

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 complaints 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 company to update its design in the face of heavy consumer complaints. Second, we are not penalizing Apple for failing to have anticipated every potential issue in its complex platform.³ The complaint challenges only one billing issue of which Apple became well aware but failed to address in subsequent design iterations. By March 2011, consumers had submitted more than ten thousand complaints to Apple stating that its billing platform for in-app purchases for children’s apps was failing to inform them about what they were being billed for and when. Although Apple adjusted certain screens in response and offered refunds, it still failed to notify account holders that by entering their password they were initiating a fifteen-minute window during which children using the app could incur charges without further action by the account holder. Even if Apple chose to forgo providing this information—the type of information that is critical for any billing platform, no matter how innovative, to provide—in favor of what it believed was a smoother user experience for some users, the result was unfair to the thousands of consumers who subsequently experienced unauthorized in-app charges totaling millions of dollars.⁴

Commissioner Wright also argues that under our unfairness authority “substantiality is analyzed relative to the magnitude of any offsetting benefits,”⁵

0120, Dissenting Statement of Commissioner Maureen K. Ohlhausen (Jan. 3, 2013), *available at* <http://www.ftc.gov/sites/default/files/documents/cases/2013/01/130103googlemotorolaohlhausenstmt.pdf>; *In re* Robert Bosch GmbH, FTC File No. 121-0081, Statement of Commissioner Maureen K. Ohlhausen (Nov. 26, 2012), *available at* <http://www.ftc.gov/sites/default/files/documents/cases/2013/04/121126boschohlhausenstatement.pdf>.

³ The complaint challenges harm that occurred since March 2011, after Apple changed its process to require the entry of the account holder’s iTunes password before incurring any in-app charges immediately after installation. Previously, the entry of the password to install an app also opened a fifteen-minute window during which charges could be incurred without again entering a password.

⁴ It is also important to note that the Commission’s proposed order does not prohibit the use of the fifteen-minute window nor require that the account holder input a password for each purchase.

⁵ Dissenting Statement of Commissioner Joshua D. Wright at 5.

and concludes that compared to Apple’s total sales or in-app sales, 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 benefits 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).