Consumer Watchdog

Chairwoman Edith Ramirez
Commissioner Julie Brill
Commissioner Maureen K. Ohlhausen
Commissioner Joshua D. Wright
Commissioner Terrell McSweeny
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

July 22, 2015

Loretta Lynch
Attorney General
William Baer
Assistant Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

Re: Apple's Streaming Music Service

Dear Chairwoman Ramirez , Commissioners Brill, Ohlhausen, Wright and McSweeny, Attorney General Lynch, Assistant Attorney General Baer:

As leaders of the nonprofit nonpartisan group Consumer Watchdog, we are writing on behalf of consumers to express grave concerns about Apple's new streaming music service.

Based on information received by our group, Apple's new streaming music service raises serious antitrust concerns that require the government to put limitations on Apple as it develops its service if consumers are to continue to have access to free streaming music services and so-called "freemium" music.

While Consumer Watchdog has traditionally had much respect for Apple's privacy policies, which protect consumers' private information in a proprietary cloud, the market power and leverage Apple is exerting in the creation of its new streaming music service is very disconcerting and must be stopped.

At issue, in fact, is the proprietary information that Apple possesses about its subscribers' credit cards and musical preferences, which it is leveraging over music labels in an attempt to rub out free (commercial sponsored) music platforms. In this regard, Apple is utilizing its market power in much the way the company did in setting e-book prices.

Our submissions in recent years to the Commission and Justice Department have typically involved privacy and antitrust issues, which have been seized on either by the companies involved, the Justice Department or the Commission.

For example, our letter to the Department regarding the proposed AT&T/T-Mobile merger on Aug. 9, 2011 preceded the Justice Department's decision to block the deal. Similarly, our June 28, 2011 submission to the Commission took on Facebook's anti-competitive developer terms, which required that game developers using the Facebook platform: (1) exclusively use Facebook's online currency, "Facebook Credits," in the operation of their games; (2) agree not to charge lower prices to consumers outside of Facebook, and (3) pay a 30% service fee to Facebook for all "Facebook Credits" purchases made by users. The Facebook complaint prompted the company to tweak its terms with developers and ultimately to abandon "Facebook Credits" entirely.

And, our recent letter to the Federal Communications Commission opposing the Time Warner and Comcast consolidation was part of a chorus of public interest opposition that led to abandonment of the buyout. After our complaint to the FTC, about Google's hacking around privacy settings on the Safari web browser to place tracking cookies, the Commission imposed a $22.5 million fine, the largest in FTC history.

It is also in the public interest to block Apple's plans to dominate the subscription music sector.

Confidential information provided to Consumer Watchdog suggests that Apple is pressing the three remaining music labels to give Apple exclusive rights to artists. Apple's threat is that 1) Apple possesses more than 800 million credit cards worldwide and is uniquely situated to charge them following a trial subscription to dominate the music subscription sector. 2) Apple has inside knowledge of the music preferences of a hundreds of millions of consumers (purportedly claiming it has 40% of all musical downloads on the Internet) and is uniquely able to leverage this knowledge to dominate the subscription music sector with whatever price it choses. 3) If the music studios don't agree to Apple's terms, the company will go directly to the artists and cut the music labels out of the business.

This does not appear to be based on mere hearsay. The documents to show Apple's tactics are purportedly currently under seal in an action before the Copyright Royalty Board where the price of compulsory copyright for streaming services is determined. The case citation is14-CRB-0001-WR (2016-2020) (Web IV). These are documents that the public cannot view, but that the Justice Department or Federal Trade Commission can subpoena.

The documents allegedly show Apple's distaste for free streaming music and its attempts to use its significant market power to both eradicate the freemium or free/commercial sponsored music sector and to force consumers to pay more for musical content.
The FTC and Justice Department can ensure that Apple does not dominate the market and eliminate the free music sector by prohibiting it from entering into agreements with clauses that will give it market dominance.

These are among the troubling practices at issue:

"Most Favored Nation" Clause: Apple is allegedly requiring music labels to commit to giving it exclusive rights to early artist releases before they go to freemium services. Such

an effort should be prohibited given Apple's market power and ability to drive Spotify, Pandora, Iheartradio and other commercial-sponsored services out of business. This is the equivalent of Apple and Amazon using their leverage over publishers to command a price for e-books, only in this case there is no player like Amazon to even balance out Apple's leverage.

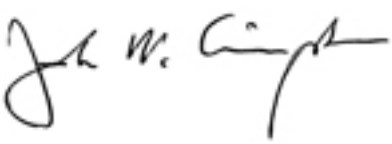
Apple has allegedly made statements to music labels claiming that "consumers have to open up their wallets." Apple has reportedly claimed it accounts for 40% of all downloads of music on the Internet, a tremendous market share, and music labels that don't participate with MFN status will suffer. Given this market power, Apple's market share of music downloads should be watched closely and it should be precluded from terms and conditions with artists and labels that allow it to grow its paid streaming business more significantly while disadvantaging or eradicating freemium services.

Leveraging Market Share and Platform For More Expensive Music: Apple has used its App store as a mechanism to prevent competitors in the music business from offering lower prices that undercut its own music services' prices. Given that Apple is both an online platform for music apps, the dominant one in the industry, and now a competitor of streaming music services, Apple is in a position to drive up prices for consumers. For example, Apple refuses to allow its competitors to offer family sharing options, though Apple offers the service to its customers. Apple's App store terms effectively prevent its competitors from undercutting Apple's price. Given that Apple dominates the app platform, and is now seeking to leverage its market power to dominate streaming services, such anti-competitive provisions in Apple's app store should be challenged on grounds of being "unfair" under Section 5 and/or on antitrust grounds.

While getting artists more money for their songs is an enviable goal, the fact that Apple is using its market position as download and credit card leader to demand higher prices smacks of the very price fixing it was caught doing in the e-book case. To prevent this type of market power abuse, Apple should be precluded from entering into terms that disadvantage the freemium, or free option, market and other streaming services. To this degree, all deals Apple enters into should be closely scrutinized for such consequences.

We urge you to immediately gain access to the CPR litigation, verify the veracity of the claims, and use them to inform restrictions placed on Apple in the future.

Sincerely,



Jamie Court
President

John M. Simpson
Privacy Project Director