
June 2024

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Recommended Citation

Rouser, Sydney (2024) "Unfair Competition in the Creative Industries: The Impact of AI Scraping," *Tennessee Journal of Law and Policy*. Vol. 16: Iss. 3, Article 3.

DOI: <https://doi.org/10.70658/1940-4131.1169>

Available at: <https://ir.law.utk.edu/tjlp/vol16/iss3/3>

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TENNESSEE JOURNAL OF LAW AND POLICY

VOLUME 16

Spring 2024

ISSUE 3

ARTICLE

UNFAIR COMPETITION IN THE CREATIVE INDUSTRIES: THE IMPACT OF AI SCRAPING

*Sydney Rouser**

Introduction

The creative industry has experienced a profound transformation due to the advent of artificial intelligence (AI) technologies.¹ One significant development in this realm is AI scraping, a technique that involves the extracting and repurposing

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¹ *Artificial Intelligence*, OXFORD ENGLISH DICTIONARY, <https://www.oed.com/search/advanced/Meanings?textTermText0=artificial+intelligence&textTermOpt0=WordPhrase> (last visited Oct. 22, 2023) (Defining artificial intelligence as the field of study concerning the capacity of computers or other machines to exhibit or simulate intelligent behaviour).

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of various internet content by AI algorithms.² This disruptive force in the creative domain holds the promise of enhancing creativity and accessibility, yet also raises concerns regarding its potential for unfair competition, resulting in legal, ethical, and economic implications. In early March of 2023, ninety-nine percent of Writers Guild of America members voted in favor of demands to regulate the use of AI to prevent the displacement of screenwriters.³ Continuing the war against the machine, in October 2023, the Federal Trade Commission (FTC) echoed consumers' concerns about AI's unsettling implications such as collecting biometric data, infringing copyrights, perpetuating biases, and lowering customer service quality.⁴ These implications create a complex landscape with both opportunities and challenges that can impact consumers, creators, newcomers in the AI market, and the broader creative ecosystem.

This paper aims to thoroughly explore the multifaceted aspects of AI scraping and its impact on the creative industry. Such exploration will specifically focus on the potential for AI to disrupt the existing status quo and act as an unfair method of competition in violation of Section 5 of the FTC Act. By scrutinizing AI's ethical,

² Thom Waite, *What is AI Image Scraping, and How Can Artists Fight Back?*, DAZED (Jan. 20, 2023), <https://www.dazeddigital.com/art-photography/article/57996/1/what-ai-image-scraping-how-can-artists-fight-back-meta-getty-stable-diffusion>.

³ Antonio Pequeño, *Hollywood Writers' Strike: Here's A Timeline Of What Led To The 100-Day Mark*, FORBES (Aug. 9, 2023), <https://www.forbes.com/sites/antoniopequenoi/2023/08/09/hollywood-writers-strike-heres-a-timeline-of-what-led-to-the-100-day-mark/?sh=339ed2867ad3>.

⁴ Simone Fondrie-Teitler & Amrith Jaynati, *Consumers are Voicing Concerns About AI*, FTC TECHNOLOGY BLOG (Oct. 3, 2023), <https://www.ftc.gov/policy/advocacy-research/tech-at-ftc/2023/10/consumers-are-voicing-concerns-about-ai>.

legal, and economic implications, this paper will illuminate the challenges and opportunities presented by AI scraping in the creative sector. Additionally, this paper will offer recommendations for policymakers and industry stakeholders on how to navigate this continuously evolving landscape.

I. What is AI Scraping?

AI scraping, like many AI-related technologies, has evolved and is not associated with a single invention or a specific date. AI scraping is a technique that involves the use of AI algorithms to extract, collect, and manipulate data from various sources on the internet.⁵ The process relies on machine learning, natural language processing, and other AI technologies to automate the process of data extraction and analysis.⁶ AI scraping goes beyond its predecessor, traditional web scraping, which involves writing scripts or code to fetch data from websites.⁷

Scraping has been an ongoing practice in the technology industry. Why, then, has AI scraping raised such concern? In contrast to web scraping, with AI scraping, machine learning models are trained to understand and interpret web content, allowing for the extraction of structured data from unstructured sources, such as

⁵ George Denison, *AI data scraping: ethics and data quality challenges*, PROLIFIC (Oct. 24, 2023), <https://www.prolific.com/blog/ai-data-scraping-ethics-and-data-quality-challenges#:~:text=What%20is%20AI%20data%20scraping,sites%20and%20stock%20image%20sites>.

⁶ Hamza Aldabbas et al, *Google Play Content Scraping and Knowledge Engineering using Natural Language Processing Techniques with the Analysis of User Reviews*, 21 JOURNAL OF INTELLIGENT SYSTEMS 192, 193 (2020) (discussing the working of artificial intelligence scraping)

⁷ Martin Perez, *What is Web Scraping and What is it Used For?*, PARSEHUB (Apr. 14, 2023), <https://www.parsehub.com/blog/what-is-web-scraping/>.

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websites, social media, online databases, or news articles.⁸ OpenAI's ChatGPT-3.5 AI model, for example, was created by scraping over 300 billion words from books, articles, web texts, and other writings from the internet.⁹ This training integration allows for more intelligent, automated, and context-aware data extraction from a proliferation of internet sources. However, obtaining such a massive volume of data does not come without issues and concerns.¹⁰

II. What are the General Concerns of AI Scraping?

AI scraping is a powerful tool that offers a host of benefits for the creative industry. However, the potential broad application of these technologies is not without ethical, legal, and economic concerns.

In terms of ethical concerns, the foremost is the use of AI to scrape and manipulate content, raising questions about the authenticity and integrity of information circulated as the line between human-generated and AI-generated content is blurred.¹¹ AI scraping can also lead to data being misused for identity theft, spam, phishing, and other malicious activities that harm individuals and businesses.¹² A further concern is Distributed Denial of Service (DDoS) attacks

⁸ Aldabbas et al, *supra* note 6.

⁹ Alex Hughes, *ChatGPT: Everything you need to know about OpenAI's GPT-4 tool*, BBC SCIENCE FOCUS (Sept. 25, 2023), <https://www.sciencefocus.com/future-technology/gpt-3>.

¹⁰ Waite, *supra* note 2.

¹¹ Oscar Trabazos, *Exploring the Ethical and Legal Frontier of AI and Web Scraping*, LINKEDIN (Sept. 22, 2023), <https://www.linkedin.com/pulse/exploring-ethical-legal-frontier-ai-web-scraping-trawlingweb/>.

¹² Shubham Agarwal, *AI is Ruining the Internet*, INSIDER (Aug. 08, 2023), <https://www.businessinsider.com/ai-scam-spam-hacking-ruining-internet-chatgpt-privacy-misinformation-2023-8>.

which occur when aggressive scraping by AI bots overloads web servers and causes performance issues for the target website.¹³

An additional ethical concern is that AI scraping and the content the algorithm generates has the potential to promote the propagation of low-quality or fake content, which can misinform, deceive, and harm users.¹⁴ A troublesome example of this fake content is child pornography. Presently, a New Jersey high school student is advocating for federal legislation to address the concern of AI-generated pornographic images after photos of her and thirty fellow female classmates were inappropriately manipulated using AI and shared online.¹⁵ This unfortunate example demonstrates the harm posed by the unregulated use of generative AI and the need for regulation to protect children and the public at large. The proliferation of falsified AI-generated content, also known as deepfakes, has also caused concern among the Subcommittee of Cybersecurity, Information Technology, and Government Innovation, a subcommittee within the U.S. House Oversight Committee.¹⁶ In a November 2023 press release, Chairwoman Nancy Mace warned of the dangers that lie in deepfakes and cited their potential to facilitate crimes,

¹³ Mark Sone, *Fighting Fire With Fire: How AI Plays a Role in Both Stopping and Committing DDoS Attacks*, SECURITY INTELLIGENCE (Jun. 21, 2018), <https://securityintelligence.com/fight-fire-with-fire-how-ai-plays-a-role-in-both-stopping-and-committing-ddos-attacks/>.

¹⁴ Trabazos, *supra* note 11.

¹⁵ Skylar Harris & Artmeis Moshtaghian, *High schooler calls for AI regulations after manipulated pornographic images of her and others shared online*, CNN (Nov. 04, 2023), <https://www.cnn.com/2023/11/04/us/new-jersey-high-school-deepfake-porn/index.html>.

¹⁶ Press Release, Comm. on Oversight and Accountability, Mace: Deepfake Technology Can Be Weaponized to Cause Harm (Nov. 08, 2023), <https://oversight.house.gov/release/mace-deepfakes-pose-real-dangers/>.

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including fraud and theft, as well as be weaponized by anti-American actors to create national security threats.¹⁷

Bias is another ethical concern as an AI algorithm may inadvertently perpetuate biases contained in the data it learned from, leading to biased or unfair content.¹⁸ A groundbreaking study in 2019 that was published in *Science* discovered that an AI algorithm employed to predict patient healthcare needs for over 100 million people demonstrated a bias towards Black patients.¹⁹ The AI algorithm utilized healthcare spending to project future healthcare needs; however, due to a historical lack of access to care, Black patients spend notably less.²⁰ Consequently, Black patients were routinely in poorer health than the AI algorithm recommended care for.²¹ Even after years of work to circumvent bias patterns in AI algorithms through regular quality control testing, biases have been detected.²² A years-long research endeavor to develop an AI algorithm to predict pediatric sepsis and lessen the fatality rate was found to have a bias that led to it less regularly detecting under-detection of sepsis in Hispanic children as compared to white children, despite nearly three years

¹⁷ *Id.*

¹⁸ Trabazos, *supra* note 11.

¹⁹ Ziad Obermeyer et al, *Dissecting racial bias in an algorithm used to manage the health of populations*, 366 *SCIENCE* 447, 448 (2019).

²⁰ Ryan Levi & Dan Gorenstein, *AI in medicine needs to be carefully deployed to counter bias – and not entrench it*, NPR (Jun. 06, 2023), <https://www.npr.org/sections/health-shots/2023/06/06/1180314219/artificial-intelligence-racial-bias-health-care>.

²¹ *Id.*

²² *Id.*

of development testing.²³ This illustrates that even with the utmost care, AI algorithms can perpetuate biases with harmful consequences.

A final ethical concern is data privacy as AI scraping may harvest personal information such as email addresses, phone numbers, and similar sensitive information in violation of data privacy laws.²⁴ Due to the prevalence of data breaches within the workplace and AI services collecting personal data of employees unbeknownst to companies, thirteen states have enacted comprehensive data protection laws to regulate the application of generative AI.²⁵ Because state data protection regulations often include clauses that provide individuals with a right to delete their personal data, AI algorithm inaccuracies that prevent deletion may expose employees to privacy breaches and employers and generative AI services to legal ramifications.²⁶

AI scraping also presents various legal concerns with copyright infringement, which results from the inability of AI algorithms to distinguish between copyrighted and non-copyrighted content, potentially exposing scrapers to copyright action.²⁷ Presently in California, artists Sarah Andersen, Kelly McKernan, and Karla Ortiz have filed a class action lawsuit against several AI

²³ *Id.*

²⁴ Trabazos, *supra* note 11.

²⁵ Zoe Argento, *Data Protection Issues for Employers to Consider When Using Generative AI*, IAPP (Aug. 9, 2023), <https://iapp.org/news/a/data-protection-issues-for-employers-to-consider-when-using-generative-ai/>.

²⁶ *Id.*

²⁷ Trabazos, *supra* note 11.

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startups including Stability AI.²⁸ In their complaint, the artists allege that Stability AI scraped billions of images from the internet, including those of the artists and other copyrighted material without permission, to teach its AI model Stable Diffusion to generate images.²⁹ By allowing AI scraping to remain unregulated, numerous copyright infringement actions brought by disenfranchised artists are certain to follow.

Another legal concern is terms of service violations as numerous websites prohibit AI scraping in their terms of use policies.³⁰ Because scraping is a foundational component of building sophisticated AI models and requires an expansive volume of data, millions of websites are scraped during the creation process.³¹ In April 2023, *The Washington Post* created a feature that allows users to input a website URL and see if it was one of the fifteen million websites scraped by Google to train its AI model.³² This scraping often occurs without the knowledge of website owners who have prohibitions against scraping in their terms of use policy.³³ Therefore, AI scraping without the consent from website providers opens the door to breach of contract litigation from these terms of use violations.

²⁸ Blake Brittain, *Judge Pares Down Artists' AI Copyright Lawsuit Against Midjourney, Stability AI*, REUTERS (Oct. 30, 2023), <https://www.reuters.com/legal/litigation/judge-pares-down-artists-ai-copyright-lawsuit-against-midjourney-stability-ai-2023-10-30/>.

²⁹ *Id.*

³⁰ Trabazos, *supra* note 11.

³¹ Stuart D. Levi et al, *Online Terms of Use and the Training of AI Models*, LEXOLOGY (July 24, 2023) <https://www.lexology.com/library/detail.aspx?g=12dc337f-bbc6-4174-861b-17e491fb85d1>.

³² *Id.*

³³ *Id.*

A final legal concern involves the complex and ever-evolving landscape of AI scraping. The legal and regulatory landscape is itself complex and varied by jurisdiction. Compliance with regulations such as the Digital Millennium Copyright Act (DMCA) in the United States and the General Data Protection Regulation (GDPR) in the European Union is paramount, but can be challenging for AI platform owners to navigate regardless of their resources.³⁴ President Biden’s October 2023 Executive Order on the “Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence” provided a foundation for AI regulation, albeit temporary as the executive order may be reversed by future administrations.³⁵ President Biden’s Executive Order appoints the Department of Commerce to identify and label AI-generated content, emphasizes enforcement of consumer protection laws and safeguards to lessen AI’s ability to increase discrimination, and implements more stringent testing requirements for generative AI models.³⁶ However, the Executive Order lacked provisions for key concerns like licensing regimes for advanced AI models, mandatory information disclosures to aid in anticipating AI harms, and guidance concerning intellectual property law’s application to generative AI works.³⁷

³⁴ Daphne Keller, *Notice and Takedown Under the GDPR: An Operational Overview*, STAN. L. SCH.: CEN. INTERNET & SOC. (Oct. 29, 2015, 3:00 AM), <https://cyberlaw.stanford.edu/blog/2015/10/notice-and-takedown-under-gdpr-operational-overview>.

³⁵ Ryan Heath, *What's in Biden's AI Executive Order—and What's Not*, AXIOS (Nov. 1, 2023), <https://www.axios.com/2023/11/01/unpacking-bidens-ai-executive-order>.

³⁶ Exec. Order No. 14,110, 88 Fed. Reg. 210 (Oct. 30, 2023).

³⁷ Heath, *supra* note 34.

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Furthermore, AI scraping can have economic implications for various stakeholders. The primary concern, which this paper aims to address, is that AI scraping acts as a method of unfair competition as businesses utilize the tool to access their competitors' products, pricing, and customer data, thus gaining an unfair competitive advantage.³⁸ A further economic concern is disruption of traditional markets due to new entrants gathering and manipulating data more effectively. Newcomers leveraging AI scraping to gain insights and market share may cause established businesses to struggle to compete.³⁹ While competition is encouraged in the marketplace, regulatory bodies such as the FTC aim to stifle unfair methods of competition that harm the balance of the free market because detrimental effects are experienced by both businesses and consumers.⁴⁰

AI scraping also presents concerns as large technology companies with advanced AI scraping capabilities have the propensity to foster monopolistic or oligopolistic market structures.⁴¹ For example, AI algorithms can reduce

³⁸ Staff in the Bureau of Competition & Office of Technology, *Generative AI Raises Competition Concerns*, FED. TRADE COMM'N TECH. BLOG (June 29, 2023), <https://www.ftc.gov/policy/advocacy-research/tech-at-ftc/2023/06/generative-ai-raises-competition-concerns>.

³⁹ ScrapeIt, *How Artificial Intelligence Is Used in Web Scraping*, SCRAPEIT (Sept. 5, 2022), <https://www.scrapeit.io/blog/how-artificial-intelligence-is-used-in-web-scraping>.

⁴⁰ Fed. Trade Comm'n, *FTC Restores Rigorous Enforcement of Law Banning Unfair Methods of Competition*, FED. TRADE COMM'N (Nov. 10, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/11/ftc-restores-rigorous-enforcement-law-banning-unfair-methods-competition>.

⁴¹ Francisco Beneke & Mark Oliver Mackenrodt, *Artificial Intelligence and Collusion*, 50 INTERNATIONAL REVIEW OF INTELLECTUAL PROPERTY AND COMPETITION LAW 109, 128 (2019) (discussing how quick price responses from artificial intelligence algorithms can conceal anti-competitive pricing patterns).

information and coordination costs by quickly predicting and responding to competitors' price changes which leads to price rigidity, a characteristic of oligopolistic market structures.⁴² Strategic billion-dollar partnerships between dominant companies and technology startups, such as Microsoft partnering with OpenAI and Amazon partnering with Stability AI and Anthropic, provide further examples of technology companies asserting their dominance to corner the nascent AI market.⁴³ While these partnerships appear unproblematic at first glance, with each exchange of AI model access for the dominant company's computing resources, dominant firms such as Microsoft, Alphabet, NVIDIA, and Amazon are placed in a better position to assert monopoly power to exploit users, erect daunting barriers to entry, and hinder regulatory efforts.⁴⁴

A final economic concern is that AI scraping stifles innovation as content creators become discouraged from producing high-quality content by the prospect of their content being scraped by AI algorithms and reused without their consent.⁴⁵ Molly Crabapple, whose illustrated journalism has been featured in *Vice*, *Rolling Stone*, and *The New York Times*, echoed this concern in an interview with

⁴² *Id* at 128.

⁴³ Max von Thun, *Monopoly Power Is the Elephant in the Room in the AI Debate*, TECH POL'Y PRESS (Oct. 23, 2023), <https://www.techpolicy.press/monopoly-power-is-the-elephant-in-the-room-in-the-ai-debate/>.

⁴⁴ *Id.*

⁴⁵ Sarah Shaffi, *'It is the Opposite of Art': Why Illustrators are Furious About AI*, THE GUARDIAN (Jan. 23, 2023), <https://www.theguardian.com/artanddesign/2023/jan/23/its-the-opposite-of-art-why-illustrators-are-furious-about-ai>.

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Marketplace Tech.⁴⁶ In the interview, Crabapple demonstrated the ability of technology startups Stability AI and Midjourney's generative AI models to recreate imitations of her life's work in seconds by simply inputting "street in New York City drawn by Molly Crabapple," to show how these models have and will continue to displace those in the arts profession.⁴⁷ The Authors Guild has also called attention to the threat posed to the creative profession by AI-scraped content and has begun actively lobbying for "sensible policies and regulations governing the development and use of generative AI," to protect writers.⁴⁸ Overall, AI poses legal, ethical, and economic threats to numerous stakeholders including consumers and creators.

III. Who are the Dominant Players in AI Scraping?

The world of AI has experienced significant strides in growth and innovation in recent years. Although there are a multitude of companies, research institutions, and startups continuously contributing to advancements in this dynamic field, several players have found themselves at the forefront of research, development, and technological breakthroughs in the AI industry. Market capitalization, commonly abbreviated as "market cap," is a fundamental metric employed to assess a publicly

⁴⁶ Meghan McCarty Carino & Jesus Alvarado, *Artists Warn of the Harm AI-generated Illustrations can do to their careers*, MARKETPLACE (Jun. 15, 2023), <https://www.marketplace.org/shows/marketplace-tech/artists-warn-of-the-harm-ai-generated-illustrations-can-do-to-their-careers/>.

⁴⁷ *Id.*

⁴⁸ Press Release, The Authors Guild, Authors Guild Policy Proposals Regarding the Development and Use of Generative AI (Jul. 15, 2023), <https://authorsguild.org/app/uploads/2023/07/Authors-Guild-AI-Policy-Proposals-7.19.23.pdf>

traded corporation's value.⁴⁹ This assessment of value is based on a corporation's outstanding shares of stock and can also be implemented to determine the dominant players of a particular industry.⁵⁰ In terms of market cap, five corporations have risen to dominance in the field of AI: Microsoft, Alphabet, NVIDIA, Tesla, and IBM.⁵¹

Dating back to its founding in 1975, Microsoft has continuously remained a leader in the development of end-user technology with a market cap of \$2.46 trillion as of June 2023; its Windows desktop operating system which presently occupies a worldwide market share of approximately seventy-four percent.⁵² In January 2023, Microsoft made a \$10 billion investment in OpenAI and subsequently integrated its ChatGPT generative AI chatbot and Dall-E image generation into both its Edge web browsing software and Bing search engine, securing its position as the world leader in AI.⁵³ Illustrating the extremely lucrative nature of this partnership, Microsoft's AI hub, known as the Intelligent Cloud Unit, produced \$24.3 billion in revenue for

⁴⁹ *Market Capitalization: What It Is and What It Means*, STASH FINANCIAL (Sept. 27, 2023), <https://www.stash.com/learn/what-is-market-cap/>.

⁵⁰ *Id.*

⁵¹ *15 Largest AI Companies in 2023*, STASH FINANCIAL (Jun. 12, 2023), <https://www.stash.com/learn/top-ai-companies/>.

⁵² History.com Editors, *Microsoft founded*, HISTORY (Oct. 09, 2015), <https://www.history.com/this-day-in-history/microsoft-founded>.

⁵³ STASH FINANCIAL, *supra* note 50.

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the quarter ending in September 2023, surpassing analyst projections by almost \$1 billion.⁵⁴

Following Microsoft is Alphabet, which has a market cap of \$1.57 trillion as of June 2023 and is the parent company of the renowned search engine Google, which occupies a market share of more than 90% of all internet searches.⁵⁵ Google and its parent company, Alphabet, began making strides in the AI world in 2017, launching an AI center in China.⁵⁶ In 2023, Google has persisted with its progress in the field of AI, exemplified by the unveiling of their AI chatbot, Bard, a creation aimed at rivaling Microsoft's recent integration of AI into their Bing search engine.⁵⁷

Positioned third among the top five AI companies is NVIDIA, with a market cap of \$975.20 billion as of June 2023.⁵⁸ Since its founding in 1993, NVIDIA has been a pivotal player in the technology space and is the inventor and manufacturer of graphics processing units ("GPUs").⁵⁹ NVIDIA's GPUs were initially designed to optimize the efficiency of rendering 3D graphics, however, the technology has recently found an application in the AI world and has become an integral

⁵⁴ Yuvraj Malik et al, *Microsoft Sales Beat Estimates as Customers Prepare for AI Rollout*, REUTERS (Oct. 25, 2023), <https://www.reuters.com/technology/microsoft-beats-quarterly-revenue-estimates-2023-10-24/>.

⁵⁵ Jeff Desjardins, *How Google Retains More Than 90% of Market Share*, BUSINESS INSIDER (Apr. 23, 2018), <https://www.businessinsider.com/how-google-retains-more-than-90-of-market-share-2018-4>.

⁵⁶ Carlos Tejada, *Google, Looking to Tiptoe Back Into China, Announces A.I. Center*, THE NEW YORK TIMES (Dec. 13, 2017), <https://www.nytimes.com/2017/12/13/business/google-ai-china.html>.

⁵⁷ STASH FINANCIAL *supra* note 50.

⁵⁸ STASH FINANCIAL *supra* note 50.

⁵⁹ *NVIDIA History*, NVIDIA, <https://www.nvidia.com/en-us/about-nvidia/corporate-timeline/>.

component for numerous generative AI technologies.⁶⁰ Currently, NVIDIA holds an 82% share of the GPU market and has played a significant role in driving major technological advancements in AI, such as the development of ChatGPT, which was trained using 10,000 NVIDIA GPUs.⁶¹ Furthermore, in November 2022, NVIDIA entered a multi-year collaborative partnership with Microsoft to create a Cloud AI computer and a platform for the rapid development and deployment of advanced AI technology.⁶² Such a partnership has the potential to foster breakthroughs in the world of AI but also can raise concerns related to oligopoly, a market structure in which a small number of large firms dominate the market.⁶³

With a market cap of \$791.83 billion as of June 2023, Elon Musk's corporation, Tesla, is the fourth most dominant player in AI technology. Launched in 2003 with the vision of innovating the automotive industry through the implementation of advanced technology, Tesla's use of AI has propelled the company to hold the number one and two spots for best-selling electric vehicles in the United States.⁶⁴ Examples of Tesla's innovative implementation of AI technology include self-

⁶⁰ *Id.*

⁶¹ STASH FINANCIAL *supra* note 50.

⁶² NVIDIA, NVIDIA Teams With Microsoft to Build Massive Cloud AI Computer (Nov. 16, 2022), <https://nvidianews.nvidia.com/news/nvidia-microsoft-accelerate-cloud-enterprise-ai#:~:text=NVIDIA%20today%20announced%20a%20multi,train%2C%20deploy%20and%20scale%20AI%2C>

⁶³ *Oligopoly: Meaning and Characteristics in a Market*, INVESTOPEDIA (Mar. 28, 2023), <https://www.investopedia.com/terms/o/oligopoly.asp>.

⁶⁴ Peter Johnson, *2022's Top 10 Best-Selling Electric Vehicles in the US: Find Out Why They Made the Cut*, ELECTREK (Jan. 09, 2023), <https://electrek.co/2023/01/09/the-top-10-best-selling-electric-vehicles-in-the-us-of-2022/>.

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driving cars and bipedal robotic units, the two of which employ AI to assess conditions and events without the aid of human direction.⁶⁵ Outside of Tesla, Musk is also looking for further ways to implement AI technology and has launched a startup, xAI to compete with OpenAI's ChatGPT.⁶⁶

Rounding out the top five AI companies is IBM, with a market cap of \$123.87 billion as of June 2023.⁶⁷ With inventions such as the personal computer, the barcode, and the hard disk drive, IBM has produced technology that has had a tremendous impact on both the world of tech and the daily lives of individuals.⁶⁸ IBM's impact has also extended to the world of AI through the development of Watson from 2004-2011.⁶⁹ Watson, a question-answering platform, is regarded as a pioneering AI language model that was the first to achieve worldwide recognition after it won the quiz show Jeopardy! in 2011.⁷⁰ In 2023, Watson continued to bring notoriety to IBM by securing the company its second successive Gartner® Magic Quadrant™ for Enterprise Conversational AI Platforms.⁷¹ The Gartner® Magic Quadrant™ is a research methodology and valuable graphical representation tool used by the advisory technology firm Gartner, Inc. to evaluate the competitive

⁶⁵ Team Stash, *supra* note 50.

⁶⁶ Alexa Corse, *Elon Musk's AI Startup Seeks to Raise \$1 Billion*, THE WALL STREET JOURNAL (Dec. 05, 2023), <https://www.wsj.com/tech/ai/elon-musks-ai-startup-seeks-to-raise-1-billion-5f809964>.

⁶⁷ STASH FINANCIAL, *supra* note 50.

⁶⁸ STASH FINANCIAL, *supra* note 50.

⁶⁹ STASH FINANCIAL, *supra* note 50.

⁷⁰ STASH FINANCIAL, *supra* note 50.

⁷¹ STASH FINANCIAL, *supra* note 50.

landscape of companies in various technology markets and industries such as conversational AI platforms.⁷²

These five organizations have dominated the field of AI and their multi-billion-dollar market caps illustrate the asperous nature of the AI playing field. Such remarkable growth and innovation in AI requires a multitude of resources to scrape the data required to train AI algorithms. Other powerful technology companies such as Meta are following suit and incorporating AI into their products, such as AI chatbots with personalities, illustrating the trend towards resource inequality within the AI playing field.⁷³ Consequently, high barriers of entry have been created, as newcomers must compete with these conglomerate corporations whose economic position allows them to consistently lead in research, development, and technological breakthroughs.

IV. The American Creative Industry in the Digital Age

The birth of the creative industry, namely the music and art sectors, can be traced back to the early history of the United States, and both have risen to significant economic importance. Diverse cultural influences brought by enslaved Africans and colonial settlers from England, Scotland, Ireland, Germany, Italy, and

⁷² Dave Russell, *What the Gartner Magic Quadrant is and How it Will Help Shape Your 2023 Resiliency Strategy*, VEEAM: BUSINESS BLOG (Oct. 21, 2022), <https://www.veeam.com/blog/gartner-magic-quadrant-for-it-pros.html>.

⁷³ Chris Cox, *How Meta Plans to Incorporate AI Into Its Products*, THE WALL STREET JOURNAL (Oct. 20, 2023), <https://www.wsj.com/tech/ai/meta-plans-to-incorporate-ai-4ba569e3>.

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France laid the foundation for the American music and art scene today.⁷⁴ In terms of music, in the 18th and 19th centuries, folk and traditional music played on instruments such as the fiddle and banjo birthed musical genres such as blues, gospel, and bluegrass that would later evolve into distinct jazz, country, rock and roll, and hip-hop genres enjoyed by many Americans today.⁷⁵ In contrast, American art traces its history to the 18th-century colonial period in which early American artisans such as John Singleton Copley and Charles Wilson Peale created portraits, landscapes, and decorative arts that laid the foundation for modern American art.⁷⁶ Artistic movements such as the Hudson River School in the 19th century, the Ashcan School, and the Harlem Renaissance of the 20th century played pivotal roles in shaping American art into its contemporary form.⁷⁷

Beyond their sensory appeal, American music and art have exerted a substantial economic influence, becoming integral components of not only the nation's cultural identity, but its economic prosperity. Researchers Robert Stoner and Jéssica Dutra from Economists Incorporated have found that as of 2018, the American music

⁷⁴ David K. Hildebrand, *Early American Music*, MOUNT VERNON LADIES' ASSOC. (Jan. 19, 2023), <https://www.mountvernon.org/library/digitalhistory/colonial-music-institute/essays/early-american-music/#:~:text=Their%20music%20included%20ballads%2C%20dance,on%20whatever%20instruments%20were%20handy>.

⁷⁵ Dr. Victor Ezquerro, *What is Blues Music?*, Metro Music Makers (Jul. 27, 2020), <https://www.metromusicmakers.com/2020/07/what-is-blues-music/>.

⁷⁶ *Art in America's Colonial and Early National Period 1776-1830*, NORFOLK TOWN ASSEMBLY (Feb. 16, 2021), <https://www.norfolktownassembly.org/post/art-in-america-s-colonial-and-early-national-period-1776-1830>.

⁷⁷ Arthipo, *American Art History*, ARTHIPO (Sept. 15, 2021), <https://www.arthipo.com/artblog/en/history-of-art/american-art-history.html>.

industry makes an annual contribution of \$170.4 billion in value to the United States gross domestic product (GDP), generates \$9.8 billion in export sales, and sustains 2.47 million jobs spanning numerous professions.⁷⁸ Furthermore, the two researchers discovered that the American music industry exhibits a direct value-added ratio of 1.5, signifying that each dollar of direct revenue generated by the industry leads to the creation of \$1.50 in revenue within another sector of the American economy.⁷⁹

Art plays an even more substantial role in the United States economy. In 2023, The National Endowment for the Arts (NEA) and the Bureau of Economic Analysis (BEA) released data indicating that the arts and cultural sector accounted for 4.4 percent of the United States' 2021 GDP with a record high of \$1.01 trillion in value added.⁸⁰ Additionally, the joint analysis conducted by the NEA and BEA showed that the total economic value added by the arts and cultural sector grew by 13.7 percent, a disproportionately larger increase than the 5.9 percent increase experienced by the total United States economy during that same period.⁸¹ The Arts and Cultural Production Satellite Account (ACPSA), which records the annual economic value of the arts and cultural production, also found that in 2021, the arts

⁷⁸ ROBERT STONER & JÉSSICA DUTRA OF ECONOMISTS INCORPORATED, RECORDING INDUS. ASS'N. OF AMERICA, THE U.S. MUSIC INDUSTRIES: JOBS AND BENEFITS 6 (2020), available at <https://www.riaa.com>.

⁷⁹ *Id.* at 6.

⁸⁰ Press Release, National Endowment for the Arts, New Data Show Economic Activity of the U.S. Arts & Cultural Sector in 2021 (Mar. 15, 2023) <https://www.arts.gov/news/press-releases/2023/new-data-show-economic-activity-us-arts-cultural-sector-2021>.

⁸¹ *Id.*

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and cultural goods services employed approximately 4.9 million American workers, accounting for \$504.2 billion in total compensation.⁸²

As the art and music sectors exert their influence on the economy, technology similarly shapes the production of music and art. Technology's profound and transformative influence has shaped the way music and art are created, experienced, shared, and accessed. The advent of AI has deepened technology's impact on music and art, manifesting in the creative production process, creative platforms and institutions, and the endeavors of content creators.

AI's increasingly significant role in the creative production of music is exhibited in a myriad of ways. AI algorithms have been employed to generate musical compositions, including melodies, harmonies, and in some cases, entire songs by analyzing current music to discern popular patterns and create new musical compositions reflecting the style and preferences of the artist utilizing the algorithm.⁸³ In terms of experiencing music, AI tools provide new possibilities to DJs and music producers as AI algorithms create remixes by analyzing and recombining existing songs.⁸⁴ Music streaming platforms such as Spotify use AI's tools to shape the way music is discovered and shared. In 2023, Spotify harnessed

⁸² *Id.*

⁸³ Aruzhan Sariyeva, *AI In Music: The Rhythmic Rise of Algorithms*, WEAREBRAIN (Aug. 10, 2023), <https://wearebrain.com/blog/ai-in-music-rhythmic-algorithms/#:~:text=AI%2Dgenerated%20music%20through%20composition,and%20preferences%20of%20the%20artist.>

⁸⁴ *Id.*

the power of AI algorithms to create its new DJ feature, offering users personalized playlists and curated song recommendations based on their listening habits.⁸⁵ To make podcasts more accessible, Spotify employed AI algorithms to replicate podcasters' voices in their pilot voice translation feature.⁸⁶ By leveraging OpenAI's recently released voiced generation technology, Spotify enables listeners across communities and cultures to enjoy podcasts in their native language while maintaining a more natural and authentic listening experience that retains the podcaster's distinctive speech characteristics.⁸⁷

Equally, the arts sector has witnessed the beneficial effects of AI as it continues to play an increasingly significant role in the creative production, enjoyment, and restoration of art. Recent breakthroughs in the collaborative world of art and AI have been seen in generative art, blockchain and non-fungible tokens (NFTs), art restoration, artistic assistance, art curation, and immersive experiences.⁸⁸ AI has enabled artists to generate unique visual art, including paintings and sculptures, as well as digital art in a more accessible manner as it

⁸⁵ Press Release, Spotify, Spotify Debuts a New AI DJ, Right in Your Pocket (Feb. 22, 2023) <https://newsroom.spotify.com/2023-02-22/spotify-debuts-a-new-ai-dj-right-in-your-pocket/>.

⁸⁶ Press Release, Spotify, Spotify's AI Voice Translation Pilot Means Your Favorite Podcasters Might Be Heard in Your Native Language (Sept. 25, 2023) <https://newsroom.spotify.com/2023-09-25/ai-voice-translation-pilot-lex-fridman-dax-shepard-steven-bartlett/>.

⁸⁷ *Id.*

⁸⁸ See Kaushik Pal, *5 Ways AI is Changing Art*, TECHNOPEdia (Feb. 01, 2023), <https://www.techopedia.com/what-is-the-impact-of-ai-on-art/2/33399>. See also Sahir Maharaj, *Reviving the Past: The Power of AI in Art Restoration*, MEDIUM (Mar. 11, 2023), <https://medium.com/@sahirmaharaj/reviving-the-past-the-power-of-ai-in-art-restoration-50cf986638e1>.

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minimizes the time and monetary resources required for creation by imitating the artistic styles used to train the AI algorithms.⁸⁹ Much like physical exhibitions where human artwork is sold, generative AI art finds its market in virtual platforms.⁹⁰ Transactions in this realm are facilitated through NFTs, a one-of-one digital asset with astonishing sales prices, such as the work of digital artist Beeple which sold for \$69 million.⁹¹ In 2022, NFT collectible sales grew by 15 percent from 2021 and generated \$11.8 billion in sales revenue for the art sector.⁹² Art restoration and preservation are essential procedures to secure the longevity of invaluable works, and AI has been interposed to enhance the efficiency of this endeavor.⁹³ Because AI algorithms can undergo training to identify specific forms of art deterioration, including cracks, color fading, and discoloration, the restoration of artwork has become notably more efficient and precise as the algorithms can accurately locate the damage and carry out the required repairs.⁹⁴ By automating repetitive tasks such as color correction, resizing images, and background removal,

⁸⁹ Sofiia Shvets, *How Generative AI Can Boost Creativity and Enhance Art*, HACKERNOON (Mar. 15, 2023), <https://hackernoon.com/how-generative-ai-can-boost-creativity-and-enhance-art>.

⁹⁰ Pal, *supra* note 86.

⁹¹ Ariella Brown, *NFT Explained: How to Make, Buy and Sell Non-Fungible Tokens*, TECHNOPEdia (Sept. 02, 2021), <https://www.techopedia.com/nft-explained-how-to-make-buy-and-sell-non-fungible-tokens/2/34530>.

⁹² Statista Research Department, *Total sales value of art and collectibles non-fungible tokens (NFTs) worldwide from 2019 to 2022*, STATISTA (Aug. 29, 2023), <https://www.statista.com/statistics/1299636/sales-value-art-and-collectibles-nfts-worldwide/#:~:text=That%20said%2C%20while%20sales%20of,billion%20U.S.%20dollars%20in%202022>.

⁹³ Maharaj, *supra* note 86.

⁹⁴ *Id.*

AI-powered tools can also revolutionize graphic design by allowing artists to place more focus on the creative aspects of their work by providing artistic assistance.⁹⁵ Enjoyment derived from experiencing art has also seen improvement as a result of AI algorithms which can orchestrate curations and exhibitions as well as craft personalized immersive experiences for art patrons.⁹⁶ This has led to AI providing exposure to emerging artists whose works may be buried in vast repositories of art and using perceptive analytics to curate exhibitions showcasing patterns that elude human observation.⁹⁷ Moreover, AI can potentially democratize art by offering virtual galleries and augmented reality (AR) exhibitions, thus making immersive art accessible to a worldwide audience, irrespective of geographical and financial barriers.⁹⁸

While AI stands as a potent tool within the creative industry, it has also altered the role of human creators of art and music in ways not proven to be consistently beneficial. Despite bringing numerous benefits to the music industry, the use of AI raises concerns for music artists, including competition and job displacement, loss of creative control, copyright and plagiarism disputes, loss of originality, and algorithmic bias. Mubert, a service that provides AI-generated background music,

⁹⁵ Ameer Muavia, *Artificial Intelligence Takes the Lead in Graphic Design*, LINKEDIN (Aug. 01, 2023), <https://www.linkedin.com/pulse/artificial-intelligence-takes-lead-graphic-design-ameer-muavia/>.

⁹⁶ Nitish Arora, *Art Meets Algorithm: How Kiran Nadar and AI Are Sculpting the Future of Art Collection*, MEDIUM (Oct. 29, 2023), <https://medium.com/@nitisharora41/art-meets-algorithm-how-kiran-nadar-and-ai-are-sculpting-the-future-of-art-collection-bf7a38f57414>.

⁹⁷ *Id.*

⁹⁸ *Id.*

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thus protecting businesses from copyright claims, illustrates that while AI provides solutions, it also creates problems for music artists who would benefit from similar exposure.⁹⁹ Hiring demo singers to provide live demonstrations to popular singers on how a song will sound is common practice in the music industry; this practice has been circumvented by AI, which has been implemented as a cheaper alternative.¹⁰⁰

AI-powered auto-tuning and sound enhancement tools which can improve the sound quality of vocals can also lead to an over-processed standardized sound that is void of the artist's vocal expression and creative vision.¹⁰¹ This has inspired artists to vocalize their disdain for the practice of using AI-powered auto-tune, such as in 2009 when staunch auto-tune critic Jay-Z released a song entitled "D.O.A – Death of Autotune."¹⁰²

Additionally, copyright disputes have ensued as AI algorithms are trained using the copyrighted material of music artists and record labels.¹⁰³ For example, on

⁹⁹ Christina Gwira, *Mubert AI Review 2023: A Game-Changer for Generative Music*, ELEGANT THEMES (Jan. 4, 2024), <https://www.elegantthemes.com/blog/business/mubert-ai>.

¹⁰⁰ Elias Leight & Kristin Robinson, *5 Ways AI Has Already Changed the Music Industry*, BILLBOARD (Aug. 04, 2023), <https://www.billboard.com/lists/ways-ai-has-changed-music-industry-artificial-intelligence/personalized-soundtracks/>.

¹⁰¹ Jacopo Prisco & Andrew Stewart, *The Invention That Changed Music Forever*, CNN (May 27, 2015, 11:27 AM), <https://www.cnn.com/2015/05/26/tech/autotune-inventor-mci/index.html#:~:text=Autotune%3A%20good%20or%20bad%3F>.

¹⁰² *Id.*

¹⁰³ Hayden Field, *Anthropic's AI Chatbot Claude Is Posting Lyrics to Popular Songs, Lawsuit Claims*, CNBC (Oct. 18, 2023 7:12 PM), <https://www.cnbc.com/2023/10/18/universal-music-sues-anthropic-for-copyright-infringement-over-lyrics.html#:~:text=Universal%20Music%20has%20sued%20Anthropic,by%20former%20OpenAI%20research%20executives>.

October 18, 2023, Concord Music Group filed an action against AI company, Anthropic, alleging that their creation, training, and operation of AI models illegally disseminates and infringes copyrighted musical compositions owned by Concord Music Group.¹⁰⁴ Lack of originality is a further concern of AI's impact on music as the creativity of music generated by AI algorithms is bound by the existing music compositions that were scraped during the training of the algorithm.¹⁰⁵

Algorithmic bias--the tendency of AI algorithms to favor certain genres and artists over others--is an ongoing concern of AI's integration into the music industry.¹⁰⁶ This concern stems from the tendency of AI algorithms to perpetuate systematic and unfair discrimination towards female and emerging music artists by being less likely to recommend musical compositions from these groups despite their material aligning with user preferences.¹⁰⁷ Therefore, maintaining a delicate balance during the integration of AI is paramount to safeguard the integrity and sustainability of the music industry.

Similarly, the integration of AI into the art sphere has presented challenges that have, in some instances, had a detrimental impact on the visual art industry.

¹⁰⁴ Complaint at 3, *Music-Z Songs v. Anthropic, PBC*, No. 3:23-cv-01092 (M.D. Tenn. filed Oct. 18, 2023).

¹⁰⁵ Annika Hope, *AI Generated Music – The Future Of The Fall Of Creativity?*, MUSIC GATEWAY (Mar. 13, 2023), <https://www.musicgateway.com/blog/music-production/ai-generated-music-the-future-of-the-fall-of-creativity>.

¹⁰⁶ See generally Arthur Flexer et al, *Hubness as a Case of Technical Algorithmic Bias in Music Recommendation*, IEEE (2018), <https://ieeexplore.ieee.org/document/8637517/metrics>.

¹⁰⁷ Julie Knibbe, *Fairness in Question: Do Music Recommendation Algorithms Value Diversity?*, MUSIC TOMORROW (Sept. 21, 2021), <https://www.music-tomorrow.com/blog/fairness-and-diversity-in-music-recommendation-algorithms>.

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These challenges encompass a range of issues including, creative ownership and authenticity in terms of copyright, the potential for economic displacement of artists as AI-generated works gain prominence, algorithmic bias leading to discrimination in art creation, and the stifling of originality and diversity in art by promoting homogenization.¹⁰⁸ In *Harper & Row, Publishers, Inc. v. Nation Enterprises*, the Supreme Court expressed that copyright laws were enacted by Congress to “be the engine of free expression” and “suppl[y] the economic incentive to create and disseminate ideas.”¹⁰⁹ Presently, as millions of prior artistic works are used to train AI algorithms in artistic creativity, AI aims to stifle free expression and economic incentives by muddling notions of authorship concerning AI-generated works and walking the line between copyright infringement and fair use, a legal principle designed to ease copyright restrictions for users who make sufficient changes to others’ work.¹¹⁰

AI-generated art also poses an economic threat to artists by dwindling the demand for traditional art as companies outsource entry-level work, such as concept artistry, to generative AI models as a less costly alternative.¹¹¹ Eva Toorenent, an

¹⁰⁸ Editorial Aela, *Artificial Intelligence: How AI is Changing Art*, AELA (Apr. 01, 2023), <https://aelaschool.com/en/art/artificial-intelligence-art-changes/>.

¹⁰⁹ *Harper & Row, Publishers Inc. v. Nation Enters.*, 471 U.S. 539, 558 (1985).

¹¹⁰ Robert Mahari et al, *Why Generative AI is a Minefield for Copyright Law*, FAST COMPANY (Jun. 27, 2023), <https://www.fastcompany.com/90913199/why-generative-ai-is-a-minefield-for-copyright-law>.

¹¹¹ Tom Carter, *Workers are Worried about AI Taking Their Jobs. Artists Say it's Already Happening.*, BUSINESS INSIDER (Oct. 1, 2023 5:20 AM), <https://www.businessinsider.com/ai-taking-jobs-fears-artists-say-already-happening-2023->

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artworks, AI has the potential to lead to the homogenization of artwork and reduce innovation by deterring newcomers with diverse styles from entering the art industry.¹¹⁷ It is essential to recognize that while AI brings remarkable opportunities, it also ushers in complex dynamics artists and the art industry must navigate, requiring a balance between embracing technological advancements and preserving the core of artistic identity and autonomy.

V. Unfair Method of Competition in the Creative Industry

Competition on the merits and the maintenance of an open and fair marketplace is the cornerstone of the American economy and its industries, including the creative industry.¹¹⁸ In America, competition on the merits concerns price, selection, and services, and benefits consumers by balancing reasonable prices with ensuring high-quality goods and services.¹¹⁹ As a result, competition on the merits encourages businesses to innovate and exceed the expectations of consumers by striving to offer a greater quality of goods and services than their competitors.¹²⁰ In contrast, the FTC expresses that traditional forms of unfair methods of competition include local price cutting, holding companies designed to restrain competition, interlocking directorates, unjustified price discrimination, procuring competitor's

¹¹⁷ Editorial Aela, *supra* note 107.

¹¹⁸ Exec. Order No. 14,036, 86 Fed. Reg. 36987 (Jul. 14, 2021).

¹¹⁹ Memorandum from the Fed. Trade Comm'n (hereinafter Fed. Trade Comm'n) on How Consumers Win When Business Compete (May 2015) [hereinafter Fed. Trade Comm'n]. <https://www.ftc.gov/sites/default/files/attachments/competition-counts/zgen01.pdf>

¹²⁰ *Id.*

secrets through illegal means, oppressive exclusive contracts, charging exorbitant prices where the seller has a substantial monopoly, and encouraging conduct on the part of a competitor's employees that is inconsistent with their duty to their employer.¹²¹ When competitors employ these unfair methods of competition rather than competing on the merits, a race to the bottom ensues, with consumers largely bearing the burden.

Through enforcing antitrust regulations, which deter dominating corporations from working together as “trusts” to suppress competition, the Department of Justice (DOJ) and FTC, along with state attorney generals, work to preserve the operation of the marketplace in an open and fair manner.¹²² The Supreme Court describes antitrust laws as “the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms,” illustrating that antitrust law promotes economic liberty and provides a reasonable solution to the ethical, legal, and economic concerns posed by AI scraping practices.¹²³ Furthermore, the FTC actively advocates for the principle of free and

¹²¹ Fed. Trade Comm'n, *Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act*, (Nov. 10, 2022), at 4, n. 16. https://www.ftc.gov/system/files/ftc_gov/pdf/P221202Section5PolicyStatement.pdf

¹²² *Fed. Trade Comm'n v. Dean Foods Co.*, 384 U.S. 597, 618–19 (1966) (Fortas, J., dissenting). See also 51 CONG. REC. 12146 (1914) (statement of Sen. Henry Hollis) (expressing that the DOJ would be able to focus on “the great task of prosecuting suits for the dissolution of monopolies, leaving to the trade commission the important service of policing competition, so as to protect small business men, keep an open field for new enterprise, and prevent the development of trusts”).

¹²³ *United States v. Topco Associates, Inc.*, 405 U.S. 596, 610 (1972).

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equitable competition and confronts business practices that hinder this competition.¹²⁴ Ultimately, the FTC aims to ensure consumers are able to access goods and services of the utmost quality at competitive prices, while also enabling companies to compete on their merits.¹²⁵ The FTC leverages its Bureau of Competition and Economics to effectively allocate its antitrust resources where consumer interests are most significant, including areas such as technology.¹²⁶

When allocating its antitrust resources and enforcing various antitrust regulations, the FTC's Bureau of Competition also safeguards against unfair methods of competition with the guidelines detailed in the FTC Act. Enacted by Congress in 1914, the FTC Act provides a legal framework that serves to bolster previously enacted antitrust legislation and put to rest growing concerns of anticompetitive business practices restricting competition and harming consumers.¹²⁷ Section 5 of the FTC Act makes unfair methods of competition unlawful as well as empowers and charges the FTC to identify and preempt conduct that utilizes unfair competition methods of competition.¹²⁸ The FTC defines the legal concept of unfair methods of competition as “tactics that seek to gain an

¹²⁴ Fed. Trade Comm'n, *supra* note 117, at 3.

¹²⁵ *Id* at 2.

¹²⁶ *Id* at 2.

¹²⁷ Press Release, Fed. Trade Comm'n, *supra* note 39.

¹²⁸ 15 U.S.C. § 45(a)(1).

advantage while avoiding competing on the merits, and that tend to reduce competition in the market.”¹²⁹

By enacting Section 5 of the FTC Act, Congress aimed to establish an expansive prohibition that extended beyond the provision of the Sherman and Clayton Acts.¹³⁰ Congress deliberately introduced the term “unfair method of competition” in the FTC Act to delineate the FTC’s jurisdiction from the conventional common law definition of “unfair competition.”¹³¹ Recognizing the dynamic nature of the business landscape, Congress intended to empower the FTC with the flexibility to adapt to changing business practices, rather than confining it within a static definition that could quickly become obsolete.¹³²

When evaluating whether conduct amounts to an unfair method of competition, the FTC uses a three-part test. First, the agency considers whether the conduct is a method of competition.¹³³ Second, the FTC decides whether the conduct is “coercive, exploitative, collusive, abusive, deceptive, predatory, or involve the use of economic power of a similar nature.”¹³⁴ If yes, the FTC then uses a sliding scale to consider whether the conduct has a tendency to negatively affect competition, a tendency that includes “conduct that tends to foreclose or impair the opportunities

¹²⁹ Fed. Trade Comm'n, *supra* note 39.

¹³⁰ Fed. Trade Comm'n, *supra* note 119, at 3.

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.* at 9.

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of market participants, reduce competition between rivals, limit choice, or otherwise harm consumers.”¹³⁵ Undoubtedly, AI scraping meets the first criterion, as the Subcommittee on Cybersecurity, Information Technology, and Government Innovation expressed, AI scraping has led to advancements in deepfake technology that can be abused to deceive viewers and create national security threats.¹³⁶ Additionally, AI scraping meets the second criterion as the vast resources necessary to scrape data to build AI models erect high barriers to entry for new entrants to the AI market, leaving AI startups no option but to partner with dominant firms such as Microsoft, Amazon, Nvidia, and Alphabet, fueling oligopoly and monopoly concerns.¹³⁷ In sum, AI scraping fits within the bounds of unfair methods of competition as established by Section 5 of the FTC Act.

In addition to federal legislative backing, the FTC has received judiciary support as courts have recognized the FTC as an independent, expert agency and give “great weight” to conduct the agency deems sufficient to constitute an unfair method of competition.¹³⁸ Further, despite courts at times disagreeing with the factual contentions of the FTC, they have continued to emphasize the scope of Section 5 of the FTC Act and the authoritative power it grants the FTC.¹³⁹ When determining whether an action taken by a competitor in the marketplace is an unfair

¹³⁵ *Id.*

¹³⁶ Comm. on Oversight and Accountability, *supra* note 16.

¹³⁷ Thun, *supra* note 42.

¹³⁸ Fed. Trade Comm'n, *supra* note 119, at 7.

¹³⁹ *Id.*

method of competition, courts “[rely] on the text, structure, legislative history of Section 5, precedent, and the FTC’s experience applying the law.”¹⁴⁰ In construing what is considered a “method of competition” violative of Section 5 of the FTC Act, courts specifically look at steps taken by a defendant rather than marketplace conditions not of the defendant’s making.¹⁴¹ Courts have determined that such conduct must have a negative impact on competition, though the relationship does not have to have a direct impact, such as conduct concerning patents, licenses, or standard setting.¹⁴²

With the backing of Congress and the endorsement of the judiciary, the FTC is vested with the authority to raise concerns about AI scraping acting as an unfair method of competition. The FTC is responsible for enforcing the provisions of the FTC Act, the Sherman Antitrust Act, the Clayton Act, and the Robinson-Patman Act, granting the agency the power to prevent unfair methods of competition and “unfair or deceptive acts in or affecting commerce.”¹⁴³ Because AI scraping has the propensity to involve deceptive, fraudulent, and unethical business practices that harm competition, consumers, and the integrity of the marketplace, it falls under the FTC’s jurisdiction.¹⁴⁴ When determining whether conduct is legally “unfair” the

¹⁴⁰ *Id* at 9.

¹⁴¹ *Id.*

¹⁴² Fed. Trade Comm'n, *Statement of the Federal Trade Commission In the Matter of Google Inc.*, Commission File No. 121-0120 (Jan. 3, 2013), at 1.

¹⁴³ Fed. Trade Comm'n, *supra* note 119, at 1.

¹⁴⁴ Teitler & Jaynati, *supra* note 4.

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FTC applies a three-part test that considers if it is substantial, if it is outweighed by any countervailing benefits to consumers or competition the conduct produces, and if it is conduct that competitors or consumers could not reasonably avoid.¹⁴⁵ The FTC has a history of addressing new and emerging issues in the technology sectors, and AI would be no exception.¹⁴⁶ Further evidence of the FTC's capability is illustrated by the agency's establishment of the Office of Technology in February 2023.¹⁴⁷ This office's primary objective is to assemble a team of technological experts to enhance the FTC's capacity to uphold American competition and consumer protection regulations.¹⁴⁸ Therefore, the FTC is effectively able to investigate and take enforcement actions against companies and individuals engaged in AI scraping practices found to be an unfair method of competition or otherwise harm consumers and the marketplace. The FTC's authority to address unfair methods of competition practices, coupled with its adaptability to evolving circumstances, allows it to scrutinize and combat practices like AI scraping which may disrupt fair competition and harm consumers.

Additionally, AI scraping can potentially fit into the FTC's landscape of addressing abuse of dominance, particularly when it involves anticompetitive

¹⁴⁵ 15 U.S.C. § 45(n).

¹⁴⁶ Stephanie T. Nguyen, *A Century of Technological Evolution at the Federal Trade Commission*, F.T.C. TECHNOLOGY BLOG (FEB. 17, 2023), <https://www.ftc.gov/policy/advocacy-research/tech-at-ftc/2023/02/century-technological-evolution-federal-trade-commission>.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

conduct. Section 2 of the Sherman Antitrust Act makes it unlawful for any person or company to “monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States or with foreign nations...”¹⁴⁹ This section is relevant to AI scraping in that it requires vast resources and data to dominate in the field of AI as shown by the top five players, making concerns of monopolization and attempts to monopolize in the technological marketplace a pressing concern.

To establish monopolization, an entity must have: “(1) monopoly power and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.”¹⁵⁰ Therefore, AI scraping—if employed by a dominant company to maintain or enhance its market power by unfairly restricting access to data or harm competitors—may be seen as a practice that leads to monopolization prohibited by Section 2 of the Sherman Antitrust Act. To establish attempted monopolization, one must show that a party engaged in “(1) anticompetitive conduct, (2) a specific intent to monopolize, and (3) a dangerous probability of achieving monopoly power.”¹⁵¹ Consequently, if a company uses AI scraping as a strategy that has a dangerous probability to weaken or otherwise exclude competitors and gain a dominant position in the market, the company could be

¹⁴⁹ 15 U.S.C. § 2.

¹⁵⁰ *United States v. Grinnell Corp.*, 384 U.S. 563, 570–71 (1966).

¹⁵¹ *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 456 (1993).

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liable for attempted monopolization in violation of Section 2 of the Sherman Act.¹⁵² Because Section 5 of the FTC Act grants the FTC broader authority than that granted in Section 2 of the Sherman Act, the FTC is more than capable of addressing AI scraping as an unfair method of competition.¹⁵³

A. Challenges of Bringing an AI Scraping Case Under Section 5 of the FTC Act

Bringing an AI scraping case alleging an unfair method of competition under Section 5 of the FTC Act poses several challenges. To enforce the law, including antitrust law as seen in Section 5 of the FTC Act, the rule of law dictates that regulatory bodies are to enforce well-defined legal restrictions adequately and efficiently in specific situations, ensuring there is adequate clarity, consistency, and predictability for competitors in the marketplace.¹⁵⁴ While Section 5 of the FTC Act is designed to protect competition on the merits by prohibiting deceptive, coercive, exploitative, collusive, and abusive conduct, the novel nature of AI scraping presents complexities that must be addressed to meet the rule of law standard. Some key challenges evaluating AI scraping under Section 5 of the FTC Act include lack of clear precedent, defining anticompetitive conduct in the AI scraping sphere, defining the market for AI, determining when implementing AI scraping becomes an exclusionary tactic, and potential procompetitive business justifications for AI

¹⁵² See *Id.*

¹⁵³ See 15 U.S.C. § 45(a)(2).

¹⁵⁴ Maurice E. Stucke, *Does the Rule of Reason Violate the Rule of Law?*, 22 LOY. CONSUMER L. REV. 15, 15 (2009).

scraping. Addressing these challenges will require a multidisciplinary approach that involves both legal and technical expertise. Legal authorities, including the FTC and the courts, may need to adapt existing legal frameworks and establish guidelines specific to AI and scraping to effectively address anticompetitive practices of this nature in the digital age.

Because Section 5 of the FTC Act has primarily evolved in response to traditional anticompetitive practices, and given the novelty of AI scraping, there is limited legal precedent to control the issue. Due to the lack of precedent, current AI scraping litigation revolves around copyright infringement, data privacy, or licensed-based claims.¹⁵⁵ The influx of pending AI and data scraping litigation will play a significant role in establishing the legal precedent for this issue. In the interim, the lack of precedent fails to provide companies who engage in AI scraping with guidelines to ensure their conduct is within the bounds of competing on the merits.¹⁵⁶ This lack of precedent also means that judges hearing AI scraping claims will have limited antitrust guidance and their decisions will be based on analogous technological issues such as web scraping.

¹⁵⁵ See D. Reed Freeman Jr. et al, *Data Scraping, Privacy Law, and the Latest Challenge to the Generative AI Business Model*, ARENTFOX SCHIFF (Jul. 17, 2023), <https://www.afslaw.com/perspectives/privacy-counsel/data-scraping-privacy-law-and-the-latest-challenge-the-generative-ai>. (describing the nature of some pending lawsuits related to generative AI models and their accumulation and use of data).

¹⁵⁶ See *Policy Brief: What is Competition on the Merits?*, OECD 1, 3 (Jun. 2006), <https://www.oecd.org/competition/mergers/37082099.pdf> (describing the difficulty of defining “competition on the merits” in the absence of formal guidelines or judicial precedent).

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Defining anticompetitive conduct in the sphere of continuously evolving AI scraping poses another challenge under Section 5 of the FTC Act as it requires a comprehensive understanding of specific AI scraping practices, its impact on competition, and its potential consumer harm. By its nature, an AI algorithm is vastly complex, thus making it difficult for factfinders who may lack the requisite technological savviness to discern what specific algorithmic actions and their implementation constitute anticompetitive conduct.¹⁵⁷ Data sharing is a common AI industry practice that further increases the difficulty of defining anticompetitive conduct in AI scraping as current FTC guidance states that information exchanges amongst competitors must be “reasonable.”¹⁵⁸

Similarly, defining the market for AI scraping poses a challenge for bringing Section 5 unfair method of competition litigation on the issue. AI can impact the market in various ways from enhancing competition by “opening up the playing field” to hindering it by “creat[ing] barriers to entry or expansion that prevent fair competition from fully flourishing.”¹⁵⁹ Furthermore, many companies employing AI scraping employ it for various reasons, complicating the ability to define its relevant market. For example, Microsoft utilizes AI scraping to improve its Bing

¹⁵⁷ See *Artificial Intelligence (AI) Algorithms: A Complete Overview*, SALESFORCE (2023), <https://www.tableau.com/data-insights/ai/algorithms#:~:text=While%20a%20general%20algorithm%20can,different%20types%20of%20AI%20algorithms.> (explaining how AI operates and the complexities it provides).

¹⁵⁸ Michael Bloom, *Information exchange: be reasonable*, FTC COMPETITION MATTERS BLOG (Dec. 12, 2014), <https://www.ftc.gov/enforcement/competition-matters/2014/12/information-exchange-be-reasonable>.

¹⁵⁹ Staff in the Bureau of Competition & Office of Technology, *supra* note 37.

search engine's web search capabilities, whereas Tesla's AI scraping focus concerns vehicular AI, robotics, and clean energy.¹⁶⁰ Since determining whether AI scraping is an unfair method of competition depends on defining the relevant market and assessing market power, it underscores the need for a comprehensive understanding of the specific scraping practices, its potential for anticompetitive effects, and its impact on consumer welfare within the context of evolving digital markets.

Determining when AI scraping is an exclusionary tactic also poses a challenge to bringing an AI scraping case under Section 5 of the FTC Act. Because of the autonomous nature of an AI algorithm, it lacks the direct communication traditionally seen in unfair methods of competition, such as collusion.¹⁶¹ Lacking this communication poses a challenge to proving exclusionary intent in the absence of explicit coordination. Furthermore, AI scraping has legitimate uses such as finding consumer discounts, competitor pricing for travel and e-commerce businesses, and social media marketing campaigns.¹⁶² These examples illustrate that distinguishing between legitimate and exclusionary uses of AI scraping is a convoluted task.

¹⁶⁰ STASH FINANCIAL, *supra* note 50.

¹⁶¹ See Elizabeth A. N. Haas et al, *FTC Releases New Policy Statement on "Unfair Methods of Competition" Enforcement under Section 5 of the FTC Act*, FOLEY & LARDNER LLP (Nov. 17, 2022), [https://www.foley.com/en/insights/publications/2022/11/ftc-policy-statement-unfair-methods-competition#:~:text=First%2C%20conduct%20may%20qualify%20as,affect%20competitive%20conditions.%E2%80%9D%20Examples%20include.\(listing activities that are traditionally considered unfair methods of competition\)](https://www.foley.com/en/insights/publications/2022/11/ftc-policy-statement-unfair-methods-competition#:~:text=First%2C%20conduct%20may%20qualify%20as,affect%20competitive%20conditions.%E2%80%9D%20Examples%20include.(listing%20activities%20that%20are%20traditionally%20considered%20unfair%20methods%20of%20competition))

¹⁶² ScrapeIt, *supra* note 38.

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Potential procompetitive business justifications present a final challenge to bringing an AI scraping suit under Section 5 of the FTC Act. Since the Supreme Court's 1911 decision in *Standard Oil Co. v. United States*, courts have primarily relied on the rule of reason test to determine whether conduct violates United States antitrust laws.¹⁶³ The rule of reason test requires factfinders to balance the anticompetitive harms of a competitor's conduct with procompetitive business justifications, and if the procompetitive effects outweigh, the conduct is lawful.¹⁶⁴ Consumer benefit is one procompetitive business justification defendants may proffer, as AI scraping may be used to lower prices for goods and services.¹⁶⁵ For example, a travel business may employ AI scraping to gain insight into its competitors pricing and offer its consumers a better deal.¹⁶⁶ Innovation, a principle valued by the FTC, is another procompetitive business justification a defendant may claim.¹⁶⁷ AI scraping can be linked to innovation since data scraped using AI may be pivotal for developing new products. For instance, in July 2023, Google updated its privacy policy to inform users that the company may "use publicly

¹⁶³ Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* ¶ 1500 (5th ed. 2020) ("Ever since [the U.S. Supreme Court's 1911 Standard Oil decision], antitrust law has been governed predominately by the 'rule of reason.'").

¹⁶⁴ *Cal. Dental Ass'n v. FTC*, 526 U.S. 756, 778 (1999).

¹⁶⁵ ScrapeIt, *supra* note 38.

¹⁶⁶ ScrapeIt, *supra* note 38.

¹⁶⁷ See Michael Pertschuk, Chairman, Fed. Trad Comm'n, Remarks at the Conference Board in New York, New York 2-3, 5 (Jan. 15, 1980), https://www.ftc.gov/system/files/documents/public_statements/688861/19800115_pertschuk_innovation_and_competition_remarks_before_the_conference_board.pdf (identifying the importance of innovation to the FTC and its role in antitrust enforcement).

available information to help train Google’s AI models and enhance products and features such as Google Translate, Bard, and Cloud AI capabilities.”¹⁶⁸ These potential procompetitive business justifications and others that may arise can pose challenges for the FTC and other antitrust regulators in establishing when AI scraping constitutes an unfair method of competition in violation of Section 5 of the FTC Act.

VI. Policy Recommendations to Deter AI Scraping Under Section 5 of the FTC Act

Policy adoption to guide and deter AI scraping practices by way of Section 5 of the FTC Act can help strike a balance between encouraging innovation and protecting competition on the merits and consumers. Under Section 5 of the FTC Act, the FTC has the authority to act against unfair or deceptive conduct in or affecting commerce as well as unfair methods of competition.¹⁶⁹ Some policy recommendations to bolster the FTC’s authority include developing a clear legal framework to strengthen antitrust enforcement, transparency requirements, and data retrieval consent. Developing a clear legal framework that defines the boundaries of AI scraping could in its most rigid form include amending Section 5 of the FTC Act to include scraping as an unfair method of competition or in a

¹⁶⁸ Jess Weatherbed, *Google Confirms it’s Training Bard on Scraped Web Data, too*, THE VERGE (Jul. 05, 2023), <https://www.theverge.com/2023/7/5/23784257/google-ai-bard-privacy-policy-train-web-scraping>. Google has since updated its research and development privacy policy to replace Bard with Gemini Apps, but the policy was not changed regarding Google’s use of publicly available information. *Privacy Policy*, GOOGLE (Feb. 8, 2024), <https://policies.google.com/privacy>.

¹⁶⁹ 15 U.S.C. § 45(a)(1).

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more lenient form, define the scope of acceptable data collection practices. Both courses of action will put those who engage in AI scraping on notice as to what practices are acceptable as well as guide factfinders in assessing whether a scraping case constitutes an unfair method of competition. Implementing transparency requirements for AI scraping would require firms to disclose their AI scraping practices and data collection purposes to consumers and competitors, ensuring accountability. Google implemented this transparency requirement in its July 2023 privacy policy update that informed its users that it would scrape publicly available data to train its AI models and provide new service features.¹⁷⁰ Data retrieval consent is a final policy recommendation to guide AI scraping practices. Establishing strict regulations that require firms to obtain explicit consent before scraping content from creators, competitors, and consumers would lessen potential hardship and litigation that could arise from AI scraping. Balancing the benefits of technological advancement with the need for competition on the merits is essential in this rapidly changing environment and these policy recommendations would deter AI scraping as an unfair method of competition under Section 5 of the FTC Act while also fostering a competitive and innovative technological ecosystem.

¹⁷⁰ Weatherbed, *supra* note 166 (citing a statement by Christa Muldoon, a spokesperson for Google).

Conclusion

AI scraping presents creators, consumers, competitors, and antitrust regulators with a potent instrument that offers both opportunities and obstacles. Striking a balance between innovation and regulation will be integral in this endeavor as many stakeholders could be impacted by the proclivity of AI scraping practices to become an unfair method of competition. The FTC is best adept at regulating this evolving landscape as it has expertise in consumer protection, antitrust enforcement power, and demonstrated repressiveness to modern advancements that have posed a threat to consumers and the maintenance of a fair, open, and competitive marketplace. While the complexities that may surface when confronting AI scraping practices within the scope of existing antitrust law are numerous, they can be effectively managed through the proactive implementation of policies aimed at regulating and discouraging certain AI scraping practices.

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