UNITED STATES INTERNATIONAL TRADE COMMISSION

In the matter of:
CERTAIN LIGHT-BASED PHYSIOLOGICAL MEASUREMENT DEVICES AND COMPONENTS THEREOF

COMMENTS OF THE CONSUMER FEDERATION OF AMERICA (CFA)
INVESTIGATION NO. 337-TA-1276

February 23, 2022

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GENERAL OBJECTIVES OF PATENT AND ANTITRUST LAW

The Consumer Federation of America (CFA) appreciates the opportunity to provide comment to the International Trade Commission (ITC) in the above-captioned proceeding. CFA has been deeply involved in antitrust issues from its very beginning for a simple reason; competition in the marketplace is the consumers' best friend. delivering vigorous price rivalry, product quality, consumer choice, and innovation.[1] CFA was the first public interest group to publicly oppose the abuse of market power by Microsoft, a case that established key principles for antitrust in the digital economy.[2] As we put it, from the consumer point of view,

> The trial undermines the claim that the monopoly persists because of the unique natural forces of the software market. The causes of its durability are to be found in… plain old anti-competitive business practices... Real competition, even in this new economy industry, is not likely to impose the costs that its critics claim; it is likely to deliver the benefits consumers have come to expect from truly competitive markets. Thus, the lesson for consumers and antitrust policymakers to be drawn from the successful prosecution of the Microsoft case is clear – antitrust properly focused on competition should be a powerful form of consumer protection in the new economy as it was in the old…
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> Claims that preventing the concentration of economic resources would hurt the economy were raised at the time and they proved to be wrong, for the same reasons they are wrong today. Competition is the wellspring of economic progress, and antitrust law still has a critical role to play in promoting and protecting competition. [3]

We have lately become very concerned and active in the digital space, not only because consumers spend an ever-growing part of their household budgets on products involving digital

[1] For example, see Cooper, Mark, Director of Research, Consumer Federation of America, 2001, "Antitrust as Consumer Protection in The New Economy: Lessons from The Microsoft Case, Hastings Law Journal, 52: 4, April 2001, first presented at Conference on Antitrust Law in the 21st Century Hasting Law School, February 10., where we concluded that competition in the digital space is extremely important:

[2] *The Consumer Harm Caused by The Microsoft Monopoly: The Facts Speak for Themselves and They Call for A Stern Remedy* (Consumer Federation of America, November 1999); *Monopoly Power, Anticompetitive Business Practices and Consumer Harm in the Microsoft Case* (Consumer Federation of America, December 1999)

[3] Cooper, 2001, Op. Cit. p. 879.

technologies,[4] but also because the abuse of market power by the dominant firms has grown to alarming levels.[5]

One of the most challenging areas of antitrust enforcement is the intersection of antitrust and intellectual property.[6] The former seeks to stimulate competition. The latter grants monopoly protection to genuinely innovative ideas and products for a limited period to stimulate progress. While the intersection of these two legal standards is complex, there is also a fundamental compatibility between the two. They both seek progress through innovation. They both recognize the long-run importance of competition, intellectual property after a period of exclusion intended to promote innovation.

In the case before the Commission, there is no conflict whatsoever because of the anti-competitive actions of Apple.[7] There is no greater offense to both the antitrust and intellectual property law than when a dominant firm infringes the patent of a smaller rival, who is an actual or potential competitor.

Apple has done so, repeatedly,[8] violating both the laws as part of an overall strategy of dominance that harms consumers.[9] It raises prices, denies consumers choice, lowers quality, and

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[4] For example, see our work on Computers; Consumer Federation of America, et al., 2016, October, Comments of Consumer Federation of America, Consumers Union, Consumer Action and Consumer Federation of California, Proposed Regulations for Computers, Computer Monitors, and Electronic Displays, CEC Docket Number: 14-AAER-02, October 24, 2016, Consumer Federation of America, et al., 2016, May, Comments of the Consumer Federation of America, Consumers Union, Consumer Action and Consumer Federation of California on Proposed Efficiency Standards for Computers, Computer Monitors and Signage Displays, Submitted to the California Energy Commission, Docket Number: 14-AAER-02, May 23, 2016, Mark Cooper, 2015, "Energy Efficiency Performance Standards: Driving Consumer and Energy Savings in California," *California Energy Commission Workshop on Computer Standards,* April 15, 2015, Consumer Federation of America, et al., 2015, "Comments of Consumer Federation of America, Consumers Union, Consumer Action and Consumer Federation of California," *Computers, Computer Monitors, and Electronic Displays,* before the California Energy Commission, Docket Number: 14-AAER-02, May 29, 2015.

[5] For example, see Cooper, Mark, Director of Research, Consumer Federation of America, 2020, Big Data Platforms, a New Chokepoint in the Digital Communications Sector Meeting New Challenges with Successful Progressive Principles, *Consumer Federation of America,* September 14.

[6] Article 1, Section 8 of the Constitution gives the Congress the power to grant "exclusive rights" to authors and inventors, for "limited times" "to promote progress of science and useful arts." Tim Wu (the Curse of Bigness has called the Sherman Act, the cornerstone of U.S. antitrust law, a Constitutional' choice in industrial and national policy…where…the nation rejected a monopolized economy and chose repeatedly over the decades to preserve its tradition of an open and competitive market."

[7] In, Cooper, Mark, forthcoming, *The Formulation of Neo-Brandeisian Policy for the 21st Century: Tim Wu and Lina Khan Reintroducing the Uniquely Successful American Approach to a Dynamic Economy*" (Consumer Federation of America), p. 12. We point out that Wu argues "Innovation efficiency or technological progress is the single most important factor in the growth of real output in…the industrialized world." (Tim Wu, Taking Innovation Seriously: Antitrust Enforcement If Innovation Mattered Most, 78 *Antitrust L. J.,* 2012, p. 312) . He invokes a leading antitrust scholar who concludes that "there seems to be broad consensus that the gains to be had from innovation are larger than the gains from simple production and trading under constant technology (p.313) Reflecting these observations, Wu argues that restraint of innovation should be a central concern of antitrust law…if innovation mattered most…law enforcement would be primarily concerned with the exclusion of competitors.(p.316).

[8] AliveCor Inc. Complainant, v. Apple Inc., Respondent, United States International Trade Commission, In the Matter of Certain Wearable Electronic Devices with ECG Functionality and Components Thereof, Inv. No. 337-TA-1266 April 20,202;1 Landi, Heather, 2022, "Judge rules Apple Watch infringed AliveCor's ECG patent, setting up potential U.S. import ban," *Fierce Healthcare*, June,29,.

[9] Epic Games v. Apple, Inc., Consumer Federation of America, et al., 2022, "Amicus Brief of Amici Curiae the Consumer Federation of America, et al. In Support of Epic Games, on Appeal from the United States District Court for the Northern District of California.

dampens the incentive of sellers of complementary, or competing products to innovate. It must be held fully accountable for its anti-consumer, anticompetitive actions, that also violate the intellectual property law.

Three additional factors make this theft of intellectual property particularly egregious. [10] Apple has (1) used stolen patents, which it could not quite replicate, to (2) to produce an inferior product that performs worse than the true patent holder. To add insult to injury, Apple has illegally taken patents from a company whose production facilities are U.S. domestic, but (3) uses the stolen intellectual property to produce them abroad. On these grounds alone, the ban on importation of the devices is entirely appropriate.

DETAILS OF THE OFFENSE AND JUSTIFICATION FOR THE REMEDY

Although the questions raised in seeking public interest comments are important, the considerations on which the Notice seeks comment that might mitigate against the remedy are not operative. [11] A recent court case concluded that "an entire industry… took licenses from Masimo for innovative technology that saved thousands of lives and billions of dollars in healthcare costs,"[12] which lays to rest the concerns of the Commission.

"(i) explain how the articles potentially subject to the recommended remedial orders are used in the United States;" [13] Masimo invented, sells and licenses noninvasive technologies that monitor physiological parameters to hundreds of companies.

(ii) identify any public health, safety, or welfare concerns in the United States relating to the recommended orders. There are none, as Masimo currently supplies the technology to hospitals and to individuals and could easily expand the output if it were not blocked by Apple's bundling of products incorporating the stolen technology. In fact, the opposite is the case. Apple has abused its market power as a gatekeeper by bundling an inferior technology into its products.

(iii) identify like or directly competitive articles that complainant, its licensees, or third parties make in the United States which could replace the subject articles if they were to be excluded. As noted above, there are numerous channels through which the technology could be distributed.

(iv) indicate whether complainant, complainant's licensees, and/or third-party, suppliers have the capacity to replace the volume of articles potentially subject to the recommended orders within a commercially reasonable time; and (v) explain how. Masimo's willingness and ability to license and partner with large

[10] United States International Trade Commission,2023, In the Matter of Certain Light-Based Physiological Measurement Devices and Components Thereof, Inv. No. 337-Ta-1276, Complainant's Statement of the Public Interest, June 29, 2021, p. 2. "The Series 6 is just one of several Apple smartwatches, which function like a smartphone on the wrist. The Series 6 is the only currently available Apple Watch that claims to measure blood oxygen. Apple heavily markets that feature of the Series 6 to give the watch the appearance of a medical device. Yet, hidden from the millions of purchasers of the Series 6, Apple warns in the fine print that the blood oxygen measurements should not be relied upon for medical purposes. See https://www.apple.com/apple-watch-series-6. Thus, despite all the marketing about the significance of the addition of this measurement, the Apple Series 6 watch is not for medical use."

[11] United States International Trade Commission,2023, In the Matter of Certain Light-Based Physiological Measurement Devices and Components Thereof, Inv. No. 337-Ta-1276, Notice of Request For Submissions On The Public Interest, January 25,

[12] *Masimo Corp v. Philips Elec. N. Am. Corp.*, C.A. No. 09-80-LPS, 2015 WL 2379485, at *19 (D. Del. May 18, 2015).

[13] United States International Trade Commission, 2023, Op. Cit, p. 2,

numbers of companies and its effort to license its technology to Apple, suggests it could meet demand, but for Apple's desire to use the technology to strengthen its hold on the bottleneck and market.

ADDITIONAL OBSERVATIONS

In this proceeding there are two additional reasons that the remedy should be allowed to go into effect. First, since these are private actions, they play a unique and important role in promoting and preserving competition, akin to the important role that private suits can play in antitrust. As aptly described by William Shepherd, over three decades ago

> Private suits offer an important force against monopoly power…Repeatedly private actions have been prepared earlier, filed sooner, and litigated more effectively than agency actions. In some areas, private actions have really been 'making the law, by posing new claims and evoking landmark decisions.[14]

Second, in the case of many of the issues the Commission raises, Apple will insist these anticompetitive pretexts outweigh the harms; nothing could be farther from the truth. Such questions, "the analysis of "pretexts," are certainly valid, under the antitrust and intellectual property laws, but they require careful consideration. As we concluded in the analysis of the Epic Games v. Apple Case, if the court "had conducted the requisite balancing under the rule of reason, it would have found that the massive harm caused by Apple's policies dwarfs the purported justifications that Apple put forth**".**[15]

In this case, as in the other cases involving Apple's egregious abuse of market power, the harms far outweighs the benefit. In fact, because competition will swiftly replace any services or products that Apple is no longer able to deliver because of the remedy, there will be little harm and a great deal of benefit for consumers and the economy.[16] The Commission should seize the opportunity to make it clear that this an instance where intellectual property and antitrust law converge so there is no conflict between the two legal standards. In doing so, it would strike a blow for competition, the best form of consumer protection, and the superior approach to defending and promoting the public interest.

Respectfully submitted

Dated: February 22, 2023

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[14] Shepherd, William, 1991, *Public Policies Toward Business,* Richard D. Erwin, 8th Edition) p. 301, cited in Cooper, Mark, forthcoming, "Private Antitrust: *Epic Games V. Apple, Inc*. Finding Apple Liable for its Pervasive Anticompetitive and Anti-Consumer Practices Will Help Restore Antitrust and Private Suits to the vital Role of Promoting Competition and Innovation in the U. S. Economy," *Consumer Federation of America,* p. 4.

[15] Consumer Federation of America, et al., 2022, Epic v. Apple, Consumer Federation of America, et al., 2022, "Amicus Brief of Amici Curiae The Consumer Federation of America, et al. In Support of Epic Games, on Appeal from the United States District Court for the Northern District of California. p. 2.

[16] "[T]he public interest favors the protection of intellectual property." *Certain Digital Television Products and Certain Products Containing Same and Methods of Using Same*, Inv. No. 337-TA-617, p.9 (Aug. 21, 2009) ("Digital TV Products"). The ITC should deny relief only where "the statutory public interest concerns are so great as to trump the public interest in enforcement of intellectual property rights." *Certain Baseband Processor Chips and Chipsets, Transmitter and Receiver (Radio) Chips, Power Control Chips, and Products Containing Same, Including Cellular Telephone Handsets*, Inv. No. 337-TA-543, pp. 153-154 (June 19, 2007). The Commission "need only decide that the public interest does not preclude" the remedy. *Certain Cigarettes and Packaging Thereof*, Inv. No. 337-TA-643, 2009 ITC LEXIS 2464, Comm'n Op., p. 46, (Oct. 1, 2009).