

In the Matter of Apple, Inc.
FTC File No. 1123108
January 15, 2014

Today, through the issuance of an administrative complaint, the Commission alleges that Apple, Inc. (“Apple”) has engaged in “unfair acts or practices” by billing parents and other iTunes account holders for the activities of children who were engaging with software applications (“apps”) likely to be used by children that had been downloaded onto Apple mobile devices.¹ In particular, the Commission takes issue with a product feature of Apple’s platform that opens a fifteen-minute period during which a user does not need to re-enter a billing password after completing a first transaction with the password.² Because Apple does not expressly inform account holders that the entry of a password upon the first transaction triggers the fifteen-minute window during which users can make additional purchases without once again entering the password, the Commission has charged that Apple bills parents and other iTunes account holders for the activities of children without obtaining express informed consent.³

Today’s action has been characterized as nothing more than a reaffirmance of the concept that “companies may not charge consumers for purchases that are unauthorized.”⁴ I respectfully disagree. This is a case involving a miniscule percentage of consumers – the parents of children who made purchases ostensibly without their authorization or knowledge. There is no disagreement that the overwhelming majority of consumers use the very same mechanism to make purchases and that those charges are properly authorized. The injury in this case is limited to an extremely small – and arguably, diminishing – subset of consumers. The Commission, under the rubric of “unfair acts and practices,” substitutes its own judgment for a private firm’s decisions as to how to design its product to satisfy as many users as possible, and requires a company to revamp an otherwise indisputably legitimate business practice. Given the apparent benefits to some consumers and to competition from Apple’s allegedly unfair practices, I believe the Commission should have conducted a much more robust

¹ Complaint, Apple, Inc., FTC File No. 1123108, at para. 28-30 (Jan. 15, 2014) [hereinafter *Apple Complaint*].

² As indicated in the complaint, initially the fifteen-minute window was triggered when an app was downloaded. *Id.* at para. 16. Apple changed the interface in March 2011 and subsequently the fifteen-minute window was triggered upon the first in-app purchase. *Id.* at para. 17. *See also infra* note 13.

³ *Apple Complaint, supra* note 1, at para. 4, 20, 28.

⁴ Statement of Chairwoman Ramirez and Commissioner Brill at 1.

can be avoided by the company at very low cost.”¹⁶ It is also well established that one of the primary benefits of performing a cost-benefit analysis is to ensure that government action does more good than harm.¹⁷ The discussion below explains why I believe the Commission’s action today fails to satisfy the elements of the unfairness framework and thereby conclude that placing Apple under a twenty-year order in a marketplace in which consumer preferences and technology are rapidly changing is very likely to do more harm to consumers than it is to protect them.

Apple’s choice to include the fifteen-minute window in its platform design, and its decision on how to disclose this window, resulted in harm to a small fraction of consumers. Any consumer harm is limited to parents who incurred in-app charges that would have been avoided had Apple instead designed its platform to provide specific disclosures about the fifteen-minute window for apps with in-app purchasing capability that are likely to be used by children. That harm to some consumers results from a design choice for a platform used by millions of users with disparate preferences is not surprising. T

degree of integration across all components of Apple's platform is remarkably high, suggesting that Apple's disclosure practices may affect all Apple's sales. For completeness, Charts 1 and 2 below measure the estimated harm as a fraction of all three variants of Apple's sales – App Store sales, iDevice sales, and total sales. These data are available from Apple's Annual Reports and press releases.

Chart 1 shows that the estimated value of the harm is a miniscule fraction of both Apple total sales (about six one-hundredths of one percent) and iDevice sales (about eight one-hundredths of one percent) over the five-year period from the inception of the App Store to September 2013. This finding of harm (about 0.0006% of total sales and 0.0008% of iDevice sales) is relatively high estimate of harm.

Irrespective of the existence of

A. Apple's Platform as a Benefit to Consumers and Competition

Unfairness analysis requires an evaluation and comparison of the benefits and costs of Apple's decision not to increase or enhance its disclosure of how Apple's platform works, including the fifteen-minute window. The fifteen-minute window is a feature of Apple's platform that applies to purchases of songs, books, apps, and in-app purchases. This feature has long been a part of the iTunes Store for downloading music, and regular users of iTunes apparently value it. In the context here, disclosure is perhaps better thought of as a product attribute—guidance—that Apple provides to the customer through on-screen and other explanations of how to use Apple's platform.³³

In deciding what guidance to provide and how to provide it, firms face two important issues. First, since it is generally not possible to customize guidance for every individual customer, the optimal guidance inevitably balances the needs of different customers. In drawing this balance, the potential for harm from misinterpretation is likely important in deciding which customer on the sophistication spectrum might represent the least common denominator for directing the guidance. For any given degree of guidance, some customers will get it immediately, while others will have to work harder. If the potential for harm is very large, e.g., harm from a drug overdose, then both the firm and consumers want obvious, strong disclosures about dosage, and perhaps other steps like childproof caps. If the potential for harm is small, then strong guidance (or caps that are hard to open in the drug context) may make it more costly for consumers to use the product. Platform designers clearly face such tradeoffs in their decision-making regarding guidance and disclosures. Apple clearly faces the same tradeoff with respect to its decisions concerning the fifteen-minute window. This tradeoff is relevant for evaluating the benefit-cost test at the core of unfairness analysis.

Second, because it is difficult to anticipate the full set of issues that might benefit from guidance of various types, the firm must decide how much time to spend researching, discovering, and potentially fixing possible issues *ex ante* versus finding and fixing issues as they arise. With complex technology products such as computing platforms, firms generally find and address numerous problems as experience is gained

³³ Compare the disclosure contemplated here with disclosure in the mortgage context, for example. Here, the disclosure itself – or the guidance offered while the user is interacting with the product – is an intrinsic part of the product's value. Indeed, Apple's business model is built on offering an integrated platform with a clean design that customers find intuitive and easy to use. The way the platform is presented, including disclosures or guidance offered during use, is a critically important component of value. In the mortgage context, the disclosures signed at closing are not a significant component of the value of the mortgage.

guidance sufficient to prevent cancellations is more than about a penny per transaction, the additional guidance will be counter-productive.³⁶

To be clear, the sales of iDevices are not an estimate of consumer benefits but rather they approximate the total universe of economic activity implicated by the Commission's consent order. Similarly, estimated unauthorized purchases merely approximate the total universe of consumers potentially harmed by Apple's practices. The harm from Apple's disclosure policy is limited to users that actually make unauthorized purchases. However, the potential benefits from Apple's disclosure choices are available to the entire set of iDevice users because these are the consumers capable of purchasing apps and making in-app purchases. The disparity in the relative magnitudes of these universes of potential harms and benefits suggests, at a minimum, that further analysis is required before the Commission can conclude that it has satisfied its burden of demonstrating that any consumer injury arising from Apple's allegedly unfair acts or practices exceeds the countervailing benefits to consumers and competition.³⁷

Nonetheless, the Commission effectively rejects an analysis of tradeoffs between the benefits of additional guidance and potential harm to some consumers or to competition from mandating guidance by assuming that "the burden, if any, to users who have never had unauthorized charges for in-app purchases, or to Apple, from the provision of this additional information is de minimis and that any mandated disclosure would not "detract in any material way from a streamlined and seamless user experience." I respectfully disagree. These assumptions adopt too cramped a view of consumer benefits under the Unfairness Statement and, without more rigorous analysis to justify their application, are insufficient to establish the Commission's burden.

asked for returns were reimbursed for the charges as Apple attests, and that obtaining a reimbursement takes half an hour.

³⁶ Let Y be the harm to non-cancelling customers from additional guidance sufficient to prevent cancellations. This harm will just equal the benefit of avoiding cancellations if $(\% \text{ Cancelling}) \times (\text{Refund Time Cost}) - (\% \text{ Not Cancelling}) \times Y = 0$. Assuming $(\% \text{ Cancelling})$ is .0008, $(\text{Refund Time Cost})$ is \$11.95, and $(\% \text{ Not Cancelling})$ is .9992, solving for Y gives $Y = \$0.009$. In other words, if the harm to non-cancelling customers from additional guidance is more than roughly one cent for each transaction, then then the costs of the additional guidance will outweigh the benefits.

³⁷ Commissioner Ohlhausen suggests that our unfairness analysis compares inappropriately the injury caused by Apple's lack of clear disclosure with the benefits of Apple's disclosure policy to the entire ecosystem. She argues that this approach "skew[s] the balancing test for unfairness and improperly compare[s] injury 'oranges' from an individual practice with overall 'Apple' ecosystem benefits." Statement of Commissioner Ohlhausen at 3. For the reasons discussed, this analysis misses the point.

B. The Costs and Benefits to Consumers and Competition of Apple's Product Design and Disclosure Choices

To justify a finding of unfairness, the Commission must demonstrate the allegedly unlawful conduct results in net consumer injury. This requirement, in turn, logically implies the Commission must demonstrate Apple's chosen levels of guidance are less than optimal because consumers would benefit from additional disclosure. There is a considerable economic literature on this subject that sheds light upon the conditions under which one might reasonably expect private disclosure levels to result in net consumer harm.³⁸

To support the complaint and consent order the Commission issues today requires evidence sufficient to support a reason to believe that Apple will undersupply guidance about its platform relative to the socially optimal level. Economic theory teaches that such a showing would require evidence that "marginal" customers – the marginal consumer is the customer that is just indifferent between making the purchase or not at the current price – would benefit

available to the Commission. We cannot say with certainty whether the average consumer would benefit more or less than the marginal consumer from additional disclosure without empirical evidence. This evidence might come from a study of how customers react to different disclosures. However, given the likelihood that the average benefit of more disclosure to unaffected customers is less than the benefit to affected customers who are likely to be customers closer to the margin, I am inclined to believe that Apple has more than enough incentive to disclose.⁴⁰

C. Other Considerations When Examining the Costs and Benefits of Platforms and other Multi -Attribute Products

Unfairness analysis also requires the Commission to consider the impact of contemplated remedies or changes in the incentives to innovate new product features upon consumers and competition.⁴¹ I close by discussing some additional dimensions of an economic analysis of the costs and benefits of product disclosures in the context of complicated products and platforms with many attributes, like Apple's platform, where such disclosures are a critical component of these has moreupo33(i)-3(scu)-11(i)-3(scu)-11(i)i03 Tc coo5

what problems arise after the product hits the marketplace and issuing desirable fixes on an ongoing basis. We

The Commission has no foundation upon which to base a reasonable belief that consumers would be made better off if Apple modified its disclosures to confirm to the parameters of the consent order. Given the absence of such evidence, enforcement action here is neither warranted nor in consumers' best interest.