning.com/post/revolutionizing-history-lessons-with-ai-using-chatgpt-for-interactive-learning.
[15] Teachers Blog. (n.d.). “AI in history education: Enhancing classrooms.” Available at: https://teachers-blog.com/ai-in-history-education-enhancing-classrooms/.
[16] AI Tools Explorer. (n.d.). “Hello History: AI chat with historical figures.” Available at: https://aitoolsexplorer.com/ai-tools/hello-history-ai-chat-app/.

those from underserved communities.[17] Educational AI illustrates why we strongly encourage you to strike 461.5 to eliminate derivative liability for providers and developers of AI tools, or at a minimum, embrace an actual knowledge standard for any third party liability.

C. Section 461.5 of the Rule Imposes Significant Penalties on Legitimate Developers and Providers of Generative AI Services

While the Commission's amendment to include a knowledge standard under Section 461.5 — thus eliminating strict liability for third-party misuse — is a positive step, the Rule remains overly broad. It holds providers and developers liable for misuses they reasonably should have known about, a standard much less forgiving than actual knowledge.

At the heart of any Generative AI service (like ChatGPT) is a machine learning model using the transformer architecture, trained on diverse datasets including books, websites, and other texts.[18] This capability to generate human-like text responses hinges on natural language processing (NLP) tools, which analyze human language to ensure responses are contextually relevant. These tools perform tasks such as syntax analysis, entity recognition, and sentiment analysis. Under Section 461.5, the developers and providers of the AI models, training datasets, and natural language processing tools essential to Generative AI services could each be held liable for any adverse outcomes resulting from the misuse of these services.

For example, it's conceivable that an AI model designed to simulate Benjamin Franklin could be repurposed to impersonate President Joe Biden and spread election misinformation. Under the amended Rule, one might argue that each of the developers involved with the Benjamin Franklin model should have foreseen such a misuse, placing an unreasonably high burden on them to predict and guard against all potential misapplications of their technology. And given the multifaceted nature of Generative AI services, *any* component is vulnerable to misuse.

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[17] Kamalov, F., Santandreu Calonge, D., & Gurrib, I. “New Era of Artificial Intelligence in Education: Towards a Sustainable Multifaceted Revolution. Sustainability, 15(16), 12451.” (2023) Available at: https://doi.org/10.3390/su151612451.

[18] Hernandez, S. “A jargon-free explanation of how AI large language models work. Ars Technica.” (Jul. 2023). Available at: https://arstechnica.com/science/2023/07/a-jargon-free-explanation-of-how-ai-large-language-models-work/.

Hence this requirement is still likely to stifle innovation and deter the development of Generative AI.

Impact on the Open Source Market

The proposed Rule's impact on the open source AI market is particularly alarming. Platforms like Hugging Face, which hosts over 70,000 datasets and models, exemplify the successful deployment of open-source models that democratize AI development and speed up innovation.[19] Similarly, more than 80% of GitHub repositories related to AI are used in both public and open source projects.[20]

Imposing significant civil penalties on contributors could deter them from sharing innovations, fearing legal consequences. This result not only stifles individual creativity but also threatens the collaborative spirit foundational to the open source AI community. Open and closed development models each present unique strengths and tradeoffs. Policymakers should not favor either approach and instead focus on fostering an innovative ecosystem with an abundance of models.

Finally, the prospect of civil penalties creates significant apprehension among venture capitalists, deterring investment in AI startups.[21] This financial reluctance could substantially inhibit growth and innovation within the AI sector, potentially precipitating another AI Winter.[22]

D. The Rule May Be Preempted by the First Amendment, Federal Copyright Law, and Section 230

First Amendment & Federal Copyright Law Preemption

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[19] Originality.ai. (n.d.). "Hugging Face statistics." (Jan. 29, 2024). Available at: https://originality.ai/blog/huggingface-statistics.
[20] GitHub. "The state of open source and AI." (Nov. 8, 2023). Available at: https://github.blog/2023-11-08-the-state-of-open-source-and-ai/.
[21] The Copia Institute, "Don't Shoot The Message Board," (2019) ("finding that venture capitalists are more likely to invest in U.S. startup companies due to its intermediary friendly regulatory environment."). Available at: https://copia.is/wp-content/uploads/2019/06/DSTMB-Copia.pdf.
[22] AI Winter refers to the period of stalled progress in AI development that occurred during the 1970s. See Atul Sharma, "How The Tech Industry Can Avoid Another AI Winter" Forbes (Feb. 5, 2024). Available at: https://www.forbes.com/sites/forbestechcouncil/2024/02/05/how-the-tech-industry-can-avoid-another-ai-winter/?sh=2f5ba5d7187a

The Rule's approach to holding providers and developers of Generative AI services liable for potential misuses overlooks the crucial fact that many impersonation-based uses are legitimate and protected forms of expression, particularly in contexts of commentary and parody. Actions covered under § 461.4, such as:

- "Creating a website or digital service, or a social media account impersonating an individual's name, identifying information, or likeness" and
- "Using an individual's identifying details, including likeness or insignia, on letterhead, websites, emails, or other physical or digital platforms"

are not always inherently fraudulent or intended to perpetrate consumer fraud. Indeed, these actions can serve important roles in social commentary or parody, which are vital forms of protected speech under the First Amendment.

As technology continuously reshapes our interaction with creative content, leading to new opportunities for profitability, rights holders are understandably vigilant. This vigilance has translated into numerous lawsuits against providers of Generative AI tools for purported copyright infringement. It has also yielded advocacy for regulations that blur the distinctions between publicity rights—which prohibit commercial exploitation of an individual's image—and copyright law, which permits transformative and expressive uses under the Fair Use Doctrine.[23]

By potentially expanding publicity rights doctrine to cover non-commercial (and non-fraudulent) uses, the Rule increases the risk of litigation that could detrimentally impact the arts.[24] By moving away from its foundational goal—to protect against unauthorized commercial and fraudulent use of likenesses—the Rule risks stifling creative freedom. Without explicit exemptions for expressive works that include commentary and parody, creators, artists, and AI developers

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[23] See e.g. Andersen et al v. Stability AI Ltd. et al, Docket No. 3:23-cv-00201 (N.D. Cal. Jan 13, 2023); Act No. 2021-344, 2021 Ala. Acts & Vt. H. 410, An Act Relating to the Use and Oversight of Artificial Intelligence in State Government, Reg. Sess. (2023). Available at: https://www.ncsl.org/technology-and-communication/artificial-intelligence-2023-legislation; Note: the RIAA is also cited throughout the Commission's Request. Available at: https://www.ftc.gov/system/files/ftc_gov/pdf/r207000_impersonation_snprm.pdf.

[24] Chamber of Progress. "Comments on Copyright Office Notice of Inquiry: Artificial Intelligence and Copyright." (2023). Available at: https://progresschamber.org/wp-content/uploads/2023/10/Chamber-of-Progress-Comments_-Copyright-Office-Notice-of-Inquiry-Artificial-Intelligence-and-Copyright.pdf.

face the daunting prospect of legal challenges over uses that may otherwise be considered legitimate.

Moreover, the imposition of significant financial penalties on providers and developers of Generative AI services for third-party misuses they might not foresee or control could chill further development in the field. This chilling effect stems from the Rule's vague and overly broad scope, which raises significant First Amendment concerns. Such ambiguity can lead to arbitrary enforcement and may compel providers to restrict their services or censor content, thereby infringing on free expression rights.

Section 230 Preemption

Furthermore, the Commission should recognize that the Rule may be preempted by 47 U.S.C. § 230(c), which shields websites and users from liability for third-party misuses and content.[25]

While the applicability of Section 230 to Generative AI services remains uncertain,[26] the underlying principle of the statute is relevant to the extent that providers and developers of Generative AI technology should not be held liable for third-party misuses.[27] Central to this consideration is whether the provider or user of an interactive computer service *materially contributed* to the illegal nature of the third-party content.[28] In the realm of Generative AI, a provider or developer might be seen as contributing materially if they designed the service explicitly for fraudulent purposes. For instance, if a model was specifically trained to impersonate an individual for exploitative purposes, the developers might be considered complicit in illegal impersonation. However, most general-purpose AI

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[25] 47 U.S.C. § 230(c)(1) ("No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.").

[26] Developers of Generative AI models may potentially claim Section 230 protection for certain outputs, although no court has definitively resolved this issue to date. Peter J. Benson & Valerie C. Brannon, Section 230 Immunity and Generative Artificial Intelligence, CONGRESSIONAL RESEARCH SERVICE, (Dec. 28, 2023). Available at: https://crsreports.congress.gov/product/pdf/LSB/LSB11097.

[27] Miers, J. "Yes, Section 230 should protect ChatGPT and other generative AI tools." Techdirt (Mar. 17, 2023). Available at: https://www.techdirt.com/2023/03/17/yes-section-230-should-protect-chatgpt-and-others-generative-ai-tools/.

[28] *Fair Housing Council of San Fernando Valley v. Roommates.Com, LLC,* 521 F.3d 1157 (9th Cir. 2008).

models and GPTs are not designed with such specific intent and may be misused by bad actors for illicit activities anyway.[29]

Should Generative AI services be classified within the scope of providers of "interactive computer services" as defined by Section 230, it is reasonable for a court to determine that third-party misuses lacking material contribution by the service provider are protected under Section 230. Importantly, the Ninth Circuit has clarified that claims related to state publicity rights issues are barred by Section 230.[30] However, a recent circuit split from the Third Circuit suggests that publicity rights laws derived from state intellectual property statutes may be exempt from Section 230.[31]

Given these complexities, the Commission must carefully evaluate the application of Section 230 (and the First Amendment) to Generative AI services to ensure that the Rule does not conflict with these established legal protections and principles.

E. The Rule Should Focus on The Individuals Perpetuating the Fraud & the Actual Knowledge of the Providers and Developers of Generative AI Services

It is imperative that the Commission reevaluate and amend Section 461.5 of the Rule to more accurately target the actual perpetrators of impersonation fraud, rather than indiscriminately penalizing the developers and providers of the technologies that could potentially be misused. If liability for Generative AI providers and developers is deemed necessary, the Rule must be narrowly tailored to apply only under an actual knowledge standard, specifically in cases where the providers or developers materially contributed to the fraud and had explicit knowledge of specific fraudulent activities.

As discussed, Generative AI technologies are currently delivering substantial benefits across various sectors of society, enhancing everything from healthcare diagnostics to educational tools and creative arts. These innovations are the

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[29] For example, an AI-generated voice impersonating President Joe Biden urged voters in New Hampshire to skip the state's primary election, reportedly employing technology from ElevenLabs. This AI company specializes in general-purpose voice cloning technology. See Greenberg, A. "Biden robocall deepfake points to a dangerous new era in scam calls." Wired. (2023). Available at: https://www.wired.com/story/biden-robocall-deepfake-elevenlabs/.

[30] *Perfect 10, Inc. v. CCBill LLC.*, 488 F.3d 1102, 1118–19 (9th Cir. 2007).

[31] *Hepp v. Facebook, Inc.,* 465 F. Supp. 3d 491 (E.D. Pa. 2020).

result of a vibrant developer and open-source community that thrives on collaboration and the free exchange of ideas. Overly broad regulatory measures, such as those currently proposed, risk stifling this innovation and curtailing the growth of the open-source economy. By imposing vague and expansive liabilities, the Rule could deter investment and discourage participation in AI development, potentially leading to a slowdown in technological progress that could otherwise benefit society at large.

We urge the Commission to carefully consider these implications to ensure that the regulations foster an environment that supports and nurtures continued innovation in AI. By focusing regulatory efforts on those directly responsible for fraudulent acts and refining the liability standards for technology providers and developers, the Commission can better balance the need for consumer protection with the imperative to maintain a robust, dynamic, and competitive AI development ecosystem.

Sincerely,

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