

inMusic's Submission on the Statement of Issues

1. inMusic Brands, Inc. and its subsidiaries and affiliates including inMusic New Zealand Limited (inMusic) welcome the opportunity to comment on the Statement of Issues published by the New Zealand Commerce Commission (Commission) on 7 February 2024 in respect of the clearance application submitted by AlphaTheta Corporation (ATC) to acquire Serato Audio Research Limited (Serato).
2. inMusic submits that the Commission has assessed the evidence and argument concerning the Proposed Acquisition correctly. The Proposed Acquisition will substantially lessen competition in both the DJ hardware and DJ software markets in New Zealand and globally and should therefore not be cleared.
3. On key points that the Commission has invited further submissions and evidence, inMusic believes that it has already provided substantial evidence and the Commission has properly credited the evidence. Nevertheless, inMusic makes this brief submission in response to the Commission's invitation to comment on the SPA between ATC and Serato¹.
4. It is worth stating at the outset that the SPA provisions clearly cannot constrain ATC's ability to exploit the market power it would enjoy post merger in the DJ software market. And nor do the parties claim as much.
5. In relation to the acquisition's impact on DJ hardware markets, in our view the Commission should not be satisfied the provisions of the SPA are likely to constrain ATC's ability to frustrate DJ hardware manufacturers from partnering with Serato to create new products in a commercially viable and timely fashion. Although inMusic has not seen the language of the SPA, inMusic has experience in acquisitions. Contract language requiring an acquirer to conduct business a certain way is rarely agreed-to precisely because it is difficult and expensive to enforce. Any inquiry in litigation will be fact-intensive, and as the Commission notes, ATC has many options to thwart the intention of the SPA language without outright breaching it.² No contract language is perfect or can anticipate every scenario. Clever and determined parties can often find a way around it. Although the Commission notes that "Towards the end of the [] period, Serato may also be less incentivised to enforce the conditions,"³ in our view the incentive is likely to, practically speaking, be low throughout the period. Litigation is costly and risky, and the exiting owners of Serato may very well not recover any monetary damages for any breach or, critically, could completely rationally settle privately with ATC without any relief for Serato's hardware partners. While the truly aggrieved parties (i.e. third party hardware manufacturers) may well have the incentive to enforce the language, they will lack knowledge of the specific language, and will have no standing to sue, resulting in ATC having no likely opponent to prevent its breach of the SPA.

¹ Statement of Issues at [45].

² Statement of Issues at [43.3].

³ Statement of Issues at [107].

6. Standing back, while we accept the Commission can take into account as part of the wider factual mix, say, a long-term facility lease arrangement where (i) identifying a breach is straightforward, and (ii) *where the party potentially harmed has standing to sue*, that is fundamentally different to relying on a contractual provision *between the merging parties*. In addition, not only does the Commerce Act prohibit the Commission accepting behavioural undertakings, the promise to behave in this case is not even enforceable by the Commission.
7. To the extent ATC, Serato and/or others submit additional evidence and argument, inMusic welcomes the opportunity to address it on cross-submission.