Weigh the Label, Not the Tractor: What Goes on the Scale in an FTC Unfairness Cost-Benefit Analysis?

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Abstract

In January 2014, Apple settled with the Federal Trade Commission ("FTC" or "the Commission") an unfairness case involving Apple's processing of in-app purchases by consumers. This settlement generated three separate statements from four Commissioners. The Commissioners' statements explore how to apply the FTC's three-part unfairness test, and they diverge primarily on what factors to weigh in the unfairness analysis. These statements are the most comprehensive Commission-level discussion of unfairness analysis since a 1984 case, International Harvester Co. *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.*

Thus, in Apple *the majority properly followed the well-established approach set forth in* International Harvester. *Departing from* International Harvester*'s guidance on applying the substantial injury threshold and on balancing costs and benefits could inefficiently focus the FTC's enforcement on smaller companies and leave significant consumer harms unchallenged.*

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INTRODUCTION

The authority of the Federal Trade Commission ("FTC") to challenge conduct that is "unfair" to consumers has at times been controversial in the courts, Congress, and at the agency itself.[1] The debate

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[1] *See generally* J. Howard Beales III & Timothy J. Muris, *FTC Consumer Protection at 100: 1972 Redux or Protecting Markets to Protect Consumers?*, 83 GEO. WASH. L. REV. 2157 (2015); Daniel A. Crane, *Debunking* Humphrey's Executor, 83 GEO. WASH. L. REV. 1835 (2015); Jeffrey A. Eisenach & Ilene Knable Gotts, *Looking Ahead: The FTC's Role in Information Technology Markets*, 83 GEO. WASH. L. REV. 1876 (2015); Andrew I. Gavil, *The FTC's Study and Advocacy Authority in Its Second Century: A Look Ahead*, 83 GEO. WASH. L. REV. 1902 (2015); Richard J. Gilbert & Hillary Greene, *Merging Innovation into Antitrust Agency Enforcement of the Clayton Act*, 83 GEO. WASH. L. REV. 1919 (2015); Woodrow Hartzog & Daniel J. Solove, *The Scope and Potential of FTC Data Protection*, 83 GEO. WASH. L. REV. 2230 (2015); David A. Hyman & William E. Kovacic, *Can't Anyone Here Play This Game? Judging the FTC's Critics*, 83 GEO. WASH. L. REV. 1948 (2015); Jeffrey S. Lubbers, *It's Time to Remove the "Mossified" Procedures for FTC Rulemaking*, 83 GEO. WASH. L. REV. 1979 (2015); Richard J. Pierce, Jr. *The Rocky Relationship Between the Federal Trade Commission and Administrative Law*, 83 GEO. WASH. L. REV. 2026 (2015); Edith Ramirez, *The FTC: A Framework for Promoting Competition and Protecting Consumers*, 83 GEO. WASH. L. REV. 2049 (2015); D. Daniel Sokol, *Analyzing Robinson-Patman*, 83 GEO. WASH. L. REV. 2064 (2015); David C. Vladeck, *Charting the Course: The Federal Trade Commission's Second Hundred Years*, 83 GEO. WASH. L. REV. 2101 (2015); Joshua Wright & John Yun, *Stop Chug-a-lug-a-lugin 5 Miles an Hour on Your International Harvester: How Modern Economics Brings the FTC's Unfairness Analysis Up to Speed with Digital Platforms*, 83 GEO. WASH. L. REV. 2130 (2015).

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 *International Harvester*, 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 *International Harvester*, ushering in the modern age of FTC unfairness enforcement.[6]

A. *FTC Act and the Wheeler-Lea Amendments*

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 *Id.*

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 *Id.* § 5.

9 *See, e.g.*, 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 *Winsted Hosiery Co.*, 258 U.S. at 494.

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

12 *See* 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 *FTC v. Raladam Co.*[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 *per se* unfair methods of *competition*. . . . If broader powers be desirable, they must be conferred by Congress."[18]

Raladam 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 *Id.* at 644–45.

15 *Id.* at 652–53.

16 *Id.* at 654.

17 *Id*. at 649.

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

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

20 *Id.* 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." *Id.* § 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. Cigarette Rule and the Sperry Factors

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 substantial injury to consumers or competitors.[25] These three factors were subsequently quoted with some approval by the Supreme Court in *FTC v. Sperry & Hutchinson Co.*,[26] albeit in dicta.[27] Furthermore, "the Court gave no guidance to the Commission on how to weigh the three prongs—even suggesting that the test could properly be read disjunctively."[28] This approach permitted the FTC to exercise its unfairness authority without even a pretense of cost-benefit analysis.

Such an unconstrained interpretation of FTC unfairness authority, when combined with rulemaking authority granted to the FTC by Congress in 1975,[29] enabled and perhaps encouraged the FTC to overreach in its regulatory efforts during the late 1970s.[30] The apogee of the FTC's overreach was the Commission's "KidVid" effort to ban or

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22 *See* Stephen Calkins, *FTC Unfairness: An Essay*, 46 WAYNE L. REV. 1935, 1950–51 (2000).

23 *See id.*

24 The Cigarette Rule established that it was an "unfair or deceptive act or practice . . . to fail to disclose, clearly and prominently, in all advertising and on every pack, box, carton or other container in which cigarettes are sold to the consuming public that cigarette smoking is dangerous to health and may cause death from cancer and other diseases." Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking, 29 Fed. Reg. 8324, 8325 (July 2, 1964).

25 *Id.* at 8355.

26 FTC v. Sperry & Hutchinson Co., 405 U.S. 233 (1972).

27 *Id.* at 244 n.5.

28 J. Howard Beales, Fed. Trade Comm'n, The FTC's Use of Unfairness Authority: Its Rise, Fall, and Resurrection (May 30, 2003), http://www.ftc.gov/public-statements/2003/05/ftcs-use-unfairness-authority-its-rise-fall-and-resurrection.

29 Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, Pub. L. No. 93-637, 88 Stat. 2183 (1975) (codified as amended at 15 U.S.C. § 2301–2312 (2012)).

30 *See* Beales, *supra* note 28 ("The result was a series of rulemakings relying upon broad, newly found theories of unfairness that often had no empirical basis, could be based entirely upon the individual Commissioner's personal values, and did not have to consider the ultimate costs to consumers of foregoing their ability to choose freely in the marketplace. Predictably, there were many absurd and harmful results. The most problematic proposals relied heavily on 'public policy' with little or no consideration of consumer injury.").

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 *Sperry & Hutchinson* ("*S&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 *See id.*

32 *See id.*

33 *See* Children's Advertising, 43 Fed. Reg. 17,967, 17,969 (Apr. 27, 1978); *see also* Ellis M. Ratner et al., Fed. Trade Comm'n, FTC Staff Report on Television Advertising to Children 328–42 (1978).

34 Editorial, *The FTC as National Nanny*, Wash. Post, Mar. 1, 1978, at A22.

35 *See* J. Howard Beales III, *Advertising to Kids and the FTC: A Regulatory Retrospective That Advises the Present*, 12 Geo. Mason L. Rev. 873, 879 (2004).

36 *See* 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) *reprinted in* Int'l Harvester Co., 104 F.T.C. 949, 1072–76 (1984) [hereinafter cited as Unfairness Statement with page references to *Int'l Harvester Co.*].

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

First, there must be a *substantial consumer injury*. 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 *must not be outweighed by countervailing benefits of that practice*.[40]

Finally, the harm *must not be reasonably avoidable by the consumer*. 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 *S&H*, but couched it in relation to the consumer injury prong. It noted that the FTC typically used the public policy prong "as a means of providing additional evidence on the degree of consumer injury caused by specific practices."[42] The Statement rejected the "immoral, unethical, oppressive, or unscrupulous" prong of the Cigarette Rule standard, reasoning that it had "proven . . . to be largely duplicative" as "[c]onduct that is truly unethical or unscrupulous will almost always injure consumers or violate public policy as well."[43] In a 1982 letter to Senators Packwood and Kasten, the Commission further limited the role of public policy, stating that it is not an independent basis for unfairness.[44] In that letter, the Commission also recommended a statutory definition of unfairness.

From 1980 to 1994, the Commission applied the test set out in the Unfairness Statement, subsequently clarified by the 1982 letter, in cases where there was no deception but still potential for substantial consumer harm. The 1984 case *International Harvester*, which is discussed at length below, was the most thorough application of the then-new test; the Commission considered it such a foundational case that

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38 *See id.* at 1073.

39 *Id.*

40 *Id.*

41 *Id.* at 1074.

42 *Id*. at 1075.

43 *Id.* at 1076.

44 James C. Miller III, *FTC's Letter to Senate Subcommittees on Bill to Restrict Agency's Jurisdiction over Professionals and Unfair Acts or Practices*, 42 Antitrust & Trade Reg. Rep. (BNA) 568, 568–70 (1982); *see also* Beales, supra note 28.

they attached the Unfairness Statement to the decision.[45] In total, during this period the Commission used the test in five adjudicated orders and twenty consent orders or settlements.[46] The Commission also evaluated several trade rules under the new test.[47] Finally, three federal appellate cases addressed the Commission's Unfairness Statement during this period.[48]

In 1994, Congress amended the FTC Act largely to codify the Unfairness Statement in Section 45(n).[49] There, Congress defined unfairness as an "act or practice [that] 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."[50] Congress also specifically prohibited the FTC from finding an act unfair using public policy as a "primary basis."[51] These congressional actions effectively codified the Commission's practice at the time, thereby ensuring that future Commissions would be bound to the three-part test established by the Unfairness Statement, with public policy playing a circumscribed role.[52]

Thus, through FTC practice and congressional action, the three-factor test for unfair consumer harm has eclipsed the *S&H* test. As the Unfairness Statement noted, "considerable attention should be devoted to the analysis of whether substantial net harm has occurred, not only because that is part of the unfairness test, but also because the focus on injury is the best way to ensure that the Commission acts responsibly and uses its resources wisely."[53]

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45 *See* UNFAIRNESS STATEMENT, *supra* note 37, at 1070–76.

46 *See* Calkins, *supra* note 22, at 1958–59.

47 *See id.*

48 *See* Orkin Exterminating Co. v. FTC, 849 F.2d 1354, 1363–64 (11th Cir. 1988); Am. Fin. Servs. Ass'n v. FTC, 767 F.2d 957, 970–72 (D.C. Cir. 1985); Harry & Bryant Co. v. FTC, 726 F.2d 993, 999 (4th Cir. 1984).

49 Federal Trade Commission Act Amendments of 1994, Pub. L. No. 103-312, § 9, 108 Stat. 1691, 1695 (codified at 15 U.S.C. § 45(n) (2012)).

50 *Id.*

51 *Id.*

52 Although the Commission's post-Unfairness Statement decisions and Congressional action ratified the consumer injury test as the essential and only standard for determining unfairness, there was still some debate about how to prove injury under that test. For example, in *FTC v. Rapp* the Commission charged that the disclosure of private financial information obtained through deception was "legally unfair." FTC v. Rapp, 1999 FTC LEXIS 112, at *10–11 (1999). Commissioner Swindle dissented from that case, saying that the other Commissioners erred by considering something unfair without showing concrete monetary harm or immediate safety or health risks. *Id.* at *22 (Swindle, dissenting).

53 UNFAIRNESS STATEMENT, *supra* note 37, at 1075.

III. Application of the Unfairness Standard in *International Harvester*

As noted above, the first major application of the FTC's Unfairness Statement was in *International Harvester*.[54] International Harvester Company ("IHC"), a major supplier of farm machinery, manufactured gasoline-powered tractors.[55] Some of these tractors experienced fuel geysering: when an operator opened a still-hot gas tank on these tractors, fuel would spew upwards like a fountain and catch fire.[56] The record in the case contained evidence of more than ninety alleged incidents of fuel geysering from the 1950s through August 1981.[57] Although ninety may sound like a lot of incidents, because over a million tractors were sold during this period, such accidents "were relatively rare and could be avoided entirely by following certain safety rules."[58] In fact, the Commission noted that IHC "manufactured approximately 1.3 million gasoline-powered tractors . . . . Of this number, twelve are known to have been involved in geysering accidents involving bodily injury. This is an accident rate of less than .001 percent, over a period of more than 40 years."[59] The record also showed that IHC knew about the possibility of fuel geysering for seventeen years before directly notifying its customers.[60]

The practice that the Commission evaluated under the unfairness standard was IHC's failure to disclose to consumers the risk of fuel geysering, not the design of the tractor that led to the occurrence of fuel geysering.[61] In evaluating this practice of failing to disclose the risk, the Commission considered each of the three prongs of the unfairness test.[62] First, the Commission found that the injury from the practice was substantial because the harms were serious—including death or disfigurement—even though the approximately 1.3 million tractors sold only physically injured twelve people.[63] The Commission then concluded that any countervailing benefits from IHC's failure to disclose the risk of fuel geysering did not outweigh the human injury

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54 *See supra* note 45 and accompanying text.

55 Int'l Harvester Co., 104 F.T.C. 949, 950 (1984).

56 *Id.*

57 *Id.* at 965.

58 *Id.* at 1051.

59 *Id.* at 1063.

60 *Id.* at 1051.

61 *Id.* at 1050.

62 *Id.* at 1064.

63 *Id.* at 1063.

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 *International Harvester*, the FTC has applied the unfairness standard set out in the policy statement in many cases. Yet *International Harvester* 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 *Id.* at 1064–65.

65 *Id.* at 1065–66.

66 *Id.* at 1066.

67 *Id.* at 1067.

68 *See* Press Release, *Apple Inc. Will Provide Full Consumer Refunds of at Least $32.5 Million to Settle FTC Complaint It Charged for Kids' In-App Purchases Without Parental Consent*, 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 *See id.*

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

71 *See Id.* at *3.

72 *Id.* 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] As a result, tens of thousands of customers reported unauthorized purchases by their children.[76] These charges totaled thousands of dollars for certain individuals and, in aggregate, totaled millions of dollars for consumers.[77]

The FTC's complaint alleged that Apple's payment processing for in-app purchases (1) failed to inform account holders that entering their password would open a fifteen-minute window in which children (or others) could incur unlimited charges with no further action from the account holder; and (2) often presented a password prompt without explaining to the account holder that password entry would finalize a purchase.[78] The complaint alleged that both of these practices were unfair, in violation of Section 5 of the FTC Act.[79]

The Commission approved the settlement on a 3-1 vote.[80] In three separate statements, the Commissioners debated how to perform the cost-benefit analysis when applying the unfairness standard. These statements indicate that the current FTC has a strong (although not unanimous) adherence to the cost-benefit approach established by *International Harvester* and the Unfairness Statement. Because Apple settled with the FTC, however, there is no extensive evidentiary record or administrative opinion applying the unfairness standard.

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73 *Id.* at *3.

74 *Id.* at *1.

75 *Id.*

76 *Id.* at *4.

77 *Id.* at *5.

78 *Id.* at *1.

79 *Id.* at *5.

80 There was no fifth sitting Commissioner at the time of the *Apple* vote.

A. *Chairwoman Ramirez's and Commissioner Brill's Joint Statement*

Chairwoman Edith Ramirez and Commissioner Julie Brill wrote in support of the *Apple* order and consent.[81] They placed the *Apple* case in the context of a long line of decisions "establishing that the imposition of unauthorized charges is an unfair act or practice."[82] They then applied the three prongs of the unfairness standard to the case.[83] First, they argued that there was substantial injury because there was both a small harm to a large number of people and a large harm in the aggregate.[84] They disagreed with Commissioner Wright's assertion that to qualify as substantial, the harm must be large compared to any offsetting benefit, arguing that this conflates the third prong of the unfairness test (weighing of countervailing benefits against the relevant harm) with the substantial injury prong.[85] The two Commissioners then concluded that consumers could not reasonably avoid the alleged injury because the fifteen-minute window was never disclosed to them.[86] Even if some consumers may have inferred the existence of a fifteen-minute window over time, this did not excuse Apple's failure to inform users, they argued.[87] Chairwoman Ramirez and Commissioner Brill concluded that countervailing benefits did not outweigh the harm.[88] They noted that the practice at issue was *not* the use of a fifteen-minute window, which undoubtedly offers many benefits, but Apple's failure to disclose that window.[89] They added that the required disclosure is a *de minimis* burden on both the company and consumers.[90] They also argued that this was not a case of punishing a company as it ironed out kinks in a new product: consumers had filed thousands of complaints about these issues over several years' time.[91] Finally, they argued that, absent the consent order, Apple would have insufficient incentives to disclose the existence of the fifteen-minute window because consumers are unaware of how in-

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81 *Id.* at *24–28 (statement of Chairwoman Edith Ramirez and Commissioner Julie Brill).

82 *Id.* at *25.

83 *Id.* at *25–27.

84 *Id.* at *25.

85 *Id.* at *26.

86 *Id.*

87 *Id.*

88 *Id.* at *27.

89 *Id.*

90 *Id.*

91 *Id.*

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

B. Commissioner Ohlhausen's Statement

I also wrote in support of the *Apple* order and consent, concluding that the complaint and consent met the requirements of 15 U.S.C. § 45(n) and the Commission's Unfairness Statement.[93] I noted that the case was "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 . . . ."[94] I further concluded that the *Apple* order would not chill iterative development because (1) that approach was not the cause of the consumer harm; and (2) the order was not a penalty for failure to anticipate unforeseen problems, but for failure to deal with problems once they became clear.[95] Finally, I disagreed with Commissioner Wright's approach to the required cost-benefit analysis. I argued that, contrary to the statutory directive to evaluate the harms and benefits of the individual act or practice at issue, Commissioner Wright's approach compared the injury caused by Apple's lack of clear disclosure with the benefits of the entire Apple mobile device ecosystem.[96]

C. Commissioner Wright's Dissenting Statement

Commissioner Wright, as is likely clear at this point, dissented from the *Apple* complaint and consent and issued a separate statement.[97] He argued that the challenged practice benefited "the overwhelming majority" of users and harmed only a "miniscule percentage" of users, and that the FTC "should have conducted a much more robust analysis to determine whether the injury to this small group of consumers justifies the finding of unfairness and the imposition of a remedy."[98]

Commissioner Wright characterized the *Apple* case as novel for two reasons. First, he argued that past unfairness cases involving failure to obtain express informed consent, "invariably involve conduct where the defendant has intentionally obscured the fact that consumers would be billed," but that there was no evidence that Apple in-

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92 *Id.*

93 *Id.* at *22–23.

94 *Id.* at *22.

95 *Id.* at *23.

96 *Id.* at *23 & n.6 (quoting 15 U.S.C. § 45(n)).

97 *Id.* at *5–15.

98 *Id.* at *6.

tended to obscure billing.[99] Second, he asserted, "the economic consequences of the allegedly unfair act or practice in this case—a product design decision that benefits some consumers and harms others—also differ significantly from those in . . . previous unfairness cases."[100]

Having characterized this case as unique, Commissioner Wright focused on the core of his argument that this case does not satisfy the unfairness standard because no substantial consumer injury resulted from the practice.[101] Commissioner Wright first argued that "substantiality is analyzed relative to the magnitude of any offsetting benefits" and that the offsetting benefits far outweighed the harm here.[102] Commissioner Wright twice applied this balancing test. First, he compared the number of complaints ("tens of thousands") to the total number of Apple store app downloads (approximately fifty billion) and concluded that complaints are "quite a small fraction" of total app downloads.[103] Second, Commissioner Wright compared the total harm (hypothetically set at $325 million, ten times the settlement amount) to Apple's tens of billions of dollars in total device sales and total overall sales.[104] He therefore estimated that consumer harm was a few hundredths of a percent of Apple's total sales.[105] Based on these two comparisons of harms to sales, Commissioner Wright concluded that the harm to consumers, while numerically large, was relatively quite small and therefore insubstantial.[106]

Finally, Commissioner Wright asserted that any consumer injury was outweighed by countervailing benefits to consumers and competition.[107] He supported this assertion with three arguments. First, he argued that additional disclosure would be a net loss even if it burdened each Apple consumer by a very small amount.[108] He did this by comparing the total unauthorized purchases to the total sales of all Apple devices.[109] Commissioner Wright argued the Commission should have more fully analyzed the countervailing benefits and criti-

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99 *Id*. at *7.

100 *Id.*

101 *Id.* at *8–9. Commissioner Wright also argued that at least some of the alleged harm was reasonably avoidable by consumers. *Id.* at *10–11.

102 *Id*. at *8–9.

103 *Id.* at *8.

104 *Id.* at *9.

105 *Id.*

106 *Id.*

107 *Id.* at *6.

108 *Id.* at *12.

109 *Id.*

cized the majority's conclusion that the burden of extra disclosure was *de minimis*.[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 *did not challenge the use of a fifteen-minute billing window*. 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-

110 *Id.* at *13.
111 *Id.* at *14.
112 *Id.* at *15.
113 *Id.*
114 *Id.* at *6.
115 *See supra* Part II.

tended to deceive consumers because, as Commissioner Wright acknowledges, intent is not a required element for unfairness.[116] Commissioner Wright's dissent also argued that the economic consequences of finding a "product feature" unfair "differ significantly"[117] from those in the Commission's previous unfairness cases. But the cost-benefit analysis in the third prong of the unfairness test accounts for any such differences; the Commission does not have a different standard for cases involving the impact of product design.

Nor does the fact that Apple offers a multisided platform materially distinguish the case from Commission precedent. Indeed, the Commission has recently brought unfair billing cases against multisided platforms that charged consumers without their consent—and Commissioner Wright supported these cases. Mobile carriers AT&T and T-Mobile both offered premium SMS platforms where consumers directly interacted with third party providers.[118] Like the *Apple* complaint, these complaints alleged that the companies unfairly failed to get express, informed consent before charging consumers for services provided by third parties.[119]

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116 *See* Apple Inc., 2014 WL 253519 at *7 n.12. Despite this acknowledgement, the essay by Commissioner Wright and his co-author in this symposium issue repeatedly attempts to distinguish *Apple* from other unfairness cases based on intent. Joshua D. Wright & John Yun, *Stop Chug-a-lug-a-lugin 5 Miles an Hour on Your International Harvester: How Modern Economics Brings the FTC's Unfairness Analysis up to Speed with Digital Platforms* 83 GEO. WASH. L. REV. 2142–43 (2015) ("The facts underlying *The Crescent Publishing Group* illustrate the typical unauthorized billing schemes that offer no consumer benefit—and illuminate the differences between these cases and *Apple* and other similar digital platform cases brought by the Commission . . . . [In *Crescent Publishing*] the court pointedly noted that the defendants attempted to disguise their charges . . . ."); *id.* at 2144 ("[T]he Commission [in *HTC America*] implicitly recognized that HTC's intention was not to implement a product feature that was designed to convey consumer benefit."); *id.* at 2146 ("[U]nfairness cases alleging unauthorized billing . . . where the defendant either has intentionally concealed from consumers the fact that they would be billed . . . ."); *id.* at 2150 ("There was no evidence that Apple's choice of refraining from disclosing the fifteen-minute window was made for any reason other than a design choice.").

117 Apple Inc., 2014 WL 253519, at *7. If we were to apply a different standard to "product features," this would raise serious questions about how to distinguish such "product features" from other product characteristics. Even unintentional product flaws provide some benefits, such as lower design or manufacturing costs, while imposing costs on others.

118 *See* Complaint for Permanent Injunction and Other Equitable Relief, FTC v. AT&T Mobility, LLC, No. 1:14-mi-99999-UNA (N.D. Ga. Oct. 8, 2014), https://www.ftc.gov/es/system/files/documents/cases/141008attcmpt1.pdf; Complaint for Permanent Injunction and Other Equitable Relief, FTC v. T-Mobile USA, Inc., No. 2:14-cv-00967 (W.D. Wash. July 1, 2014), https://www.ftc.gov/system/files/documents/cases/140701tmobilecmpt.pdf.

119 *Compare* Apple Inc., 2014 WL 253519, at *5 ("Respondent bills parents and other iTunes account holders for children's activities in apps that are likely to be used by children without having obtained the account holders' express informed consent."), *with* Complaint for

International Harvester 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 *Apple*.

A. *The "Substantial Harm" Factor Is a Threshold Test, Not a Balancing Test*

The Unfairness Statement treats substantiality as a threshold test. Indeed, the statement focuses almost entirely on the qualitative aspect, describing the *kind* 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."), *and* 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, *supra* note 116, at 2156. This assertion is puzzling. *FTC v. Crescent Publishing Group, Inc.* and *Jesta*, like all modern unfairness cases, rely explicitly on, and are therefore completely consistent with, the unfairness framework established in *International Harvester*. *See* 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 *Jesta* and *Crescent* or relying on *International Harvester* "is a difference without much of a distinction as a matter of law . . . ." Wright & Yun, *supra* note 116, at 2156. To be clear, my focus here on *International Harvester* does not reflect a change in legal theory; it is an examination of first principles in response to Commissioner Wright's *Apple* dissent, which I believe is inconsistent with the three-part legal framework set forth in *International Harvester*.

121 UNFAIRNESS STATEMENT, *supra* note 37, at 1073.

122 *Id.*

ial . . . harms"[123] although "a small harm to a large number of people"[124] may be sufficiently substantial.

Similarly, *International Harvester* evaluated substantiality as a threshold test. There, the Commission focused largely on the *character* of the injury rather than its *magnitude*, noting that the geysering injuries "are of a kind that satisfies the first unfairness test. It is true that they involve physical rather than economic injury, but the Unfairness Statement reaches such matters."[125] The magnitude of the injury was a secondary consideration, and one which the Commission treated as a threshold to be met, admitting that while the injuries "involve only limited numbers of people . . . [a] number of previous Commission cases have in fact been brought to correct injuries less numerous and less severe than those involved here."[126] Thus the Commission found that the injuries had crossed the required threshold of substantiality.

Although the Commission in *International Harvester* found the injuries of sufficient magnitude to be substantial, it did not balance the harm of the practice against its benefits in this step of the analysis. The Commission evaluated the type of harm caused and the absolute numbers of users harmed; it did not compare the number of users injured by geysering to the millions of tractor users not injured.[127]

The Commission did not accidentally omit balancing when evaluating the first prong of the unfairness test in *International Harvester*. The Commission had in fact employed a balancing test, but did so while evaluating whether the IHC's actions were deceptive: "Harvester manufactured approximately 1.3 million gasoline-powered tractors in the period after 1939. Of this number, twelve are known to have been involved in geysering accidents involving bodily injury. This is an accident rate of less than .001 percent, over a period of more than 40 years."[128]

If the Commission in *International Harvester* had thought balancing an important factor for determining substantiality for unfairness, one would expect that the Commission would have cross-referenced this already completed analysis. Instead, consistent with the Unfair-

123 *Id.*

124 *Id.* at 1073 n.55.

125 Int'l Harvester Co., 104 F.T.C. 949, 1064 (1984).

126 *Id.*

127 *Id.* at 1064–65 ("At least one person has been killed and eleven others burned.").

128 *Id.* at 1063.

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 *International Harvester* 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. The "Countervailing Benefits" to Be Weighed Are Limited to Those Benefits from the Practice at Issue

There is a second clear lesson we can draw from *International Harvester* and *Apple*: 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 *Id.* at 1064.

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

131 Beales, *supra* note 28 (footnote omitted).

that the sales practice also produces."[132] And "[t]he Commission . . . will not find that *a practice* unfairly injures consumers unless *it* is injurious in *its* net effects."[133] Section 5 of the FTC Act is likewise clear in this regard.[134] Both *International Harvester* and the *Apple* majority statements focus exclusively on comparing the harms and the benefits of the specific business practice challenged.

In *International Harvester*, the Commission evaluated IHC's practice of ineffectively disclosing the risk of fuel geysering to tractor users.[135] The Commission noted that the principal tradeoff to consider was compliance costs—how much money had IHC saved by not notifying consumers about the risk of fuel geysering?[136] The Commission looked at the cost of IHC's Fuel Fire Prevention Program, which all parties agreed finally led to an effective warning.[137] This campaign consisted of media advertisements and a direct mailing, and cost $2.8 million dollars.[138] The Commission then balanced this amount—the amount IHC had "saved" by not notifying consumers—against the harm caused by not notifying consumers.[139] The Commission did not analyze the overall benefits of IHC tractors or the benefit to consumers of IHC generally.[140] Instead, the Commission strictly limited itself to considering the harms and benefits of IHC not effectively disclosing the risk of fuel geysering.

In *Apple*, as in *International Harvester*, the Commission evaluated whether the company's failure to provide information to customers was unfair. Specifically, the majority weighed the costs and benefits of Apple's failure to disclose the existence of the fifteen-minute purchase

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132 UNFAIRNESS STATEMENT, *supra* note 37, at 1073 (emphasis added).

133 *Id.* (emphasis added).

134 "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 . . . not outweighed by countervailing benefits to consumers or to competition." 15 U.S.C. § 45(n) (2012) (emphasis added).

135 Int'l Harvester Co., 104 F.T.C. 949, 955–56 (1984).

136 *See id.* at 1065.

137 *Id.*

138 *Id.* The Commission explained it was possible that some other, less expensive form of notification, "such as a clearly worded warning in the operating manual," could have been sufficient. *Id.* However, out of an abundance of caution, the Commission assumed that the avoided cost (the "benefit" of the practice) was that of the more expensive approach. *Id.*

139 *Id.* at 1065–66.

140 As discussed above in Part V.A, the Commission *did* evaluate such benefits while considering whether IHC's actions were deceptive. Again, this demonstrates that the Commission could have done such a balancing to evaluate the substantiality of the injury had it considered the broader scope of benefits to be relevant to the countervailing benefits prong of the test.

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 suggests that the benefits of the one-time per device notice far outweigh

141 *See* Apple Inc., FTC File No. 112-3108, 2014 WL 253519, at *27 (F.T.C. Jan. 15, 2014). Commissioner Wright and his co-author again mischaracterize the majority's position when they state that "[f]or the Commission majority and Commissioner Ohlhausen, failure to add additional disclosures concerning the fifteen-minute window is not fundamentally different than a product defect." Wright & Yun, *supra* note 116, at 2151. In *International Havester*, the FTC offered no legal analysis of the fuel geysering itself, because the practice being analyzed was the failure to disclose the risk of injury. The unfairness liability analysis would have been no different if the tractors had unexpectedly spewed piping hot doubloons. Similarly, in *Apple*, the cost and benefit that must be measured is that of the one-time per device disclosure. To repeat, the costs and benefits of the fifteen-minute window itself are not at issue.

142 *See id.* Apple Inc., 2014 WL 253519, at *17–18.

143 There are two categories of benefits from the lack of disclosure. First, the actual cost Apple saved by not implementing the notice. Second, the avoided cost to consumers (in time spent) to read and understand the notice. Because the case did not go to litigation, we do not have conclusive public information about the costs of each of these categories. Commissioner Wright and his co-author argue that the majority's decision in *Apple* is flawed because it failed to consider Apple's role as a platform and the indirect effects of avoiding a one-time notification. Wright & Yun, *supra* note 116, at 2147. As detailed below, the cost to the consumer of the one-time notification is so low that any effects on platform demand are likely negligible. *See infra* notes 154–57 and accompanying text.

144 As the Senate Report for the FTC Act Amendments of 1994 observes:

> In determining whether a substantial consumer injury is outweighed by the countervailing benefits of a practice, the Committee does not intend that the FTC quantify the detrimental and beneficial effects of the practice in every case. In many instances, such a numerical benefit-cost analysis would be unnecessary; in other cases, it may be impossible. This section would require, however, that the FTC carefully evaluate the benefits and costs of each exercise of its unfairness authority, gathering and considering reasonably available evidence. S. Rep. No. 103–30, at 13 (1993).

145 Apple Inc., 2014 WL 253519 at *13 ("[F]urther analysis is required before the Commission can conclude . . . that any consumer injury arising from Apple's allegedly unfair acts or practices exceeds the countervailing benefits to consumers and competition."); *id.* at *14 ("The Commission should not support a case that alleges that Apple has underprovided disclosure without establishing this through rigorous analysis demonstrating—whether qualitatively or quantitatively—that the costs to consumers from Apple's disclosure decisions have outweighed benefits to consumers and the competitive process.").

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 *per transaction*.[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 *Id.* 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 *See id.* at *12 & n.35. At the average wage Wright uses, a penny is equivalent to 1.5 seconds of consumer time.

148 *See id.* at *17–18.

149 *See id.* 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, *supra* 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 *See* Simon Khalaf, *App Install Addiction Shows No Signs of Stopping*, FLURRY INSIGHTS (Dec. 17, 2014), http://www.flurry.com/blog/flurry-insights/app-install-addiction-shows-no-signs-stopping#.VPtPl_nF98E.

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

152 *Id.* 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 *per transaction*, 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 *Apple* 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 *Id.*

154 One recent estimate concludes that the average price for an iPhone app is nineteen cents. *See* Erica Ogg, *The Average Price of an iPhone App is 19 Cents—and It'll Probably Keep Shrinking*, 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 *See id.* at *12 & n.36. Assuming (% Cancelling) is .046, (% Not Cancelling is .954), and keeping (Refund Time Cost) as $11.95, Y=$0.576.

157 Of course, not every consumer will fully comprehend the one-time disclosure—just as not every consumer comprehends other billing disclosures. However, the benefits of this notice likely still outweigh the costs. Because consumers must actively acknowledge the disclosure, a significant percentage of consumers will be on notice that they may be charged without entering a password, enabling them to avoid any injury. This percentage need not be overwhelming to outweigh the very small cost of the disclosure. *See id.* *17–18. (requiring that Apple get from consumers "an affirmative act communicating informed authorization of In-App Charge(s), made proximate to an In-App Activity for which there is an In-App Charge and to Apple's Clear and Conspicuous disclosure of all material information related to the billing . . . .").

158 David S. Evans & Richard Schmalensee, *The Antitrust Analysis of Multi-Sided Platform*

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

159 *See id.* 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 *See, e.g.*, Andrei Hagiu, *Multi-Sided Platforms: From Microfoundations to Design and Expansion Strategies* 2–4 (Harvard Bus. Sch., Working Paper No. 09-115, 2009), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=955584.

161 *See id.* at 5–8.

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

163 *See* Brad Reed, *Here's Why iOS Keeps Getting All the Best Apps Before Android Does*, BGR (June 4, 2015, 4:41 PM), http://bgr.com/2015/06/04/ios-vs-android-apps-developers/.

164 *See* Josh Lowensohn, *Apple Q4 2014 Earnings: Revenue Surges on Huge iPhone 6 Sales*, 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 would ultimately incentivize the Commission to focus enforcement efforts on small companies that impose small harms overall if those harms are disproportionately large compared to the companies' total sales. It would also force the Commission to disregard large total monetary harms inflicted by companies that also have large total sales. This would ultimately result in a suboptimal allocation of the Commission's enforcement resources and leave unaddressed substantial consumer harms.

Conclusion

The standard set forth in the Unfairness Policy Statement in *International Harvester* and subsequently codified at 15 U.S.C. § 45(n)

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165 *See, e.g.*, Associated Press, *Apple App Store: Catnip for Free-Spending Kids?*, CBS News, (Dec. 9, 2010, 6:20 AM), http://www.cbsnews.com/news/apple-app-store-catnip-for-free-spending-kids/; Cecilia Kang, *In-app Purchases in iPad, iPhone, iPod Kids' Games Touch off Parental Firestorm*, Wash. Post (Feb. 8, 2011, 12:34 AM), http://www.washingtonpost.com/wp-dyn/content/article/2011/02/07/AR2011020706073.html?sid=ST2011020706437.

166 *See supra* Part V.

167 *See supra* Part V.B.

has served the agency and consumers well over the past thirty-four years of unfairness enforcement. This standard appropriately focuses our enforcement efforts on substantial consumer harm, supported by a strong cost-benefit analysis, and it has helped the Commission to make the most effective use of its limited resources. It has also largely reined in the kinds of regulatory adventurism of the late 1970s. However, in applying the unfairness analysis, the FTC must continue to follow the well-established approach set forth in *International Harvester*. Departing from *International Harvester*'s guidance on applying the substantial injury threshold and on balancing costs and benefits could leave significant consumer harms unchallenged.