Statement of Commissioner Maureen K. Ohlhausen

In Re **Apple Inc., No. 122-3108**

January 15, 2014

I voted to accept for public comment the accompanying proposed administrative complaint and consent order, settling allegations that Apple Inc. engaged in unfair acts or practices by billing iTunes account holders for charges incurred by children in apps that are likely to be used by children without the account holders' express informed consent.[1] I write separately to emphasize that our action today is consistent with the fundamental principle that any commercial entity, before billing customers, has an obligation to notify such customers of what they may be charged for and when, a principle that applies even to reputable and highly successful companies that offer many popular products and services.

In his dissent, Commissioner Wright lauds the iterative software design process of rapid prototyping, release, and revision based on market feedback; this approach has proven to be one of the most successful methods for balancing design tradeoffs. He also notes that it can be difficult to forecast problems that may arise with complicated products across millions of users and expresses concern that our decision today requires companies to anticipate and fix all such problems in advance.

I agree with Commissioner Wright that we should avoid actions that would chill an iterative approach to software development or that would unduly burden the creation of complex products by imposing an obligation to foresee all problems that may arise in a widely-used product.[2] I do not believe, however, that today's

[1] For the reasons given in the Statement of Chairwoman Ramirez and Commissioner Brill, I believe the complaint meets the requirements of 15 U.S.C. § 45(n) and the Commission's Unfairness Statement.

[2] I am concerned about any action that this agency takes that is likely to have adverse effects on firms' incentives to innovate. For example, in the antitrust context, I voted against the Commission's complaint in Bosch and Google/MMI based in significant part on my concern that those enforcement actions would hamper intellectual property rights and innovation more generally. *See In re Motorola Mobility LLC & Google Inc.*, FTC File No. 121-

action implicates such concerns. First, Apple's iterative approach was not the cause of the harm the complaint challenges. In fact, Apple's iterative approach should have made it easier for the compa

and concludes that compared to Apple's sales or in-app fees, injury was not substantial and that any injury that did occur is outweighed by the benefits to consumers and competition of Apple's overall platform. The relevant statutory provision focuses on the substantial injury caused by an individual act or practice, which we must then weigh against countervailing benefits to consumers or competition from that act or practice.[6] Thus, we first examine whether the harm caused by the practice of not clearly disclosing the fifteen-minute purchase window is substantial and then compare that harm to any benefits from that particular practice, namely the benefit to consumers and competition of not having a clear and conspicuous disclosure of the fifteen-minute billing window. It is not appropriate, however, to compare the injury caused by Apple's lack of clear disclosure with the benefits of the entire Apple mobile device ecosystem. To do so implies that all of the benefits of Apple products are contingent on Apple's decision not to provide a clear disclosure of the fifteen-minute purchase window for in-app purchases. Such an approach would skew the balancing test for unfairness and improperly compare injury "oranges" from an individual practice with overall "Apple" ecosystem benefits.

[6] "The Commission shall have no authority under this section or section 57a of this title to declare unlawful an act or practice on the grounds that such act or practice is unfair unless the act or practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition." 15 U.S.C. § 45(n).