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

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Abstract

In this Essay, the authors argue that in cases involving digital platforms, the Federal Trade Commission—when alleging unfair acts or practices in violation of section 5 of the Federal Trade Commission Act—must adopt the insights from platform economics and apply them within the legal framework of section 5(n), as informed by the Commission's Policy Statement on Unfairness. After outlining the development and rise of digital platforms and discussing of the importance of digital platforms to consumers and the marketplace, this Essay sets forth a brief overview of the basic economics of multisided platform markets and points out the key differences between these markets and traditional markets as well as their corresponding implications for consumer welfare. The Essay then describes the evolution of the Commission's unfairness authority in consumer protection cases—including the statutory requirement that the agency conduct cost-benefit analysis—and examines how the Commission has performed such cost-benefit analyses in recent cases. The Essay critiques the Commission's decision in the recent Apple case as an example of the potential pitfalls for consumer protection in multisided markets when the Commission conducts a cost-benefit analysis without arming itself with the basic economic insights from platform economics. Untethered from the appropriate economic framework, the Commission's logic allows it to condemn product design decisions whenever it can imagine an alternative design it believes survives a cost-benefit test. As the number of consumer protection cases involving digital platforms inevitably rise, the authors recommend that the Commission instead apply insights from platform economics within the well-established legal framework of section 5(n) and the FTC Policy Statement on Unfairness.

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Note that the title of this Essay was inspired by CRAIG MORGAN, *International Harvester*, *on* LITTLE BIT OF LIFE (Broken Bow Records 2006).

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Introduction

When the Federal Trade Commission ("FTC" or "the Commission") issued its Policy Statement on Unfairness in 1980,[1] it formally articulated the necessity—when bringing an enforcement action based upon the Commission's "unfairness authority"—of evaluating the benefits and costs to competition and consumers of various business practices.[2] The 1980 Policy Statement on Unfairness, subsequently codified by Congress in 1994 in section 5(n) of the Federal Trade Commission Act ("FTC Act"), declares unlawful an act or practice only if it "causes or is likely to cause substantial injury to consumers

1 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, 1070 (1984) [Unfairness Statement]. A copy of the version of the Unfairness Statement can also be found at https://www.ftc.gov/public-statements/1980/12/ftc-policy-statement-unfairness.

2 *See id.*

which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition."[3]

The FTC increasingly finds itself applying its unfairness authority in high-tech markets involving digital platforms. In this Essay, we argue that when alleging unfair acts or practices in violation of section 5 of the FTC Act[4] in cases involving digital platforms, such as the recent *Apple*[5] case, the Commission must leave behind analyses tethered to the *factual* underpinnings of traditional unfairness cases grounded in failures to disclose or unauthorized billing, such as *International Harvester*,[6] *Crescent Publishing*,[7] and *Jesta*.[8] Instead, in cases involving digital platforms, the Commission must adopt the insights from platform economics and apply them within the *legal* framework of section 5(n), as informed by the Commission's Policy Statement on Unfairness.[9] To do otherwise would render the cost-benefit analysis required by section 5(n) meaningless.

Part I of this Essay provides background on the development and rise of digital platforms, highlighting some recent examples that illustrate the importance of digital platforms to consumers and the marketplace. Part II sets forth a brief overview of the basic economics of multisided platform markets and points out the key differences between these markets and traditional markets and their corresponding implications upon consumer welfare. This Part concludes by discussing the successful incorporation of the fundamental insights of platform economics into traditional competition analysis. Part III describes the evolution of the Commission's unfairness authority in consumer protection cases—including the statutory requirement that the agency conduct cost-benefit analyses—and examines how the Commission has performed such analyses in recent cases. We emphasize the need for the Commission to integrate platform economics into

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3 15 U.S.C. § 45(n) (2012).

4 Section 5 of the Federal Trade Commission Act, codified at 15 U.S.C. § 45, prohibits, in part, "unfair . . . acts or practices in or affecting commerce." 15 U.S.C. § 45(a). As set forth in section 5(n) of the FTC Act, in order for an act or practice to be deemed unfair, it must "cause[ ] or [be] 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." *Id.* § 45(n).

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

6 *Int'l Harvester Co.*, 104 F.T.C. at 1070.

7 FTC v. Crescent Publ'g Grp., Inc., 129 F. Supp. 2d 311, 313 (S.D.N.Y. 2001).

8 Complaint for Permanent Injunction & Other Equitable Relief at 10, FTC v. Jesta Digital, LLC, No. 1:13-cv-01272 (D.D.C. Aug. 20, 2013).

9 UNFAIRNESS STATEMENT, *supra* note 1.

its unfairness analysis in consumer protection matters. Part IV critiques the Commission's recent *Apple*[10] case and illustrates the potential pitfalls for consumer protection in digital platforms and multisided markets when the Commission conducts a cost-benefit analysis without arming itself with the basic economic insights from platform economics. Part V concludes.

I. The Rise of Digital Platforms

The rise of the digital software industry in the 1980s and 1990s was a watershed event in history, instigating today's digital market platforms. Most would agree that the Windows operating system developed by Microsoft—with its myriad programs creating an ecosystem attracting both users and developers—ushered in this new age.[11] Since then, the proliferation of digital market platforms (both in number and variety) has surpassed most people's wildest expectations.

The Internet itself has become an incubator for digital market platforms, fostering the creation of commercial giants such as Amazon, eBay, and Alibaba, and offering a limitless supply of consumer products including niche platforms with tailored services along the lines of OpenTable, Orbitz, Match.com, Airbnb, Zillow, TaskRabbit, Kickstarter, and Venmo. Search engines such as Google and Yahoo! have evolved into their own expansive digital market platforms. Content providers such as YouTube, Netflix, Spotify, and Pandora have fully embraced their role as digital market platforms, as have social media networks such as Facebook and LinkedIn. Further, Apple's iOS and Google's Android operating systems have joined the ranks of Microsoft, providing users, developers, and other third parties with an increasingly attractive environment in which to interact. The widespread adoption of smartphones[12] and tablets[13] has spurred not only the development of mobile operating systems, but also the proliferation of applications such as Twitter, Instagram, Yelp, Uber, and Lyft,

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

11 *See, e.g.*, U.N. Conference on Trade & Development, *Changing Dynamics of Global Computer Software and Services Industry: Implications for Developing Countries*, U.N. Doc. UNCTAD/ITE/TEB/12, at 6, (2002), http://unctad.org/en/Docs/psitetebd12.en.pdf.

12 *See* Aaron Smith et al., Pew Research Ctr., U.S. Smartphone Use in 2015, at 2 (2015), http://www.pewinternet.org/files/2015/03/PI_Smartphones_0401151.pdf ("64% of American adults now own a smartphone of some kind, up from 35% in the spring of 2011.").

13 *See Tablet Users to Surpass 1 Billion Worldwide in 2015*, eMarketer (Jan. 8, 2015), http://www.emarketer.com/Article/Tablet-Users-Surpass-1-Billion-Worldwide-2015/1011806 ("More than 1 billion people worldwide will use a tablet in 2015 . . . representing nearly 15% of the global population and more than double the number three years ago. By 2018, the number of tablet users in the world will reach 1.43 billion.").

that are able to exploit the advantages of mobile devices and often operate as digital platforms themselves.[14]

These digital platforms have provided immense value to consumers and the marketplace. Their ubiquity, prevalence, and the level of consumers' engagement with them[15] underscore their importance in today's society and economy.[16] As consumers spend an already large and ever-increasing share of their time interacting with these platforms, it is incredibly important that regulators implement the correct economic tools to ensure that consumer protection enforcement and policy initiatives actually promote consumer welfare rather than stifle innovation and leave consumers worse off.[17]

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14 The FTC has recognized the role that mobile operating systems play in this ecosystem. *See, e.g.*, FED. TRADE COMM'N, MOBILE PRIVACY DISCLOSURES: BUILDING TRUST THROUGH TRANSPARENCY 14 (2013) ("Platforms use the plethora of apps offered on their devices as a significant marketing tool and rely on functionality provided by apps to increase sales of their devices.").

15 *See, e.g.*, Joshua Brustein, *We Now Spend More Time Staring at Phones than TVs*, BLOOMBERGBUSINESS (Nov. 19, 2014), http://www.bloomberg.com/bw/articles/2014-11-19/we-now-spend-more-time-staring-at-phones-than-tvs ("People with access to a smartphone or tablet now spend an average of 2 hours and 57 minutes on them each day . . . putting phones ahead of televisions . . . ."); Niall McCarthy, *Mobile App Usage By The Numbers [Infographic]*, FORBES (Oct. 29, 2014), http://www.forbes.com/sites/niallmccarthy/2014/10/29/mobile-app-usage-by-the-numbers-infographic/ ("In 2014, app downloads are expected to top 179 billion. By 2017, this is going to rise to over almost 270 billion.").

16 *See* U.S. DEP'T OF COMMERCE, U.S. CENSUS BUREAU NEWS: QUARTERLY RETAIL E-COMMERCE SALES 4TH QUARTER 2014 1 (2015), http://www2.census.gov/retail/releases/historical/ecomm/14q4.pdf ("Total e-commerce sales for 2014 were estimated at $304.9 billion, an increase of 15.4 percent (±2.3%) from 2013.").

17 On the role of the FTC generally, see J. Howard Beales III & Timothy J. Muris, *FTC Consumer Protection at 100: 1970s 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); Maureen K. Ohlhausen, *Weigh the Label, Not the Tractor: What Goes on the Scale in an FTC Unfairness Cost-Benefit Analysis?*, 83 GEO. WASH. L. REV. 1999 (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, *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).

II. The Evolution and Adoption of Platform Economics

To better understand the economic impact of the regulation of platforms, regulators must recognize the complexities of and relationships between various entities affecting their operation, success, and ultimate viability. An important economic feature of these complexities and interdependencies is that even relatively small changes can hinder the efficient operation of platforms and negatively impact innovation. Accordingly, this Part provides a brief review of the basic economics of multisided platform markets, or "two-sided markets," and highlights some key differences between platform markets and traditional markets, as well as their implications for consumer protection and regulation more generally. It then discusses the incorporation of platform economics into traditional antitrust analysis.

A. *The Unique Characteristics of Multisided Platforms Mandate Appropriate Economic Analysis*

Although there is no canonical definition of a platform, Andrei Hagiu and Julian Wright offer a useful starting point in their paper, *Multi-Sided Platforms*.[18] First, platforms "enable *direct* interactions between" two or more groups, e.g., buyers and sellers of used goods.[19] Second, each group is *affiliated* with the platform in some manner—typically through "platform-specific investments,"[20] e.g., a website such as eBay that facilitates transactions between registered buyers and sellers.[21]

Platforms are ubiquitous in the modern economy. Examples include ride-sharing applications like Uber, radio stations, shopping malls, search engines, and operating systems. Uber brings together those customers looking for rides with drivers.[22] A radio station brings together listeners and advertisers. A search engine brings together users and online advertisers. A shopping mall brings together shoppers and merchants. An operating system brings together users, software developers, and hardware suppliers. A platform such as Ap-

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18 *See* Andrei Hagiu & Julian Wright, *Multi-Sided Platforms* 4–7 (Harvard Bus. Sch., Working Paper No. 15-037, 2015), http://www.hbs.edu/faculty/Pages/download.aspx?name=15-037.pdf.

19 *Id.* at 5 (emphasis added).

20 *Id.*

21 Other economic definitions of platforms rely more upon the existence of "cross-group or indirect network effects," i.e., the value of the platform increases for one group as more of another group participates. Nonetheless, indirect network effects are not sufficient to establish a platform market. *See id.* at 4–7.

22 *See The Company*, Uber, https://www.uber.com/about (last visited Oct. 2, 2015).

ple, with its iOS operating system and other components such as the App Store and iTunes, brings together users, software developers, and hardware suppliers. Apple monetizes the platform primarily through hardware sales and royalties from software sales.[23]

In contrast, examples of nonplatform markets include restaurants, retail stores, and supermarkets. While restaurants and retail stores directly interact with suppliers and customers, the suppliers and customers do not directly interact with each other.[24] Similarly, while a supermarket has characteristics similar to a platform market in some respects, it also does not feature direct interaction between its suppliers and customers.[25]

A defining feature of platforms is the interrelationship between the various groups—e.g., suppliers and customers—with each other and with the platform.[26] These relationships and interactions often result in platform-specific investments.[27] The same interdependencies also prompt platforms to balance the needs of the various groups when making pricing and design decisions. For instance, a radio station will likely weigh the preferences of its listeners and advertisers. Listeners generally prefer better songs and less advertising, whereas advertisers generally prefer more advertising. A radio station will have to balance these two competing preferences, which can be influenced by factors such as how much competition the radio station faces for either listeners or advertisers.

Similarly, Google Search offers relevant search results in order to attract users, which, in turn, attracts advertisers. Google's business decisions must balance the preferences of these two groups. More ads increase short-run revenue but likely decrease user quality. Fewer ads increase user quality but may lower the value of the platform to advertisers. A more attractive design and faster loading pages increase the quality of the platform to both users and advertisers.

The interrelationship between the various groups associated with the platform and the platform itself can create pricing incentives that

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23 *See* Brad Reed, *Three Charts Explain Everything You Need to Know About Apple, Google, and Microsoft*, BGR (Feb. 6, 2014, 2:29 PM), http://bgr.com/2014/02/06/apple-google-microsoft-revenue-sources; Derek Thompson, *These Charts Tell You Exactly How and Where Apple Makes Money Right Now*, The Atlantic (Jan. 23, 2013), http://www.theatlantic.com/business/archive/2013/01/these-charts-tell-you-exactly-how-and-where-apple-makes-money-right-now/272463/.

24 *See* Hagiu & Wright, *supra* note 18, at 24–25.

25 *Id.* at 5–6.

26 *See id.* at 5.

27 *See id.*

differ markedly from nonplatform markets. For instance, profit-maximization may involve charging one group less than the marginal cost to serve that group, e.g., free access or even a subsidy to participate.[28] A search engine like Google is free to consumers despite the fact that it is costly to operate. Yet, free access is perfectly consistent with the incentives of the platform because if Google charges users to access the platform, then there will be fewer users. In turn, fewer users would mean a reduction in advertisers. With fewer advertisers, the platform's revenues would fall. Given this, it is reasonable to infer that the revenue gain from charging for search engine access would not compensate for the loss from lower ad revenue.[29]

Similarly, when a platform implements a design change, it impacts demand *across the entire platform*.[30] Suppose a platform introduces a design feature—for example, fingerprint technology to "verify" purchases—that reduces overall transaction costs. The design change makes the platform better off while also increasing consumer welfare through improving the user experience and increasing market output through greater app purchases. One fundamental insight from basic platform economics—and in particular, interdependent demand—is that consumer welfare depends upon aggregating effects across different sides of the platform. The critical point is that, when a product design change is made, the benefits and costs of the change are propagated throughout the entire platform.[31] Focusing on only a certain segment of the platform, e.g., disregarding the inherent complementarity between Apple's hardware sales and its operating system design, ignores the various interrelationships, how the platform monetizes its services, and how these interactions ultimately impact consumers.

In contrast, firms making pricing and design decisions in nonplatform markets generally need not consider differential impacts of those decisions on various market participants.[32] Below-cost pricing of a tractor, for example, cannot be offset through increased participation from the tractor's input suppliers, as this idea is effectively meaningless in a nonplatform setting. Thus, when a tractor manufacturer makes pricing or product design decisions, including disclosure deci-

28 *See* David S. Evans & Michael Noel, *Defining Antitrust Markets When Firms Operate Two-Sided Platforms*, 2005 COLUM. BUS. L. REV. 667, 668, 681–82.

29 *See id.* at 675–76 (describing "advertising-supported media").

30 *See id.* at 669.

31 *See id.* at 684.

32 *See id.* at 668.

sions, it bases those decisions solely upon its own input costs and the direct impact on its consumers.

B. Competition Analysis Has Embraced Platform Economics

There is now little debate among economists on the importance of these basic insights from the economics of platforms and multisided markets.[33] Few commentators today hold the view that, for example, competition analysis should treat platform markets and one-sided markets symmetrically.[34] Indeed, David Evans and Richard Schmalensee have shown convincingly that many basic economic tools and insights traditionally applied in antitrust analysis generally do not apply and can lead to systematic error when applied to platforms.[35] Although the economic analysis of platforms can be complex and technical, the basic insight is relatively simple: a complete consumer welfare analysis requires one to consider all sides of the platform and the economic forces that connect them.

The insights from platform economics and multisided markets have now been embraced generally within antitrust analysis.[36] This was not always the case. The antitrust community—including regulators—did not immediately welcome modern economic tools.[37] Evans and Schmalensee, primary contributors to the platform economics literature, describe the initial reaction of antitrust commentators and practitioners to the notion that a subset of businesses—multisided platforms—required any unique consideration at all.[38] Indeed, the authors recall that "some commentators argued that there was nothing new in the economics of multisided platforms and thus no reason for competition analysis to treat them differently from grocery stores or copper mines. Few hold this view today."[39] It is now generally ac-

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33 One of the pioneers of platform economics is Jean Tirole, the 2014 Nobel Laureate in Economics. In describing Tirole's work, the Royal Swedish Academy of Sciences referred to his contributions to platform economics, observing that "[c]urrent industrial policy has to deal with new forms of competition, often linked to the introduction of new technology." THE ROYAL SWEDISH ACAD. OF SCI., JEAN TIROLE: MARKET POWER AND REGULATION 27 (2014).

34 *See* David S. Evans & Richard Schmalensee, *The Antitrust Analysis of Multisided Platform Businesses*, *in* 1 THE OXFORD HANDBOOK OF INTERNATIONAL ANTITRUST ECONOMICS 404, 406 (Roger D. Blair & D. Daniel Sokol eds., 2015).

35 *See generally id.* at 404.

36 *See generally* OECD, COMPETITION COMM., TWO-SIDED MARKETS (2009) (discussing antitrust approach to multisided platforms across countries); Evans & Schmalensee, *supra* note 34, at 405–07.

37 *See* Evans & Schmalensee, *supra* note 34, at 406.

38 *See id.*

39 *Id.*

cepted within antitrust economics that application of the analytical methods and tools used to assess the likely effects of business practices upon consumers in nonplatform cases will systematically lead to erroneous conclusions when applied in the platform setting.[40] Further, insights from platform economics are routinely applied in antitrust enforcement actions and investigations.[41]

III. The Next Step: Integrating Platform Economics into the Commission's Unfairness Analysis in Consumer Protection Matters

The obstacles to the adoption of platform economics into consumer protection analysis—and unfairness analysis in particular—appear to be at least as formidable as they were in the antitrust context. The hesitancy to adopt new economic tools is not surprising. There are a number of institutional, legal, and economic reasons why one might expect antitrust law to enjoy a deeper integration with eco-

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40 *See, e.g.*, *id.* ("The economics literature that has developed since 2000 shows robustly that many results derived from models of one-sided businesses generally do not apply to multi-sided platforms that serve different interdependent customer groups.").

41 The economics of multisided platforms have been relevant in many antitrust agency decisions and investigations. *E.g.*, Complaint at 10–13, United States v. Google Inc., No 1:11-cv-00688 (D.D.C. Apr. 8, 2011) ("Google-ITA"); Statement of Commissioner Olhausen, Commissioner Wright, and Commissioner McSweeny Concerning Zillow, Inc./Trulia, Inc., FTC File No. 141-0214 (2015), https://www.ftc.gov/system/files/documents/public_statements/625671/150219zillowmko-jdw-tmstmt.pdf; Statement of the Federal Trade Commission Regarding Google's Search Practices, FTC File No. 111-0163, at 2–3 (2013) [hereinafter Google's Search Practices Statement], https://www.ftc.gov/system/files/documents/public_statements/295971/130103googlesearchstmtofcomm.pdf; FTC, Statement of the Commission Concerning Google/AdMob, FTC File No. 101-0031, at 2 (2010), https://www.ftc.gov/sites/default/files/documents/closing_letters/google-inc./admob-inc/100521google-admobstmt.pdf; Statement of Federal Trade Commission Concerning Google/DoubleClick, FTC File No. 071-0170, at 9–10 (2007), https://www.ftc.gov/system/files/documents/public_statements/418081/071220googledc-commstmt.pdf; Press Release, Dep't of Justice, Statement of the Department of Justice Antitrust Division on Its Decision to Close Its Investigation of the Internet Search and Paid Search Advertising Agreement Between Microsoft Corporation and Yahoo! Inc. (Feb. 18, 2010), http://www.justice.gov/sites/default/files/atr/legacy/2010/02/18/255377.pdf; Press Release, Dep't of Justice, Yahoo! Inc. and Google Inc. Abandon Their Advertising Agreement (Nov. 5, 2008), http://www.justice.gov/archive/atr/public/press_releases/2008/239167.pdf; *see also* United States v. Am. Express Co., No. 10-CV-4496, 2015 WL 728563, at *2 (E.D.N.Y. Feb. 19, 2015) (recognizing the payment card industry is a "two-sided platform comprise[d] [of] at least two separate, yet deeply interrelated, markets . . . ."). Incorporation of insights from platform economics into regulatory decisionmaking is not limited to the United States. *See* Michael Zhang & Sam Davis, Qihoo 360 v. Tencent*: A Landmark Decision Under China's Anti-Monopoly Law*, Antitrust L. Blog (July 22, 2013), http://www.antitrustlawblog.com/2013/07/articles/articles/qihoo-360-v-tencent-a-landmark-decision-under-chinas-anti-monopoly-law/ (noting that the Guangdong High Court considered "market analytics" in its decision finding that a firm's market dominance was not the result of anticompetitive behavior).

nomic analysis than does consumer protection.[42] Indeed, a considerable challenge facing the Commission is making the investments necessary to overcome these obstacles. The most important of these reasons for present purposes is that the overwhelming majority of the Commission's unfairness cases simply do not require significant economic analysis because they involve business practices that create substantial risk of consumer harm but little or no consumer benefit. When one side of the scale is empty, balancing harms and benefits does not present a serious analytical burden or require much use of economic tools to illuminate tradeoffs. To elaborate upon this point, the Commission has a significant—and fairly recent—history with an unbounded unfairness standard completely devoid of economic analysis.[43] As others have pointed out, untethered from a rigorous cost-benefit analysis, this early unfairness standard failed to "reflect[ ] the underlying philosophy that the ultimate objective of consumer protection is consumer welfare and that the role of consumer protection laws is to supplement market forces, rather than to entirely displace them."[44] This Part briefly discusses the recent evolution of the unfairness prong of section 5 of the FTC Act. It then examines FTC cases that have applied unfairness in a traditional context, providing analysis that contrasts those cases from cases where a digital platform is a central component of the unfairness case.

A. Integration of Cost-Benefit Analysis into the Unfairness Standard

Only in 1980, when the Commission adopted the Policy Statement on Unfairness,[45] did it begin considering the benefits of various business practices and their corresponding impact of enhancing competition among firms or otherwise making consumers better off.[46]

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42 One obvious difference is that the Supreme Court has adopted economic welfare as the lodestar of the antitrust laws and determined that "Congress designed the Sherman Act as a 'consumer welfare prescription.'" Reiter v. Sonotone Corp., 442 U.S. 330, 343 (1979) (quoting ROBERT BORK, THE ANTITRUST PARADOX 66 (1978)).

43 This early articulation of unfairness resulted in "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." J. Howard Beales, *The FTC's Use of Unfairness Authority: Its Rise, Fall, and Resurrection*, FED. TRADE COMM'N § II.A (May 30, 2003), http://www.ftc.gov/public-statements/2003/05/ftcs-use-unfairness-authority-its-rise-fall-and-resurrection.

44 Henry N. Butler & Jason S. Johnston, *Reforming State Consumer Protection Liability: An Economic Approach*, 2010 COLUM. BUS. L. REV. 1, 9–10.

45 UNFAIRNESS STATEMENT, *supra* note 1.

46 *See id.*

Under this revised standard, subsequently codified by Congress in 1994 in section 5(n) of the FTC Act, the agency may pursue enforcement action on the basis of "unfairness" in cases where an 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."[47]

In reformulating its unfairness standard in its decision in *International Harvester*, the Commission recognized that in utilizing its authority to deem an act or practice "unfair," it must undertake a much more rigorous analysis than is necessary when it uses its deception authority.[48] As Howard Beales, an economist and former Director of the Commission's Bureau of Consumer Protection has noted, "the primary difference between full-blown unfairness analysis and deception analysis is that deception does not ask about offsetting benefits. Instead, it presumes that false or misleading statements either have no benefits, or that the injury they cause consumers can be avoided by the company at very low cost."[49] It is also well established that one of the primary benefits of performing a cost-benefit analysis is to ensure that government action does more good than harm.[50] Rigorous economic analysis protects against the risk of erroneously condemning business practices that provide consumers net benefits.

Rigorous economic analysis is often absent when the Commission alleges unfairness even in the nonplatform context. Again, this is not altogether surprising or necessarily problematic.[51] Unfairness analysis in the context of disclosures is relatively straightforward when the product is simple and the effects of the disclosure or omission are clear. For example, prohibiting the seller of a weight-loss product from making a false claim is likely to reduce the number of unwanted and uneconomic purchases, while simultaneously allowing producers

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47 15 U.S.C. § 45(n) (2012).

48 Int'l Harvester Co., 104 F.T.C. 949, 1070 (1984).

49 Beales, *supra* note 43, § III.

50 *Int'l Harvester Co.*, 104 F.T.C. at 1070; *see also* Matthew D. Adler & Eric A. Posner, *Rethinking Cost-Benefit Analysis*, 109 YALE L.J. 165, 245 (1999) ("[Cost-benefit analysis] is superior to rival methodologies in enabling agencies to evaluate projects according to the extent that they contribute to overall well-being."). *See generally* Exec. Order No. 13,563, 76 Fed. Reg. 3821 (Jan. 18, 2011) (instructing agencies to use cost-benefit analyses).

51 Rigorous economic analysis of unfairness involving both costs and benefits may also be relatively rare because the Commission settles, rather than litigates, the majority of its consumer protection cases. Parties may realize they are clearly on the wrong side of the law and that settlement makes the most sense; other defendants may prefer the cost of an administrative or federal consent decree to the cost of litigating. Regardless, a full-blown cost-benefit analysis rarely occurs in the absence of a vigorous defense.

of legitimate and viable products to make credible claims and succeed. Forbidding a seller from charging customers for subscriptions when they do not click "subscribe"[52] or forbidding charges for services performed after customers cancel their enrollment[53] are clear examples where requiring more information or prohibiting certain practices have obvious benefits and trivial, or nonexistent, costs from a consumer welfare perspective.

B. *Examining Cost-Benefit Analysis in Traditional FTC Unfairness Cases*

The facts underlying the *Crescent Publishing Group*[54] decision 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.[55] In *Crescent Publishing*, defendants operated pornography websites that offered visitors "free tours" of the content on parts of the websites.[56] In order to take a tour, visitors were required to enter their credit card number but were assured that the card "will not be billed" during the free tour and told that the credit card number was only necessary to verify age.[57] Despite these representations, many visitors ultimately were charged a monthly membership without their knowledge or consent.[58]

In a preliminary injunction hearing, in addition to concluding that the Commission was likely to prevail on its claims that defendants' representations were deceptive, the court also concluded, after application of the FTC's three-pronged unfairness test, that the FTC was likely to prevail on its claims that Crescent Publishing's business practices were unfair.[59] The court's willingness to conclude that Crescent

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52 *See, e.g.*, Complaint for Permanent Injunction & Other Equitable Relief at 6, FTC v. Jesta Digital, LLC, No. 1:13-cv-01272 (D.D.C. Aug. 20, 2013) (alleging that "Jesta charged consumers who did not click on the subscribe button and charged consumers for products they did not order.").

53 *See, e.g.*, Complaint for Permanent Injunction & Other Equitable Relief at 15–16, FTC v. JAB Ventures, LLC, No. CV08-04648 (C.D. Cal. July 8, 2008) (alleging unauthorized billing when defendants charged consumers who had cancelled their enrollment or who had not been adequately informed about negative option features).

54 FTC v. Crescent Publ'g Grp., Inc., 129 F. Supp. 2d 311 (S.D.N.Y. 2001).

55 *See* Complaint for Permanent Injunction & Other Equitable Relief, FTC v. Amazon .com, Inc., No. 2:14-cv-01038 (W.D. Wash. July 10, 2014); GOOGLE'S SEARCH PRACTICES STATEMENT, *supra* note 41, at 2–3.

56 *Crescent Publ'g Grp., Inc.*, 129 F. Supp. 2d at 314.

57 *Id.* at 314–15.

58 *Id.* at 313–15.

59 *Id.* at 321–22. Based upon the defendants' online obfuscation of its intent to charge

Publishing's billing practices were unfair was based upon a determination that the defendants were being less than forthright with consumers and that their activities lacked much semblance of legitimacy.[60] The court pointedly noted that the defendants attempted to disguise their charges on billing statements by using pseudonyms, avoided informing consumers about the charges for which they were being billed, and engaged in various other behaviors to avoid detection and having to provide refunds.[61]

Apart from unfairness cases that allege a failure to obtain express informed consent, many of the cases brought by the Commission under its unfairness authority have focused on unreasonable or inappropriate business practices that cause consumers monetary or other tangible injury,[62] or otherwise threaten consumers' well-being by compromising the privacy or security of sensitive personal information.[63] In many of these applications, the unfairness analysis is relatively straightforward, as the business practice generates relatively obvious harms and little or no benefit. For example, in *HTC America*,[64] the Commission charged mobile device manufacturer HTC with failing to employ reasonable and appropriate security practices in the design and customization of the software it developed for its smartphones

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consumers, the court easily found that the injury was substantial and not reasonably unavoidable by consumers. *See id.* at 322–23. In doing so, the court considered facts common in fraudulent billing schemes: not only did consumers have "difficulty in avoiding or reversing defendants' bills," but consumers were also "unable to determine who was billing them, what they were being billed for, and how to contest the charges." *Id.* at 322. In granting a preliminary injunction, the court ultimately concluded that any purported benefits did not offset the harm caused by the defendants. *Id.*

60 *Id.*

61 *Id.*

62 For example, in the so-called "Cupcake Party" case, a cyberscammer used more than 5,500 copycat or misspelled Web addresses to divert Internet users from their intended Internet destinations to one of his sites, and then hold them captive while he barraged them with ads. *See* FTC v. Zuccarini, No. 01-CV-4854, 2002 WL 1378421, at *1 (E.D. Pa. Apr. 9, 2002). It was extremely difficult for website visitors to exit from this programming, and often computers would crash and consumers could lose unsaved work product, or otherwise be deprived of the use of their computers. *See id.*

63 These cases involve more conduct that offers little or no benefit to consumers, and have included problematic business practices such as spying on unwary consumers. *See, e.g.*, DesignerWare, LLC, 155 F.T.C. 421, 442 (2013) (analysis of consent order). DesignerWare developed and then licensed its proprietary software to rent-to-own stores and its franchisees to help them track and recover rented computers. *Id.* at 443. DesignerWare included an add-on program known as "Detective Mode" that purportedly helped rent-to-own stores locate rented computers and collect late payments. *Id.* at 443, 445. When Detective Mode was activated, the software could log keystrokes, capture screen shots, and take photographs using a computer's webcam. *Id.* at 445.

64 HTC Am. Inc., 155 F.T.C. 1617 (2013) (complaint).

and tablet computers, which introduced security flaws that placed sensitive information about millions of consumers at risk.[65] In its complaint, the Commission implicitly recognized that HTC's intention was not to implement a product feature designed to confer a consumer benefit.[66] Rather, HTC had merely failed to act reasonably under the circumstances instead of implementing readily available, low-cost measures to address the vulnerabilities at issue.[67]

The Commission has also alleged that a platform entity has engaged in unfair business practices in the complaint issued against Facebook.[68] Here again, the unfairness charge was not focused upon a platform entity's decision to offer a consumer-welfare enhancing product attribute, but rather was based upon an entity's conduct that caused only consumer harm with little or no offsetting consumer benefits; namely a failure to obtain informed consent when it updated its privacy policy.[69] In the administrative complaint, the Commission alleged that when Facebook changed its privacy policy to designate certain user information that previously had been subject to privacy settings as "publicly available," Facebook materially changed its promise that users could keep such information private.[70] Because Facebook retroactively applied these changes to personal information that it had previously collected from users without their informed consent, the Commission alleged that this practice was unfair.[71] The *Facebook* administrative complaint and consent order was consistent

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65 *Id.* at 1619. Among other things, the complaint alleged that HTC failed to provide its engineering staff with adequate security training, failed to review or test the software on its mobile devices for potential security vulnerabilities, "failed to follow well-known and commonly-accepted secure programming practices," and failed to establish "a process for receiving and addressing" vulnerability reports from third parties. *Id.* at 1619, 1621.

66 *See id.* at 1627 (acknowledging the lack of any countervailing benefits to HTC consumers to offset the substantial injury they were likely to face based on HTC's practices).

67 *See id.* at 1618–20 (discussing HTC's "failure to employ reasonable and appropriate security" measures).

68 Facebook, Inc., FTC File No. C-4365, 2012 WL 3518628, at *3–6 (F.T.C. July 27, 2012) (complaint); *see also* Complaint for Permanent Injunction & Other Equitable Relief at 16–17, FTC v. Ticketmaster LLC, No. 1:10-cv-01093 (N.D. Ill. Feb. 18, 2010) (pleading unfairness where defendants charged customers for "speculative" tickets, retained their money for several months "without a reasonable basis for believing that they could fulfill these orders," and failed to notify customers or ultimately fulfill the orders).

69 *Facebook, Inc.*, 2012 WL 3518628, at *5.

70 *Id.* at *3–6.

71 *See id.*; *see also* Gateway Learning Corp., 138 F.T.C. 443, 444–50 (2004) (complaint) (involving a deliberate, unilateral breach of representations made in a company's privacy policy). In *Gateway Learning Corp.*, the Commission alleged that the company, the maker of the popular "Hooked on Phonics" system, retroactively changed its privacy policy, without notifying consumers, to allow the company to rent customers' personal information to marketers. *Id.*

with the Commission's longstanding doctrine that a unilateral contract change that causes substantial injury to consumers that is not outweighed by countervailing benefits is an unfair practice under section 5.[72]

Many unfairness cases involve business practices that do not generate substantial consumer benefits. However, because disclosure and product design decisions that offer substantial consumer benefits are increasingly common, the Commission's unfairness analysis must move beyond one that is irrevocably committed to the presumption that more disclosure is always better. We must distance ourselves from the idea that so-called "failure to adequately disclose" information always imposes greater costs upon consumers than it confers benefits.

Failure to engage in a thorough and appropriate cost-benefit analysis that incorporates insights from the economics of platforms can lead to serious policy errors when regulators apply consumer protection concepts to digital platforms. As products become increasingly complex and the role of disclosures broadens beyond simply informing consumers about the risks of using the products to providing guidance and affecting the user experience directly, the need for incorporating these insights increases dramatically. If the benefits of these welfare-enhancing business practices are not weighed correctly against the harms they present to consumers, we run the risk of squelching innovation and depriving consumers of these benefits.

IV. The FTC's Unfairness Authority, iPads, and Tractors

The Commission did not undertake the appropriate cost-benefit analysis in *Apple* in large part because it failed to consider platform economics, leading it to conflate a product design decision capable of generating substantial benefits for consumers with conduct that amounts to pure deception or fraud. We explain the significant economic tensions created by trying to frame *Apple* as a traditional unfairness case and explain the appropriate economic analysis.

A. The Commission's Approach in Apple

In *Apple*, the Commission issued an administrative complaint alleging that Apple engaged in "unfair acts or practices" by billing parents and other iTunes account holders for the activities of children who were engaging with software apps likely to be used by children

72 *See* Orkin Exterminating Co., 108 F.T.C. 263, 341 (1986).

that had been downloaded onto Apple mobile devices.[73] In particular, the Commission took issue with a product feature that opens a fifteen-minute window during which a user does not need to re-enter a billing password after completing an initial transaction with the password.[74] Because Apple did not expressly inform account holders that the entry of a password upon the initial transaction triggered the fifteen-minute window, the Commission's complaint alleged that Apple billed parents and other iTunes account holders for the activities of children without obtaining express informed consent.[75]

In issuing the complaint, the Commission majority insisted upon describing *Apple* as yet another simple unauthorized billing case, noting that it merely reaffirmed the concept that "companies may not charge consumers for purchases that are unauthorized."[76] The Commission routinely brings unfairness cases alleging unauthorized billing based on a defendant's failure to obtain express informed consent from a consumer. However, in the vast majority of such cases, the defendant either has intentionally concealed from consumers the fact that they would be billed or has fraudulently billed consumers without even any pretense of obtaining permission.[77] Other unauthorized billing cases involve conduct falling just short of complete fraud—the consumer may have agreed to one charge, but the defendant also bills

73 Apple Inc., FTC File No. 112-3108, 2014 WL 253519, at *5 (F.T.C. Jan. 15, 2014) (complaint).

74 As indicated in the complaint, initially the fifteen-minute window was triggered when an app was downloaded. *Id.* at *3–4. Apple changed the interface in March 2011 and subsequently the fifteen-minute window was triggered upon the first in-app purchase. *Id.* at *3–4.

75 *Id.* at *1–5.

76 Apple Inc., FTC File No. 112-3108, 2014 WL 253519, at *24 (F.T.C. Jan. 15, 2014) (statement of Chairwoman Edith Ramirez and Commissioner Julie Brill). In their statement, Chairwoman Ramirez and Commissioner Brill, citing to *Jesta* and *Crescent Publishing*, assert that in finding Apple in violation of section 5, they are "follow[ing] a long line of FTC cases establishing that the imposition of unauthorized charges is an unfair act or practice." *Id.* at *25. Commissioner Ohlhausen likewise endorsed this position. *Id.* at *22 n.1 (statement of Commissioner Maureen K. Ohlhausen) ("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.").

77 *See, e.g.*, Complaint for Permanent Injunction & Other Equitable Relief at 15, FTC v. T-Mobile USA, Inc., No 2:14-cv-00967 (W.D. Wash. July 1, 2014) (alleging as unfair defendant's practice of placing charges for unauthorized third-party subscriptions on consumers' telephone bills); Complaint for Permanent Injunction & Other Equitable Relief at 6, FTC v. Jesta Digital, LLC, No. 1:13-cv-01272 (D.D.C. Aug. 20, 2013) (alleging that "Jesta charged consumers who did not click on the subscribe button and charged consumers for products they did not order"); Complaint for Permanent Injunction & Other Equitable Relief at 14, FTC v. Wise Media, LLC, No. 1:13-cv-01234 (N.D. Ga. Apr. 16, 2013) (alleging that defendants charged consumers for purported services without consumers ever knowingly signing up for such services).

the consumer for other, inadequately disclosed items.[78] Such circumstances were not alleged in *Apple*.

Instead, the *Apple* case required the Commission to analyze consumer injury within the unfairness framework in a novel and previously unexplored context: a platform entity failing to disclose adequately a "product feature to consumers that results in some injury to one group of consumers but that generates benefits for another group."[79] Put another way, the allegedly unfair practice at issue is not the failure to disclose, but rather Apple's introduction of the fifteen-minute window feature without an accompanying pop-up disclosure.

Viewed in this proper light, the facts of the *Apple* case make it exceedingly clear that enforcement action was not warranted. There was no substantial disagreement over the proposition that some consumers were harmed from the product feature.[80] However, the group of consumers made worse off by Apple's business decisions constituted a miniscule percentage of total Apple consumers[81]—the parents of children who made purchases ostensibly without their authorization or knowledge. Further, the overwhelming majority of consumers used the very same mechanism to make legitimate purchases, and those charges were properly authorized.

Apple is distinguishable from any other prior Commission consumer protection case alleging unfairness because the economic consequences of the allegedly unfair act or practice—a product design decision that benefits some consumers and harms others—are of a completely different nature and degree than those in any previous unfairness case.[82] Prior to *Apple*, none of the unfairness cases brought

78 *See, e.g.*, Complaint for Permanent Injunction & Other Equitable Relief at 15–16, FTC v. JAB Ventures, LLC, No. CV08-04648 (C.D. Cal. July 16, 2008) (alleging unauthorized billing when defendants charged consumers who had cancelled their enrollment or who had not been "adequately informed" about "negative option features"); FTC v. Crescent Publ'g Grp., Inc., 129 F. Supp. 2d 311, 313, 315 (S.D.N.Y. 2001) (pornography website failing to disclose the point at which a "free tour" ended and a monthly membership would begin).

79 *Apple Inc.*, 2014 WL 253519, at *7 (dissenting statement of Commissioner Joshua D. Wright).

80 *See, e.g.*, *id.* at *6.

81 *See id.*

82 *Id.* at *8. Commissioner Ohlhausen appears to fail to understand what distinguishes *Apple* from other Commission unfairness cases. The key distinction is not the multisided platform per se. Fraud on a platform is not likely to generate consumer benefits and thus it is not surprising to find that fraud or near-fraudulent conduct violates section 5 under the analysis set forth in the Commission's Unfairness Statement whether it occurs on a platform or otherwise. Apple's conduct is not fraudulent or near fraudulent. It is apparent that the consumer benefits are nontrivial. Thus, the economic analysis is fundamentally different and one must, in order to understand the effects of the product design decision on consumers, take into account the fact

by the Commission implicated the unique product features of platforms, platform economics, or conduct generating substantial consumer benefits. Accordingly, the cost-benefit analysis performed pursuant to the unfairness standard in those cases was necessarily more truncated.

Rather than acknowledge these distinguishable factual underpinnings, all three Commissioners voting in favor of the Apple complaint and settlement embraced an analysis that characterized Apple's conduct as just another failure to disclose case—using precedents such as *Crescent Publishing* and *Jesta*.[83] As this Part next explains, however, the Commission's view that Apple is just another failure to disclose case cannot withstand close scrutiny and fails as a matter of law and sound economic analysis.[84]

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that Apple's disclosure affects product design, which in a multisided platform, has effects throughout the platform. *See* Maureen K. Ohlhausen, *Weigh the Label, Not the Tractor: What Goes on the Scale in an FTC Unfairness Cost-Benefit Analysis?*, 83 GEO. WASH. L. REV. 1999 (2015) ("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."). Furthermore, the challenged conduct in recent unfair billing cases referred to by Commissioner Ohlhausen—for example, the AT&T and T-Mobile matters—was permeated with fraud. *See* Complaint for Permanent Injunction & Other Equitable Relief at 3–4, FTC v. AT&T Mobility, LLC, No. 1:14-mi-99999 (N.D. Ga. Oct. 8, 2014) ("In numerous instances, Defendant has charged consumers for Third-Party Subscriptions that the consumers did not order or authorize, a practice known as cramming. Defendant has continued to charge consumers for Third-Party Subscriptions even after large numbers of consumers complained about unauthorized charges and the refund rate for the subscriptions were [sic] high—in some cases as high as 40%.); Complaint at 3, FTC v. T-Mobile USA, Inc., No. 2:14-CV-00967 (W.D. Wash. July 1, 2014) (same); *see also* Press Release, Fed. Trade Comm'n, FTC Alleges T-Mobile Crammed Bogus Charges onto Customers' Phone Bills (July 1, 2014), https://www.ftc.gov/news-events/press-releases/2014/07/ftc-alleges-t-mobile-crammed-bogus-charges-customers-phone-bills.

83 In her concurring statement in the Apple matter, Commissioner Ohlhausen characterized the unfairness inquiry thusly: "[W]e 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." *Apple Inc.*, 2014 WL 253519, at *23 (statement of Commissioner Maureen K. Ohlhausen) (emphasis added). Chairwoman Ramirez and Commissioner Brill framed the allegedly unfair conduct in a similar fashion. *See id.* at *24 (statement of Chairwoman Edith Ramirez and Commissioner Julie Brill) (Apple "fail[ed] to inform parents that, by entering a password, they were permitting a charge . . . and . . . triggering a 15-minute window during which their child could make unlimited additional purchases . . . .").

84 As a preliminary matter, this Essay agrees that *International Harvester*'s explication of the unfairness standard remains useful and provides the proper framework for analyzing the three prongs of the unfairness test. However, as mentioned, for analytical purposes, not all cases alleging unfairness can—or should—be shoehorned into a "failure to disclose" framework, whether it be the one set forth by *Crescent Publishing* and *Jesta* or *International Harvester*. In-

B. *Apple's Product Design Decision Was Qualitatively Different from Conduct Challenged in Other Commission Case Precedent*

This Essay's discussion thus far begs the question of how to properly define the conduct or business practice to be analyzed under the cost-benefit framework required by section 5(n) of the FTC Act[85] and the Unfairness Statement. Carefully examining and articulating the conduct at issue with an eye toward its overall impact upon consumers will better inform the analysis undertaken in the three-part unfairness test.

Consider first the factual predicate of *International Harvester*: a tractor's propensity to geyser fuel when the fuel cap was removed at inopportune times.[86] The fuel geysering was not a per se product defect requiring a recall or other mechanical fix,[87] yet over the course of many years, International Harvester had become aware of it and had halfheartedly attempted to bring it to the attention of tractor operators.[88] In the *International Harvester* opinion, the Commission rightfully identified the respondent's failure as failing to carry out its obligation to adequately notify its customers of the hidden hazard of fuel geysering.[89] Under the circumstances of this case—involving the potential for geysering that could result in grievous bodily injury or death—notifying customers would have been the most appropriate course of action. Fuel geysering was an unintended and unfortunate occurrence that was precipitated by opening the fuel cap at the wrong time.[90] International Harvester was not concerned that a warning would impair the usability, functionality, or quality of its users' experience in dealing with tractors. Indeed, the company had taken some measures to notify dealers.[91] However, International Harvester ultimately failed to act reasonably under the circumstances. The key point here is that the circumstances and alleged consumer harm in

deed, the Commission has pleaded unfair practices differently in other circumstances. Consider, for example, the *HTC* case discussed above. *See supra* notes 64–67 and accompanying text. Under the facts of that case, the Commission found the company's failure to utilize reasonable and appropriate security measures to be unfair. *See id.* The complaint did not allege that HTC failed to notify consumers of its security shortcomings. *See id.*

85 15 U.S.C. § 45(n) (2012).

86 *See* Int'l Harvester Co., 104 F.T.C. 949, 954 (1984) (initial decision).

87 *See id.* at 955.

88 *See id.* at 954–55, 994–1007.

89 *See id.* at 1050 (opinion of the Commission).

90 *See id.* at 955, 967 (initial decision).

91 *See id.* at 994–1007.

International Harvester led to only one conclusion and a singular remedy: the company should have notified users.

Contrast the conduct in *Apple* with the practices set forth in *Crescent Publishing*, *Jesta*, and *International Harvester*. Apple purposefully designed its billing platform to include a fifteen-minute window to streamline and optimize its customers' experience.[92] Many platform operators had employed similar windows—reflecting the popularity of this design choice with users.[93] The seamless integration of the fifteen-minute window was a calculated choice to improve its product and its appeal.[94] 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.[95] The simplicity of Apple's consumer interface is an important attribute of Apple's platform that directly impacts the demand for and consumer benefits derived from its devices and services.[96] The nature and frequency of disclosures made while consumers interact with their mobile devices has a critical impact on the user experience for these products, and Apple invests considerable resources focusing upon these aspects of its product design and functionality.[97] Minimizing disclosures on its platform and choosing to integrate the fifteen-minute window into the user experience on its platform, is an apparent reflection of Apple's business de-

92 *See Apple Inc.*, 2014 WL 253519, at *7 (dissenting statement of Commissioner Joshua D. Wright).

93 *See, e.g.*, Complaint for Permanent Injunction & Other Equitable Relief at 7–8, FTC v. Amazon.com, Inc., No. 2:14-cv-01038 (W.D. Wash. July 10, 2014) (describing window that remained open between fifteen minutes to one hour).

94 *See Apple Inc.*, 2014 WL 253519, at *7 (dissenting statement of Commissioner Joshua D. Wright).

95 *See id.* at *7–8.

96 *See, e.g.*, Jayson DeMers, *Here's the Simple Secret to Apple's Marketing Success*, FORBES (July 8, 2014, 1:45 PM), http://www.forbes.com/sites/jaysondemers/2014/07/08/heres-the-simple-secret-to-apples-marketing-success/ ("The popularity of Apple's products is largely due to their simplicity and intuitiveness, making them accessible not only to tech-savvy consumers, but also to kids and seniors.").

97 Samantha Nielson, *Apple's Premium Pricing Strategy and Product Differentiation*, MARKET REALIST (Feb. 6, 2014, 8:43 PM), http://marketrealist.com/2014/02/apples-premium-pricing-strategy-product-differentiation/ ("Jobs' vision for Apple was always to create a premier product and charge a premium price. Apple's cheapest products are usually priced in the mid range, but they ensure a high-quality user experience with their features."); Dave Wiskus, *The Secret of Apple's Design Success: The Humane Interface*, MACWORLD (Jan. 24, 2013, 7:00 AM), http://www.macworld.com/article/2025988/the-secret-of-apples-design-success-the-humane-interface.html ("A key to Apple's success is the company's insistence on reducing options in the name of reducing complexity."); *see also* Sam Oliver, *Apple's R&D Spending Shoots Up 42% Year-Over-Year, Hit New $1.9B Record in Q1*, APPLEINSIDER (Jan. 28, 2015, 3:42 PM), http://appleinsider.com/articles/15/01/28/apples-rd-spending-shoots-up-42-year-over-year-hit-new-19b-record-in-q1 (describing the large amount of resources Apple invests in research and development).

termination regarding consumer preference: to wit, most consumers do not want to be subjected to excessive disclosures or to be inconvenienced by having to enter their passwords every time they make a purchase.[98]

Failure to disclose the risk of fuel geysering, as in *International Harvester*, or engaging in unauthorized billing, as in *Crescent Publishing* and *Jesta*, cannot provide substantial benefits for consumers. For the Commission majority and Commissioner Ohlhausen, the failure to add additional disclosures concerning the fifteen-minute window is not fundamentally different than a product defect.[99] Of course, the decision to not impose additional disclosures for the fifteen-minute window is not a product defect or fraud—it is the result of a deliberate design decision by Apple intended to improve the user experience by reducing the frictions imposed upon a user who has already entered his or her password to operate the platform.[100] This fundamental error—misinterpreting Apple's deliberate decisions aimed at internalizing the costs and benefits of product design choices on consumers—highlights the fundamentally different premises about the economics of information adopted by Commissioner Wright, Commissioner Ohlhausen, and the Commission majority.

C. *The Commission's Framing of Apple's Conduct Distorts the Required Cost-Benefit Analysis and Ignores Platform Economics*

The critical economic observation, and one that coincides with common sense in the case of using iPads and iPhones, is that requiring additional disclosures necessarily interferes with the product design decision Apple has made to optimize the user experience and thus runs a substantial risk of imposing consumer harm.[101] Here we discuss precisely why—based upon insights from platform economics—the risk of substantial consumer harm from a regulator or court tinkering with the product design decision is especially large when additional disclosures can actually make consumers worse off. Such regulatory hubris, apparent in the Commission's decision to substitute its own

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98 *Apple Inc.*, 2014 WL 253519, at *7 (dissenting statement of Commissioner Joshua D. Wright).

99 *See id.* at *4–5 (complaint) (alleging that Apple's practices constituted unfair billing); *id.* at *22–23 (statement of Commissioner Maureen K. Ohlhausen) (noting that FTC action in Apple 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").

100 *See id.* at *4–5 (dissenting statement of Commissioner Joshua D. Wright).

101 *See id.* at *8.

judgment for Apple's with respect to product design choices, is within the Commission's authority only if it can satisfy the Unfairness Statement's requirement that the consumer harm from the allegedly unfair conduct outweighs its benefits and cannot be reasonably avoided. Commissioner Ohlhausen understandably strains to avoid the reality that the Commission substituted its judgment about optimal product design for Apple's by declaring Apple's choices unlawful and by asserting her view that the Commission's remedy would impose relatively small costs on consumers and might pass a cost-benefit test.[102] While we very much doubt the proposition that the Commission's remedy does more good than harm, the Unfairness Statement simply does not contemplate an analysis that allows the Commission to micromanage the affairs of digital platforms whenever it identifies a remedy it believes makes consumers better off.

Framing the conduct at issue as a "failure to disclose" is problematic because it fails to distinguish between legitimate business choices and failures to discharge a duty to adequately warn consumers.[103] This framing leads to an incomplete and inadequate identification and analysis of the costs and benefits faced by consumers as a result of the allegedly unlawful conduct. A correct unfairness analysis requires an assessment of the marginal benefits and costs to consumers and competition—relative to the status quo—from ceasing the "practice of not clearly disclosing the fifteen-minute purchase window."[104] The contrary approach and Commissioner Ohlhausen's analysis imply that the marginal costs to consumers of Apple altering its design and increasing its disclosure of the fifteen-minute window are trivial or even zero.[105]

The proposition that liability for unfairness requires only that the Commission demonstrate that it can conceive of billing practices or disclosures that it perceives would have generated net benefits for consumers relative to those that actually occurred is troublesome. Such an approach licenses the Commission to operate as the

102 *See id.* at *6. The Commission's regulatory hubris is evident in Commissioner Ohlhausen's observation that rather than prohibiting use of a fifteen-minute window, "[t]he Commission merely required a one-time-per-device disclosure. The simple analysis done above is sufficient to demonstrate that this single disclosure *imposes only a minor one-time cost on consumers*, essentially equivalent to raising the cost of an iDevice by a few dimes." *See* Ohlhausen, *supra* note 82, at 24 (emphasis added).

103 *Apple Inc.*, 2014 WL 253519, at *7 (dissenting statement of Commissioner Joshua D. Wright).

104 *Id.* at *23 (statement of Commissioner Maureen K. Ohlhausen).

105 *See id.*

micromanager of digital platforms by searching for and correcting perceived imperfections, not responding only to demonstrable market failure and thereby overstepping its role. Identifying a remedy that a majority of Commissioners believe will make consumers better off is not equivalent to demonstrating that the allegedly unfair business practice itself caused net harm to consumers.[106]

Commissioner Ohlhausen's preferred framing of the allegedly unfair conduct grapples awkwardly with the economic analysis required for unfairness liability by assuming contrary to evidence that one side of the cost-benefit inquiry is irrelevant. Likewise, Chairwoman Ramirez and Commissioner Brill limit their analysis to the perceived costs and benefits of their preferred remedial disclosure rather than analyzing the impact upon consumers of Apple's product design decisions in the first instance. In their discussion, Chairwoman Ramirez and Commissioner Brill assert without more that the Commission's remedy would not "detract in any material way from a streamlined and seamless user experience" and "the provision of this additional information [would be] *de minimis*."[107] Once again, the Commission's fundamental error is to assume that product design decisions in the platform context are akin to fraud or a product defect and therefore a more robust analysis of costs and benefits is not required. In her essay in this symposium issue, Commissioner Ohlhausen devotes significant effort to arguing that this Essay's approach is misguided.[108] Drawing upon the facts of *International Harvester*, Commissioner Ohlhausen argues that our approach would have required the Commission to consider the benefits to the consumer of tractor ownership rather than the costs and benefits from disclosing the risks of fuel geysering and, by extension, she contends that our analysis would require the Commission in *Apple* to consider the benefits consumers derive from all of Apple's products and services.[109] The proposition that this Essay's advocated cost-benefit analysis of the allegedly unfair conduct requires counting all of Apple's sales as consumer benefits is simply incorrect—however, some elaboration will illustrate the economic considerations that should guide the proper analysis.

This Essay asserts that it is the economic impact of the allegedly unlawful conduct on consumers and competition that should determine liability under an unfairness analysis. The economic impacts of

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106 *See id.* at *13–14 (dissenting statement of Commissioner Joshua D. Wright).

107 *Id.* at *27 (statement of Chairwoman Edith Ramirez & Commissioner Julie Brill).

108 Ohlhausen, *supra* note 82, at 1999.

109 *Id.* at 2011.

disclosure on the users' experience for tractors and digital platforms are markedly different. Failing to recognize these differences and the fundamentally different economic forces at work, Commissioner Ohlhausen erroneously insists that it would have been incorrect to "compare the harm to the overall sales of the iPhone or iPad or total Apple sales more broadly. 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."[110]

The plain language of Commissioner Wright's dissent is sufficient to reject the proposition that the proposed analysis requires a cost-benefit analysis of all of Apple's products and services. What is required to conduct the analysis is an understanding of basic platform economics and demand complementarities. For platforms, "Apple's disclosure practices may *affect* all Apple's sales."[111] Evans and Schmalensee provide the simple economic logic: "By increasing demand on one side, a platform can increase its value to agents on other sides through indirect network externalities."[112] The same logic applies for decreasing demand. Given the integrated nature of Apple's platform, design changes made to the user interface, such as requiring additional disclosures that necessarily slow consumer actions on the platform, will necessarily affect demand for complementary products including software and iDevice sales. This economic proposition is not controversial; it requires no more than for the law of complements to hold.[113] A cost imposed on the platform will have effects on the demand for complementary products—and in turn, upon the benefits to consumers of those products.[114] The direction of that effect is known, but not its magnitude.[115] The magnitude will depend upon the size of the relevant universe of complementary products.[116] Narrowly attempting to carve out portions of the platform, such as just App Store sales, ignores the inherent interrelationships, or complementarities, between various components of the platform.

Additionally, Commissioner Ohlhausen misuses an example in Commissioner Wright's dissent to give a rough sense of the cost of

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110 *See id.* at 2024 (footnote omitted).

111 *Apple Inc.*, 2014 WL 253519, at *9 (dissenting statement of Commissioner Joshua D. Wright) (emphasis added).

112 Evans & Schmalensee, *supra* note 34, at 438.

113 *See id.* at 411–13 (describing theories of complements).

114 *See id.*

115 *See id.*

116 *See id.*

disclosure.[117] Specifically, the dissent presented a back-of-the-envelope calculation of the potential consumer benefits from implementing further disclosures.[118] Similarly, the dissent presented an illustrative calculation of the cost of disclosure that would need to be imposed on consumers to offset such an upper-bound estimate of the benefit.[119] The point of the calculations is to highlight that the ratio of estimated unauthorized purchases to all purchases is miniscule. Commissioner Ohlhausen appears to misunderstand the purpose of the calculations, which were never intended to offer a formal methodology to calculate costs and benefits and should not be used in that way. To that end, the dissent expressly cautioned that "[t]his fact, by itself, does not establish that the benefits of Apple's decision to forgo additional guidance of the type required by the consent order outweigh its costs."[120]

The primary point in the *Apple* dissent is that the Commission did not know or attempt to calculate the tax on the total benefits from the platform. Nor do we know the size of that tax. The error is to assume that increasing the cost of using a digital platform will have zero or negligible effects on the consumers using the platform to purchase consumer products and services.[121] The dissent acknowledges as much, noting, "[t]o be clear, the sales of iDevices are not an estimate of consumer benefits but rather they approximate the total universe of economic activity implicated by the Commission's consent order."[122] It is the burden of the Commission to perform a properly framed cost-benefit analysis before it can satisfactorily conclude that the consumer injury arising from Apple's allegedly unfair acts or practices exceeds the countervailing benefits to consumers and competition.[123] The Commission failed that burden both in terms of assessing the proper allegedly unfair practice and in executing an actual cost-benefit assessment.

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117 Ohlhausen, *supra* note 82, at 2019–21.

118 Apple Inc., FTC File No. 112-3108, 2014 WL 253519, at *8–9 (F.T.C. Jan. 15, 2014) (dissenting statement of Commissioner Joshua D. Wright). The illustrative calculations dramatically overstate the benefit of additional disclosure both because they allow the disclosure to completely eliminate unauthorized purchases, which is highly unlikely, and because they multiplied the $32.5 million in refunds required by the consent decree by a factor of ten. *See id.*

119 *See id.*

120 *Id.* at *12.

121 Ohlhausen, *supra* note 82, at 2020 n.143 ("[T]he cost to the consumer of the one-time notification is so low that any effects on platform demand are likely negligible").

122 *Apple Inc.*, 2014 WL 253519, at *13 (dissenting statement of Commissioner Joshua D. Wright).

123 *See id.* at *13–14.

Conclusion

Apple is an important and precedent-setting case. It sets forth the Commission's likely approach to unfairness analysis in cases involving digital platforms. Despite the obvious differences between Apple's conduct and the relevant conduct in the Commission's prior unauthorized billing cases involving failure to disclose, the Commission's analysis does not take into account the critical factual or economic distinctions.[124] Rather than embrace the unique institutional and economic details of the case and digital platforms more generally, the majority unfortunately insists upon forcing Apple's conduct into a framework for failure to disclose cases that simply does not fit.[125] Moreover, in arguing that a simple disclosure remedy would impose trivial or no costs on Apple, the Commission turns unfairness analysis on its head. Rather than demonstrating that the consumer harm from the conduct at issue exceeds any benefits before proceeding to identifying the appropriate remedy, the Commission's logic allows it to condemn product design decisions when it can imagine an alternative design it believes survives a cost-benefit test. Further, the Commission's quick dismissal of the potential benefits of Apple's product design decisions demonstrate that it failed to consider the characteristics of multisided platforms, which are critical to a proper assessment of costs and benefits in digital platforms.

As the number of consumer protection cases involving digital platforms inevitably rises, the Commission should leave 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. In the case of consumer protection matters involving unfairness allegations aimed at digital platforms, the Commission should accept the insights from platform economics and apply them within the well-established legal framework of section 5(n), as informed by the Commission's Policy Statement on Unfairness.

124 *Id.* at *7–8.
125 *See id.* at *1.