Weigh the Label, Not the Tractor:

continues today with a recent settlement of an unfairness matter in *Apple, Inc.*[2] generating three separate statements from four Commissioners.[3] Despite this contentious history, the agency's unfairness authority has evolved over time to become one of the Commission's most powerful tools for protecting consumers while permitting innovation in business models and technology. One of the foundations for the agency's successful use of this authority is the three-part test for unfairness, which includes a de facto cost-benefit analysis. To invoke unfairness successfully, the Commission must show that the conduct at issue causes or is likely to cause substantial harm to a consumer, that the consumer cannot reasonably avoid that harm, and the harm is not outweighed by the conduct's benefits to consumers or competition.[4]

The Commissioners' statements in *Apple, Inc.* explore how to apply this three-part test, and they diverge primarily on what factors to weigh in the unfairness analysis. These statements are the most comprehensive Commission-level discussion of that topic since a 1984 case, *International Harvester Co.*[5] This Essay outlines the development of the FTC's unfairness test and then compares how the FTC applied that test in *International Harvester* with how the Commissioners applied it in the *Apple, Inc.* in-app purchases case, with a particular focus on what was actually weighed in the cost-benefit analysis in both matters. From this comparison, I draw two conclusions about the FTC's modern unfairness analysis that are as true in *International Harvester* as they are in *Apple, Inc.* First, the "substantial harm" factor is a threshold test, not a balancing test. Second, when weighing countervailing benefits in the third prong of the unfairness test, the only benefits weighed are those from the practice at issue: only the practice's effects should be considered under the third prong of the unfairness test and it is inappropriate to weigh other benefits, such as the total benefits of the product or platform itself or benefits of the company's entire line of products.

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2 Apple Inc., FTC File No. 112-3108, 2014 WL 253519 (F.T.C. Jan. 15, 2014).

3 *See id.* at *5–15 (dissenting statement of Commissioner Joshua D. Wright); *id.* at *22–23 (statement of Commissioner Maureen K Ohlhausen); *id.* at *24–27 (statement of Chairwoman Edith Ramirez and Commissioner Julie Brill).

4 *See* 15 U.S.C. § 45(n) (2012).

5 Int'l Harvester Co., 104 F.T.C. 949, 1073–74 (1984).

I. A Brief History of Unfairness at the FTC Before *International Harvester*

Prior to *I H*, the evolution of the FTC's unfairness authority was punctuated by changes in doctrine and bursts of activity. After Congress established the agency in 1914 with authority over unfair methods of competition and later clarified the FTC's consumer protection authority in 1938, the Commission did not use unfairness as a separate authority until the mid-1960s. Once it started using unfairness as independent grounds for liability, however, the agency did so with enthusiasm, taking on sweeping regulatory efforts that backfired spectacularly. Humbled by the experience, in the early 1980s the FTC adopted a policy statement and applied it in *I - H*, ushering in the modern age of FTC unfairness enforcement.[6]

A. F C A A

Concerns about "unfair" conduct go to the Commission's earliest days. Congress passed the Federal Trade Commission Act in 1914,[7] and Section 5(a) of that Act declared "unfair methods of competition" ("UMC") unlawful.[8] In the early 1920s, the FTC began testing the boundary of its authority, arguing that deceptive advertising constituted an unfair method of competition in violation of Section 5.[9] In 1922, the Supreme Court agreed with the FTC that mislabeling knit goods "constituted an unfair method of competition" in part because it harmed competitors labeling their products truthfully.[10] The FTC interpreted this decision as a license to embark on an ambitious consumer protection enforcement campaign, bringing numerous investigations for competition violations such as selling or offering with tendency and capacity to deceive or mislead; misbranding; and false and misleading statements.[11] By 1925, roughly seventy percent of the FTC's orders involved deceptive advertising.[12]

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6 *I* .

7 Federal Trade Commission Act, Pub. L. No. 63-203, 38 Stat. 717 (1914) (codified as amended at 15 U.S.C. §§ 41–58 (2012)).

8 *I* . § 5.

9 ., FTC v. Winsted Hosiery Co., 258 U.S. 483, 484–87 (1922); Royal Baking Powder Co. v. FTC, 281 F. 744, 745, 748 (2d Cir. 1922).

10 *H C* ., 258 U.S. at 494.

11 Fed. Trade Comm'n, Annual Report of the Federal Trade Commission 82–90 (1932).

12 6 The Legislative History of the Federal Antitrust Laws and Related Statutes 4808 (Earl W. Kintner ed., 1983) [hereinafter Wheeler-Lea House Report].

The FTC's expansive interpretation of unfair methods of competition eventually ran into trouble in the courts. In 1931, the Supreme Court again evaluated the scope of the FTC's authority in *F C . C .*[13] The Court reviewed the FTC's assertion that false and misleading claims for a purported obesity cure comprised unfair methods of competition.[14] But the Court only considered the competitive effects of the false advertising on the relevant competitors in the weight-loss drug market, who were engaging in similar conduct.[15] Thus, the false advertising at issue did not put other competitors at a disadvantage, and the Court disregarded the effect of the misleading statements on consumers.[16] The Court limited severely the FTC's authority, noting, "[i]t is that condition of affairs [the loss of competition] which the Commission is given power to correct, and it is against that condition of affairs, and not some other, that the Commission is authorized to protect the public."[17] The Court closed its analysis by proclaiming, "[u]nfair trade methods [such as false advertising] are not unfair methods of . . . . If broader powers be desirable, they must be conferred by Congress."[18]

effectively gutted the FTC's consumer protection authority. To revive the FTC mandate to protect consumers directly and not just through ensuring a competitive marketplace, Congress proposed to amend the FTC Act.[19] Congress's intent was clear: "[s]ince it is the purpose of Congress to protect the consumer as well as the honest competitor, the Commission should be empowered to prevent the use of unfair or deceptive acts or practices in commerce, regardless of whether such acts or practices injuriously affect a competitor."[20] Congress passed the Wheeler-Lea Act in 1938, giving the FTC its consumer protection authority to police unfair or deceptive acts or practices.[21]

For two decades after the Wheeler-Lea amendments passed, the FTC generally did not distinguish between deceptive and unfair acts,

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13 FTC v. Raladam Co., 283 U.S. 643 (1931).

14 *I* . at 644–45.

15 *I* . at 652–53.

16 *I* . at 654.

17 *I* . at 649.

18 *I* . (emphasis added to "competition").

19 WHEELER-LEA HOUSE REPORT, note 12, at 4809.

20 *I* . at 4813.

21 Wheeler-Lea Act of 1938, Pub. L. No. 75-447, 52 Stat. 111 (codified as amended at 15 U.S.C. §§ 41–58 (2012)). The Act provided that "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful." *I* . § 45(a)(1).

nor separate such practices from unfair methods of competition.[22] Instead, the FTC often brought complaints that pled deceptive and unfair acts and unfair methods of competition simultaneously.[23]

B. C[illegible] F[illegible]

This changed in 1964, when the Commission, during the adoption of its Cigarette Rule,[24] developed a three-part test for determining unfairness of a trade practice. This test considered: (1) whether the practice offended public policy; (2) whether the practice was unethical, immoral, oppressive, or unscrupulous; and (3) whether it caused sub-

regulate television advertising directed towards or seen by children.[31] Specifically, the FTC concluded that much advertising to children was likely deceptive and unfair.[32] It therefore proposed a rule with three elements: (1) a ban on all television advertising of products directed to, or seen by, audiences with a significant proportion of younger children; (2) a ban on television advertising for sugared food products linked to dental cavities that was directed to or seen by older children; and (3) a requirement that television advertising for sugared food products not already included in the second provision be balanced by nutritional or educational disclosures funded by the advertisers.[33]

The backlash against this sweeping regulatory agenda was fierce. Ultimately, even the Washington Post criticized the Commission for being a "National Nanny."[34] Congress in particular demonstrated its disapproval of the FTC's overreach by refusing to fund the agency, causing the Commission to close its doors for a brief time.[35] Congress also passed new laws limiting the FTC's jurisdiction and prohibiting the use of unfairness-based regulation of commercial advertising.[36]

II. THE UNFAIRNESS STATEMENT AND THE MODERN UNFAIRNESS STANDARD

As part of its efforts to shore up its relationship with Congress after the conflict of the KidVid era, the Commission in 1980 unanimously adopted a policy statement describing its jurisdiction over unfair practices.[37] The policy statement reframed the [illegible] & H[illegible] ("[illegible]&H") factors in light of case law, emphasizing the primacy of the consumer harm element. "Unjustified consumer injury is the primary focus of the FTC Act, and the most important of the three S&H criteria. By itself it can be sufficient to warrant a finding of un-

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31 [illegible]

32 [illegible]

33 [illegible] Children's Advertising, 43 Fed. Reg. 17,967, 17,969 (Apr. 27, 1978); [illegible] ELLIS M. RATNER ET AL., FED. TRADE COMM'N, FTC STAFF REPORT ON TELEVISION ADVERTISING TO CHILDREN 328–42 (1978).

34 Editorial, [illegible], WASH. POST, Mar. 1, 1978, at A22.

35 [illegible] J. Howard Beales III, [illegible], 12 GEO. MASON L. REV. 873, 879 (2004).

36 [illegible] Federal Trade Commission Improvements Act of 1980, Pub. L. No. 96-252, § 11, 94 Stat. 374, 378–79.

37 FED. TRADE COMM'N., COMMISSION STATEMENT OF POLICY ON THE SCOPE OF THE CONSUMER UNFAIRNESS JURISDICTION (1980) [illegible] Int'l Harvester Co., 104 F.T.C. 949, 1072–76 (1984) [hereinafter cited as UNFAIRNESS STATEMENT with page references to [illegible]].

fairness."[38] The statement set out a three-factor test to evaluate whether a practice is unfair:

> First, there must be a [illegible]. This is an objective test. The Commission requires a real injury—emotional distress is not sufficient. The harm need not be large to any individual, but if it is significant in aggregate it may be substantial harm. The statement also notes that the harm might be small as an absolute matter, but still substantial if it is significantly larger than the benefit.[39]
>
> Second, the harm of the practice [illegible].[40]
>
> Finally, the harm [illegible]. If the consumer could have avoided the harm by choosing differently, the FTC will respect the consumer's choice.[41]

The Statement supported the importance of the public policy prong from [illegible]&H, but couched it in relation to the consumer injury

caused.[64] Finally, the Commission determined that the harm was not reasonably avoidable, even though a consumer could simply leave the gas cap in place until the tractor engine was off and cooled.[65] The Commission explained that because consumers were not aware of the risk of fuel geysering, they could not have reasonably taken steps to avoid it.[66]

Therefore, because the Commission found that IHC's failure to disclose the risk of fuel geysering to customers was substantial, unavoidable, and not outweighed by benefits to consumers or competition, the Commission concluded that this practice was unfair under Section 5 of the FTC Act.[67]

In the thirty-four years since *I . H* , the FTC has applied the unfairness standard set out in the policy statement in many cases. Yet *I . H* remains one of the most thoroughly explained applications of the unfairness standard to a detailed factual record and is thus a useful guidepost and point of comparison for future unfairness cases.

IV. Applying the Unfairness Standard in *Apple*

In January 2014, Apple settled an unfairness case with the FTC.[68] Importantly, this case prompted significant discussion by the four sitting FTC Commissioners over the application of the unfairness standard. The case involved Apple's processing of in-app purchases by consumers.[69] Apple required account holders to input their Apple password before downloading apps from the Apple app store, regardless of whether the app is free or costs money.[70] Certain free-to-download iPhone and iPad apps, including many child-targeted game apps, permitted users to obtain virtual items for use in the app in exchange for real money.[71] Some of the child-directed game apps also had virtual currency that could be obtained free of charge, while some had virtual currency that cost actual money, and some had both.[72]

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64 *I* . at 1064–65.

65 *I* . at 1065–66.

66 *I* . at 1066.

67 *I* . at 1067.

68 Press Release, *A I . F C $32.5 F C C I C I -A C* , Fed. Trade Commission (Jan. 15, 2014), https://www.ftc.gov/news-events/press-releases/2014/01/apple-inc-will-provide-full-consumer-refunds-least-325-million.

69 [illegible]

70 Apple Inc., FTC File No. 112-3108, 2014 WL 253519, at *2 (F.T.C. Jan. 15, 2014).

71 *I* . at *3.

72 *I* . at *4.

Apple charged the account holder for any in-app transactions that cost actual money.[73]

During the period addressed by the complaint, Apple would sometimes prompt the user for a password before authorizing a download or a single in-app purchase, and frequently Apple would store and use the consumer's entered password for any additional purchases for the next fifteen minutes.[74] Apple did not disclose that the initial password entry for a download would also authorize a purchase, nor explain the existence of the fifteen-minute window during which additional purchases would be automatically authorized.[75]

app purchases work and face barriers to switching platforms easily or quickly.[92]

B. C[illegible]

I also wrote in support of the *A*[illegible] order and consent, concluding that the complaint and consent met the requirements of 15 U.S.C.

cized the majority's conclusion that the burden of extra disclosure was *[illegible]*.[110] Second, he argued that the Commission was obligated to establish "through rigorous analysis" that Apple's disclosure decisions have imposed costs on consumers that outweigh benefits to consumers and the competitive process.[111] Third, Commissioner Wright argued that the cost-benefit analysis should have also evaluated how much it costs to solve a problem ahead of time as compared to once the problem emerges.[112] He characterized the complaint as requiring Apple to fix all flaws ahead of time or be charged with unfair practices.[113]

Thus, because Commissioner Wright concluded that the unfairness standard was not met, he dissented from the complaint and order against Apple.[114]

V. *Apple* is Consistent with *International Harvester* and the Unfairness Statement

The statutory definition of unfairness, as well as the Commission's explication of the relevant factors in the Unfairness Statement, controls the Commission's application of its unfairness authority.[115] The Commission's decision in *International Harvester* not only provides useful precedent on how to apply the unfairness test to actual facts, but the similarity of the issues in that case and *Apple*—product design rather than intentional misconduct, a failure to disclose a risk that affected a small number of consumers, and a large number of sales of a valuable product by a reputable company—also make it a particularly useful guidepost.

As an initial matter, the facts in the *Apple* case do not materially distinguish it from previous unfairness cases. To be absolutely clear, the Commission's complaint and order *[illegible]*. Instead, the Commission challenged the failure to disclose that window before billing consumers for in-app purchases in games geared to children. The legal standard for cases where we have found a failure to obtain express consent for billing to be unfair does not differ from our more general unfair failure-to-disclose cases. Under that standard, it would not matter if Apple in-

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110 *Id.* at *13.

111 *Id.* at *14.

112 *Id.* at *15.

113 *Id.*

114 *Id.* at *6.

115 *See supra* Part II.

[illegible] exhibits the proper way to apply the unfairness analysis.[120] It shows that the "substantial harm" factor is a threshold test, not a balancing test. It—and 15 U.S.C. § 45(n) after it—also clarifies that the costs and benefits weighed are limited to the particular practice at issue: a failure to disclose a design element that harmed a small number of users of an otherwise valuable product. This is the same approach the Commission takes in *A[illegible]*.

A. [illegible]

The Unfairness Statement treats substantiality as a threshold test. Indeed, the statement focuses almost entirely on the qualitative aspect, describing the *[illegible]* of harms that might qualify as unfair. The statement notes that "monetary harm" or "[u]nwarranted health and safety risks" are the kinds of harm that may be substantial.[121] It also notes that "[e]motional impact and other more subjective types of harm" are generally not substantial.[122] The statement further indicates that there is a threshold of harm—it must be substantial—for finding a practice unfair: "The Commission is not concerned with triv-

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Permanent Injunction and Other Equitable Relief at ¶ 49, FTC v. AT&T Mobility, LLC, No. 1:14-mi-99999-UNA (N.D. Ga. Oct. 8, 2014) ("In numerous instances, Defendant has charged consumers for Third-Party Subscriptions for which consumers have not provided express, informed consent."), *[illegible]* Complaint for Permanent Injunction and Other Equitable Relief at ¶ 42, FTC v. T-Mobile USA, Inc., No. 2:14-cv-00967 (W.D. Wash. July 1, 2014) ("In numerous instances, Defendant has charged consumers for Third-Party Subscriptions for which consumers have not provided express, informed consent.").

120 Commissioner Wright and his co-author assert that "the Commission should leaave behind analyses tethered to the factual underpinnings of International Harvester, Crescent Publishing, and Jesta in favor of a methodological commitment to using the appropriate economic tools for the facts at issue." Wright & Yun, *[illegible]* note 116, at 2156. This assertion is puzzling. *[illegible]*, *[illegible]*. and *[illegible]*, like all modern unfairness cases, rely explicitly on, and are therefore completely consistent with, the unfairness framework established in *[illegible]*. *[illegible]* FTC. v. Crescent Publ'g Grp., Inc., 129 F. Supp. 2d 311, 321 (S.D.N.Y. 2001); Complaint for Permanent Injunction and Other Equitable Relief, FTC. v. Jesta Digital, LLC, Civ. No. 1:13-cv-01272 (D.D.C. Aug. 20, 2013), https://www.ftc.gov/sites/default/files/documents/cases/2013/08/130821jestacmpt.pdf. Inexplicably, immediately after accusing me of legal fickleness, Commissioner Wright admits that relying on *[illegible]* and *[illegible]*

ness Statement, the Commission evaluated substantiality of harm as a qualitative/threshold test.[129]

Furthermore, treating the substantiality prong as a balancing test is unnecessary. The "countervailing benefits" prong of the unfairness analysis is dedicated to weighing the benefits of a practice. Treating the substantiality prong as a balancing test conflates these two prongs and renders the countervailing benefits prong superfluous.

In his statement, Commissioner Wright based his balancing approach to the unfairness standard's substantiality prong on a sentence from a speech by J. Howard Beales, a former Director of the FTC's Bureau of Consumer Protection.[130] In full context, however, Beales's remark is consistent with *I* ... *H* ... and the Unfairness Statement:

> Even in the aggregate, total injury may not be large, as in cases when the company is small or the practice is one that creates unnecessary transaction costs. But relative to the benefits, the injury may still be substantial. To qualify as substantial, an injury must be real, and it must be large compared to any offsetting benefits.[131]

Beales appears to be saying that some injury, although not large in absolute amount, remains substantial if it is large compared to small or nonexistent, benefits. His statement, in context, does not support Commissioner Wright's claim that a large, otherwise substantial harm becomes insubstantial under the first prong of the unfairness test if the related benefits are large enough.

B. *C* ... *B* ... *B* ... *A* ... *B* ... *I* ...

There is a second clear lesson we can draw from *I* ... *H* ... and *A* ...: when weighing countervailing benefits (the third prong of the unfairness test), the only harms and benefits on the scale are those resulting from the specific practice being challenged.

Like all balancing tests, the outcome of the "countervailing benefits" balancing depends on what we place on the scale. On that issue, the language of the Unfairness Statement is clear: "[T]he injury must not be outweighed by any offsetting consumer or competitive benefits

129 *I* . at 1064.

130 Apple Inc., FTC File No. 112-3108, 2014 WL 253519, at *6 & n.8 (F.T.C. Jan. 15, 2014) (citing Beales, note 28).

131 Beales, note 28 (footnote omitted).

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window.[141] The agreed-upon solution in the settlement was a one-time-per-device prominent notification of the existence of the fifteen-minute window.[142] Thus, the relevant "benefit" to be weighed is the amount Apple saved by not providing such a one-time notice.[143] Although the majority did not identify a specific dollar amount that failing to provide such a notice saved Apple, such a specific finding is not always mandated.[144] Commissioner Wright criticizes the majority's cost-benefit analysis as lacking rigor,[145] but such precision is not necessarily required by the statute or the Unfairness Statement.

Yet even when not strictly required, such an inquiry remains useful and should be the norm. Digging into the available evidence sug-

the costs to consumers. Commissioner Wright estimates that, to be worth it, the additional guidance must cost consumers who never suffer unauthorized purchases less than a penny per transaction.[146] Under Commissioner Wright's own methodology, this is equivalent to saying the additional disclosure is efficient if it costs such consumers less than 1.5 seconds .[147] However, the order only requires a one-time per device disclosure, not a per-transaction disclosure.[148] Therefore, to calculate the per-transaction cost, one must prorate the time a consumer spends dealing with this one-time disclosure across all subsequent transactions during the lifetime of that device. Thus, under Commissioner Wright's own analysis, a one-time per device disclosure that required a consumer's attention for thirty seconds would be efficient if the consumer made twenty or more transactions over the life of the device.[149] Given that the average U.S. consumer downloads 8.8 apps per month[150]—or almost nine transactions per month without even counting in-app purchases—the additional disclosure is almost certainly worth the cost.

Furthermore, Commissioner Wright bases his penny-per-transaction estimate on an unfounded assumption. Specifically, Commissioner Wright estimates that .08% of iDevice consumers were harmed by the lack of disclosure and thereby sought to cancel an unauthorized in-app purchase.[151] The proper way to estimate this percentage would be to divide the number of iDevice users harmed by the lack of disclosure by the total number of iDevice users. Lacking this precise data, Commissioner Wright seeks to calculate this ratio by proxy.[152] Thus, he takes the estimated total value of unauthorized purchases (as a proxy for the number of iDevice users harmed) and compares it with the estimated total value of iDevice sales (as a proxy for the total

146 *I* . at *12 & n.36. It is not immediately clear from Commissioner Wright's approach what counts as a "transaction," but what seems to make the most sense is every individual purchase of an iDevice, an app, or an in-app purchase.

147 . at *12 & n.35. At the average wage Wright uses, a penny is equivalent to 1.5 seconds of consumer time.

148 . at *17–18.

149 . at *12–13. Commissioner Wright's essay in this issue criticizes my use of his example, stating that he only intended "to provide perspective." Wright & Yun, note 116, at 2152. He succeeded: his example does provide perspective by effectively showing that a one-time disclosure likely has a very low cost.

150 Simon Khalaf, *A I A* , FLURRY INSIGHTS (Dec. 17, 2014), http://www.flurry.com/blog/flurry-insights/app-install-addiction-shows-no-signs-stopping#.VPtPl_nF98E.

151 Apple Inc., 2014 WL 253519, at *12.

152 *I* . at *9, *12.

number of iDevice users) during the same period.[153] But this approach is problematic. Specifically, iPhones or iPads cost hundreds of dollars each, while unauthorized in-app purchases max out at $99 each, and the vast majority are much less expensive.[154] Thus, Commissioner Wright is comparing apples and oranges. The numerator and the denominator are not in the same units, resulting in an estimate for the percent of iDevice users cancelling an in-app purchase that is likely several magnitudes of order too small.

A better estimate would compare the total value of unauthorized purchases with total App Store sales over the same period, which Commissioner Wright calculates as 4.6%.[155] Plugging this into his formula, we find that as long as the required disclosure costs less than fifty-eight cents, or takes less than one and a half minutes of consumer time [illegible], it would be efficient.[156] Thus, even using an unrealistically high estimate of the time a one-time per device disclosure could require, such as thirty full minutes of a user's time, such a disclosure would still be efficient if the average user performed twenty or more transactions over the life of the device. Of course, in reality a user would spend substantially less than thirty minutes on a one-time disclosure, which means that the benefit very likely outweighs the costs.[157]

In their Essay in this symposium issue, Commissioner Wright and his co-author criticize the *A*[illegible] majority for failing to evaluate the indirect effects of a change to Apple's platform. However, the evidence strongly suggests that in this case platform "feedback effects are small and could be ignored . . . ."[158] Multisided platforms, like the

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153 *I*.

154 One recent estimate concludes that the average price for an iPhone app is nineteen cents. [illegible] Erica Ogg, [illegible] 19 C[illegible], GIGAOM (July 18, 2013, 6:00 AM), https://gigaom.com/2013/07/18/the-average-iphone-app-price-is-now-0-19-and-itll-probably-keep-shrinking/.

155 Apple Inc., 2014 WL 253519, at *9.

156 [illegible] at *12 & n.36. Assuming (% Cancelling) is .046, (% Not Cancelling is .954), and keeping (Refund Time Cost) as $11.95, Y=$0.576.

Apple Store, reduce transaction costs and enable economic agents on one side (e.g., consumers) to connect easily with economic agents on the other side (e.g., app developers).[159] A key characteristic of a multisided platform is that the platform becomes more valuable to agents on one side when it attracts agents on the other side.[160] For example, the Apple Store attracts consumers in part because so many app developers use the platform, and it attracts app developers in part because so many consumers use the platform. Platform features that reduce transactions costs—such as a fifteen-minute window for additional purchases—might contribute to this feedback loop of increased value and demand.[161]

Fortunately, as noted repeatedly, the majority did not prohibit the use of transaction cost-reducing technologies such as the fifteen-minute window. The Commission merely required a one-time-per-device disclosure. The above analysis is sufficient to demonstrate that this single disclosure addresses a substantial consumer harm while imposing only a minor one-time cost on consumers, essentially equivalent to raising the cost of an iDevice by a few dimes at most. In a platform that long ago reached critical mass,[162] such a small change is extremely unlikely to depress consumer and app developer demand for the Apple platform in a manner that would disrupt the existing demand feedback loop. Indeed, since Apple's settlement with the FTC, the Apple platform remains the most profitable and desirable platform for app developers,[163] and consumer demand for Apple devices continues to break records.[164]

Moreover, any analysis of the practice's impact on the platform must consider both its positive and negative effects. In this case, Apple's failure to disclose the fifteen-minute window caused consumer

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B, 1 OXFORD HANDBOOK ON INTERNATIONAL ANTITRUST ECONOMICS 404, 421 (Roger D. Blair & D. Daniel Sokol eds., 2015).

159 . at 420 ("The fundamental service provided by multisided platforms is the ability of economic agents on each side to interact in a valuable way with economic agents on the other sides.").

160 ., Andrei Hagiu, *: F D E* 2–4 (Harvard Bus. Sch., Working Paper No. 09-115, 2009), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=955584.

161 . at 5–8.

162 Evans & Schmalensee, note 158, at 431–33.

163 Brad Reed, *H G A B A B A D* , BGR (June 4, 2015, 4:41 PM), http://bgr.com/2015/06/04/ios-vs-android-apps-developers/.

164 Josh Lowensohn, *A 4 2014 E : H 6* , THE VERGE (Oct. 20, 2014, 4:41 PM), http://www.theverge.com/2014/10/20/7022335/apple-q4-2014-earnings.

concerns about the platform. Media stories echoed—and likely amplified—such concerns.[165] These concerns could have suppressed demand for the Apple platform, devices, and apps. Commissioner Wright and his co-author entirely omit from their analysis this potential negative effect of the nondisclosure.

VI. Implications of Placing Inappropriate Factors on the Unfairness Scale

As shown above, it would have been incorrect for the Commission to compare the harm caused by the failure to notify consumers with the benefits of the design choice to use a fifteen-minute purchase window, or to compare the harm to the overall sales of the iPhone or iPad or total Apple sales more broadly.[166] This would be the equivalent of comparing the harm caused by tractor geysering against the benefits of the tractors or the overall value of IHC as a company.[167]

More importantly, such an approach would stack the deck against consumers, in favor of large companies. As long as a company's extensive line of products benefited consumers overall, the company would be free to inflict a significant amount of consumer harm with impunity. Conversely, smaller companies with more limited product lines and smaller total sales would be held to a higher consumer protection standard than large companies, based on size alone. This