

**inMusic’s Response to AlphaTheta Corporation/Serato Audio
Research Limited’s Cross-Submission in Relation to Submissions
Made in Response to Statement of Preliminary Issues**

I. Executive Summary

- a. inMusic Brands, Inc. and its subsidiaries and affiliates including inMusic New Zealand Limited (inMusic) welcome the opportunity to comment on AlphaTheta Corporation (ATC) Cross-Submission in Relation to Submission Made in Response to Statement of Preliminary Issues (Cross-Submission), together with the accompanying report by NERA Economic Consulting (NERA), submitted to the New Zealand Commerce Commission (Commission) on 28 November 2023.
- b. Neither ATC’s submission nor NERA’s report adds anything of substance to this matter. For its part, ATC’s original Clearance Application was thinly-sourced and speculative, and ATC (or Serato) has not subsequently rebutted the substantial evidence submitted by inMusic. ATC continues that theme by blithely dismissing the significant, well-supported concerns raised by inMusic and others. Without offering contrary evidence, or even a logical counterargument, ATC invites the Commission simply to take their word for it and ignore what conventional wisdom and common sense dictate that monopolists typically do.
- c. Adopting a faux innocence, ATC is essentially telling the Commission, “Just trust us. We would *never* even think about inconveniencing customers, and we would *happy* to collaborate with industry competitors.” These are not serious, evidence-based arguments made by an applicant who respects the Commission and the clearance application process. ATC’s statements are not even enforceable promises that could give rise to behavioural undertakings, even if such undertakings were allowed. These are the types of glib assertions made by entitled, bad faith actors, who resent having been challenged to justify why this clearly anti-competitive acquisition should be permitted and whose disdain for the law and this process is palpable as a result. The statement about supporting industry collaboration is simply astounding: as we detail below, [redacted].
- d. As for the accompanying NERA Report, although undoubtedly NERA has analyzed the facts as it “understands” them,¹ with all due respect to NERA and its expertise in economic analysis, its ultimate conclusions necessarily suffer from the fatal defect that most of its bedrock assumptions about the DJ software and hardware industry—supplied largely by ATC and Serato—are unsupported and wrong. Indeed, NERA notes² that “Information furnished by others...has not been independently verified”

¹ NERA uses the qualifying phrases “our understanding” and “we understand” throughout the report to reflect that it is not an expert on DJ software and hardware functionality or their relevant markets but rather is being spoon-fed certain assumptions by ATC/Serato.

² NERA Report at Page 48.

unless specified. Further, with respect to any “predictions,” NERA acknowledges that such predictions are “subject to inherent risks and uncertainties.”³

II. ATC’s Cross-Submission’s Assertions

- a. ATC notes that it is only responding to “a few key assertions” because of the “limited timeframe available” and is otherwise relying on its Application.⁴ The Commission’s Statement of Preliminary Issues was published on 26 October 2023, and inMusic’s response to the Application was published on 13 November 2023. And further, ATC has been aware of inMusic’s concerns since well before it filed for clearance. In short, ATC has had ample notice of the numerous concerns raised by its Application yet only attempts to respond to three. But none of those responses offer evidence in support nor meet the substance of the issues raised. The Commission should reject such bald assertions.
- b. ATC denies that it is its “intention” or “rationale” to monopolize Serato.⁵ Additionally, ATC contends that it will not cause its or Serato’s customers “any grief” because its “raison d’être” is its customers.⁶ Besides being hopelessly vague—“grief” can mean many things in the context of a business to customer relationship—no part of the decision the Commission must make requires any analysis of customer “grief” levels.⁷ Even if it did, ATC cannot possibly guarantee this and is not even offering to. It has instead chosen its words very carefully, stating that it does not *intend* to cause problems for its customers because it loves its customers, but what if it does anyway? There is no recourse for causing “grief” after the deal closes. Moreover, the concerns raised by inMusic are not confined to ATC’s customers; this deal implicates the entire industry, and *all* customers and competitors will be impacted. ATC’s empty platitudes that its post-acquisition actions will be customer-friendly are insufficient to address inMusic’s well-supported arguments⁸ that this deal is likely to substantially lessen competition.
- c. As a rational business with obligations to its shareholders, there is no basis for the Commission to conclude that ATC is not likely to increase the price of standalone software following the removal of the constraint from its closest (by far) competitor. Similarly, there is no basis to conclude it is not likely to rationally seek to increase the price of Serato to its closest hardware competitor and/or otherwise seek to drive

³ NERA Report at Page 48.

⁴ Cross-Submission at [5].

⁵ Cross-Submission at [3(a)].

⁶ Cross-Submission at [3(a)].

⁷ Not to mention, it is borderline insulting to the Commission and inMusic, as well the entire industry. As a publicly-traded company, ATC’s board of directors has a fiduciary duty to its shareholders. Its true *raison d’être* is to make money for its shareholders, not please its customers. The Commission should not fall for such pablum.

⁸ See, generally, inMusic’s Submission in Response to the Statement of Issues dated 8 November 2023 and inMusic’s Cross-Submission in Response to the Statement of Issues dated 22 November 2023, as well as inMusic’s 9 November 2023 demonstration and interview with the Commission.

customers from inMusic to ATC by making inMusic a relatively less attractive proposition.

- d. ATC’s next response cobbles together three sentences that are very cleverly structured to appear to address a major concern but instead sidestep the critical issues around MIDI mapping. ATC opens by noting inMusic’s assertion that “rekordbox is tightly integrated with Pioneer DJ hardware.”⁹ ATC does not deny this. Instead, ATC changes the subject by stating that the “paid version of rekordbox” is “MIDI supported,” which allows it to be mapped to non-ATC products.¹⁰ These claims are not mutually exclusive. rekordbox can be, and is, both MIDI supported and tightly integrated with Pioneer DJ hardware. What ATC avoids, though, is inMusic’s principal point that any MIDI mapping of rekordbox to non-ATC hardware is technically complex, will result in a far less satisfying experience for the customer and is therefore rare in practice.¹¹ ATC does not (because it cannot) refute the numerous vexing limitations of MIDI mapping.¹² ATC next sentence concludes its tap dance around the crux of the issue by stating “[i]t would not make sense” for ATC to move away from the MIDI standard.¹³ Of course this is true but irrelevant. If users of non-ATC hardware want to undertake the arduous and imperfect task of MIDI mapping, ATC is wise to let them, but it does not change the fact that the vast majority of customers will opt for the convenience of plug-and-play functionality offered by ATC between Pioneer DJ hardware and rekordbox or Serato. ATC, Serato and now NERA have all stated, without evidence, that the availability of the MIDI protocol in both DJ software and DJ hardware means that the merged entity cannot foreclose rivals from making their DJ hardware compatible with rekordbox/Serato nor can it stop DJ software providers. The Commission should reject such baseless, self-serving claims—bearing in mind the ultimate issue is whether the theoretical ability of consumers to MIDI map is a sufficiently strong competitive constraint on a combined ATC (Pioneer)/Serato that the Commission can conclude that an SLC is not likely.
- i. Not to put too a fine point on it, and hopefully dispense of this issue once and for all, inMusic attaches certain documents shared in the ordinary course of business with Serato. As inMusic has argued extensively¹⁴, its controller integrations with Serato are deep and extensive, require months of collaboration and users will not opt to undertake a lengthy, technical and incomplete process when they could simply instead buy an ATC controller. Examples to support inMusic’s position abound. [redacted].¹⁵ [redacted].¹⁶ [redacted].¹⁷

⁹ Cross-Submission at [3(b)].

¹⁰ Cross-Submission at [3(b)].

¹¹ See inMusic’s Submission at [V(a)(i)] and inMusic’s Cross-Submission at [II(a)-(d)].

¹² See inMusic’s Submission at [V(a)(i)] and inMusic’s Cross-Submission at [II(a)-(d)].

¹³ Cross-Submission at [3(b)].

¹⁴ See inMusic’s Submission at [II(s)(i)-(vi); III(c)(i)(4)(a) and III(d)].

¹⁵ [redacted].

¹⁶ [redacted].

¹⁷ [redacted].

[redacted].¹⁸ [redacted]¹⁹ [redacted].²⁰ [redacted].²¹ [redacted], the development process to ensure that inMusic’s DJ hardware works seamlessly with Serato’s DJ software takes many months, involves several engineers and product development experts, requires extensive product knowledge and testing and concerns matters beyond simple MIDI mapping. No end user can match this level of integration between hardware and software. Perhaps because ATC and Serato recognize they are wrong on this point, they have utterly failed to engage substantively with inMusic’s well-supported argument. While NERA cannot be criticized for explicitly relying on the factual position put to it by ATC in relation to the MIDI point, it does mean its conclusions which are premised on this being true cannot be relied upon.

- e. ATC concludes its brief rebuttal with an outright misrepresentation. It claims that ATC “has never turned down any collaboration offers.”²² [redacted].²³ [redacted]. ATC’s distortion is perplexing and disturbing. Moreover, ATC’s examples of prior working relationships in the industry are entirely irrelevant. ATC names only software providers that it has worked with. None are hardware suppliers. While ATC understandably welcomes software collaboration to sell its high-margin controllers, ATC has never collaborated to make rekordbox available to its competitors because it wants to maintain the closed ecosystem with rekordbox.²⁴ This is precisely what inMusic warns the Commission will happen with Serato if ATC is cleared to purchase it.

III. The NERA Report

- a. NERA relies heavily on ATC’s Application for factual support. Putting aside for the moment NERA’s analysis (which we address further below), since ATC provided very little evidence to support the Application, the NERA report similarly lacks a firm evidentiary foundation. As a result, the flawed factual premise put to NERA by ATC inevitably leads to conclusions which cannot be relied upon. inMusic will respond to each of NERA’s findings in order:
- b. Barriers to Entry and Expansion. NERA argues that the threat of entry by new players or expansion by existing/adjacent players in the DJ software market should constrain the merged ATC/Serato from raising prices because barriers to entry are low. In support, NERA makes four key conclusions that we will address in order.
- i. Switching Costs. NERA posits that switching costs are low for DJ software users. In support, NERA notes that switching software does not require

¹⁸ [redacted].

¹⁹ [redacted].

²⁰ [redacted].

²¹ [redacted].

²² Cross-Submission at [3(c)].

²³ [redacted].

²⁴ inMusic’s Submission at [I(f)].

switching hardware, music libraries/data can be easily transferred and all DJ software performs similar functions and is laid out similarly and thus there will be limited frictions with learning an alternative software.²⁵

1. As to NERA's first point, it is generally correct as long as the DJ hardware is compatible with the new DJ software; however, this is not a given. Its second point elevates the exception over the rule, and its third point is simply wrong. Overall, the entire analysis is incomplete.
2. With respect to transferring libraries/data, NERA ignores inconvenient details and underestimates the cost and work required to do this. As explained in the article NERA cites,²⁶ each DJ software stores the "extra" info used to DJ such as cues, loops, playlists in its own *proprietary* database. In other words, DJ software providers all use their own, exclusive file format to store the substantial user-generated data that is critical to DJ performance, and cross-compatibility is not automatic. NERA points to Virtual DJ²⁷ as a software that allows library import from other DJ software providers, but Virtual DJ only allows playlist import from other DJ software as long as the playlist's original DJ software is also installed on the same computer.²⁸ Additional data such as cues and loops are not importable. NERA can only otherwise refer to third-party conversion tools but ignores that these tools cost money, require the user to rely on third-parties to keep such tools updated and leave the user without recourse if the third-party corrupts or destroys data.²⁹ In short, similar to the MIDI-mapping canard that ATC continues to push, library transfer—though technically possible—is not easy, cheap or common. And certainly not enough to undermine attempts to harm the competitiveness of independent hardware suppliers.

²⁵ NERA Report at [16(a)-(c)].

²⁶ <https://www.digitaldjtips.com/3-ways-to-convert-your-dj-library-between-platforms/>

²⁷ Indeed, NERA's repeated mention of Virtual DJ is not particularly compelling with added context. Virtual DJ is very aggressive in trying to convert users to its software. NERA cites Virtual DJ for the propositions that most DJ hardware is compatible with most DJ software and that converting libraries from one to another is available. But Virtual DJ is the exception and not the norm. The fact that its tactics have not resulted in higher market share supports inMusic's view that switching DJ software is atypical, regardless of what DJ software providers do to encourage it.

²⁸ Although NERA does not mention, inMusic's Engine DJ desktop library management software (which, as the Commission knows is not a DJ performance tool) allows the import of all relevant library data from rekordbox, Serato and others. See <https://enginedj.com/software/enginedj-desktop>. This allows such libraries to then be exported for use on inMusic's all-in-one/standalone products. The fact that this tool is available and has resulted in very little conversion of customers to Engine DJ undermines the notion that library conversion and switching is typical.

²⁹ See, for example, <https://www.lexicondj.com/terms> ("Your use of the Service is at your sole risk."); <https://www.mixo.dj/terms> ("MIXO recommends the User backs-up all tracks before using the export service. In the event an error might occur, MIXO shall not be held responsible for any loss of data or damage to audio tracks as a result of the error.")

3. NERA’s final point focuses exclusively on aesthetics, not functionality, and ignores the economic principle that decisions are made at the margins. Of course, DJ software often *looks* the same.³⁰ Like any profession, discipline or hobby, there is a great deal of homogeneity to DJ performance. DJs need to be able to beatmatch, mix, control EQ and use effects, among other things.³¹ For this reason, all DJ software must provide an interface that allows for these techniques. However, functionality is a different question and matters greatly. As previously discussed,³² outside of Serato and rekordbox, which compete only with each other, other providers struggle to add functionality sufficient to be a viable alternative to these top two. For example, Traktor is said to have “baffling limitations” and Virtual DJ is “[n]ot as slick as some, and you may have to work with it to get some features behaving how you wish them to.”³³ NERA’s superficial analysis of general features ignores that the incremental differences in features make all the difference in purchasing decisions.
 4. Although NERA is focused on costs, its analysis of switching software is also incomplete because it ignores non-monetary factors. Ultimately, “switching software is painful, as DJs necessarily get deeply attached to workflows that are tied to the software they’ve chosen.”³⁴ Regardless of cost, because software is “sticky,” switching is uncommon.
- ii. Reputational Barriers. NERA undertakes a largely academic exercise with respect to reputational barriers that is nevertheless divorced from market reality. Pointing to low search costs, no information disadvantages and a purported lack of failure severity, NERA concludes that a “familiarity bias” has not arisen with respect to Serato and therefore its “‘industry-standard’ reputation and branding” will not create a barrier to entry.³⁵ The focus on Serato alone ignores that the combined entity post-merger will trade on both Pioneer DJ’s and Serato’s brand reputations. As seen from the unusual number of submissions to the Commission in favor of the acquisition, all of which reflect an unwavering passion for Pioneer DJ and Serato but none of which provide substantive reasons why the combination will be good for innovation and the industry at large, brand loyalty unquestionably drives demand for Serato and rekordbox. This is reflected in the fact that Serato and rekordbox have remained at stable

³⁰ Although it should be noted that the DJ hardware cited by NERA in Figure 2.2 (which compares the layout of popular controllers) is all outdated. Both the Pioneer DJ DDJ-400 and Denon DJ MC4000 have been discontinued, and the other two were released years ago. Also, all were also relatively low- to mid-tier controllers, selling in the \$300-\$400 USD range. Certainly, comparing DJ products across price ranges and manufacturers will show much greater variation.

³¹ <https://iamghostproducer.com/blog/mastering-the-mix-basic-dj-skills-every-beginner-should-know/>

³² See inMusic Response to RFI dated 17 November 2023 at [6].

³³ <https://www.digitaldjtips.com/best-dj-software/>; see also inMusic Submission at [II(g)-(i)].

³⁴ <https://www.digitaldjtips.com/best-dj-software/>; see also inMusic Submission at [II(i)].

³⁵ Cross-Submission at [27].

market shares at the top, while other providers have jockeyed for position below as the next tier of suppliers.³⁶ Additionally, as discussed previously, Serato is the *only* DJ software that the top two DJ hardware suppliers (ATC and inMusic) license for inclusion in their products.³⁷ Regardless of what NERA’s analysis may say as a general proposition in theory, the actual outcomes in the marketplace reflect something very different—brand loyalty to Serato and Pioneer DJ is extraordinarily high and creates an enormous barrier to entry.

- iii. DJ Software Development Costs. NERA contends that DJ software development costs are low. Since all figures are redacted, inMusic cannot respond to the entirety of NERA’s analysis; however, from what we can see, there are a number of flaws. NERA’s sample size is one company; it relies entirely on figures provided by ATC. NERA states that it “might cost up to [REDACTED] upfront to develop a desktop application as sophisticated as rekordbox.”³⁸ It is not clear if NERA is relying on the actual cost for ATC to develop rekordbox (back in 2009) or some other estimate ATC provided for the present day. No explanation is given, but each has weaknesses. If it was the original cost, it needs to be converted to 2023 dollars. If it is an estimate, then there should be some explanation provided for the estimate. NERA does state that startup costs to build a new DJ software are “reasonably substantial” in relation to ATC’s and Serato’s *present day* revenue, but that is not the relevant analysis.³⁹ Any new entrant cannot expect to earn anywhere near what rekordbox and Serato *currently* earn. Serato and rekordbox are mature DJ software at the top of the market. If the cost to develop new DJ software were a “reasonably substantial” proportion of ATC’s 2022 software sales, a new entrant would likely expect to operate at a loss for several years as it incrementally builds market share and revenue. Not to mention, when ATC entered the market with rekordbox, it was already an established name in DJ. Whatever investment it made was relatively low risk since it was a known commodity. Finally, NERA’s contention that a mobile app developer or music production software provider could add DJ functionality cheaply (again, the exact figures are unknown) is pure speculation.⁴⁰ There is no reason to believe that any such companies are contemplating such development. In fact, Serato’s and rekordbox’s dominance is likely to dissuade them. And again, the issue is whether the prospect of this entry is sufficient that the Commission can be satisfied an SLC is not likely, in both the hardware and software markets.

³⁶ As reflected in the Digital DJ Tips annual Global Census previously provided to the Commission.

³⁷ inMusic’s Submission at [II(s)(vii)]; inMusic’s Cross-Submission at [IV(d)(ii)].

³⁸ NERA Report at [51].

³⁹ NERA Report at [51].

⁴⁰ Not to mention, NERA does not consider that DJ software is a relatively small market. Especially compared to music production software, the incentives for new entrants into a market with entrenched incumbents. In fact, both Avid and FL Studios, which are two of the biggest providers of music production software, launched DJ software but exited the market relatively quickly.

- iv. NERA’s ultimate conclusion that “the merged entity will continue to face competitive constraint from the threat of potential competition”⁴¹ on the basis of its findings that there are low barriers to entry is faulty for the reasons set forth above but also because it flies in the face of present reality. Serato and ATC *only act as a competitive constraint on each other* and have such massive market share that there is no reason to believe that combining them will somehow result in lower barriers to entry as there presently are and therefore more competition than there is now. Further, inMusic will mention yet again that ATC has agreed to pay over NZD 100 million for Serato. That is not the action of a buyer who sincerely believes that barriers to entry are low.
- c. Unilateral Behaviour. NERA next concludes that the merged entity will face several constraints from raising prices, decreasing quality and/or reducing innovation. We will address each constraint analyzed.
- i. Constraint from Desktop Software. We note that market share data has been redacted for some reason even though NERA purports to have developed it from public sources. Therefore, inMusic cannot fairly respond to NERA’s data. As for the remainder of NERA’s argument, it suffers again from a misunderstanding of actual market conditions. NERA contends that the merged entity will face “continued” competitive restraint because desktop software is homogenous and users can substitute similarly-positioned products but developers also can reposition themselves to target a different niche.⁴² Presently, Serato and rekordbox are only constrained by each other. No other DJ software has gained any ground on the two market leaders for years. Therefore, the notion that constraint would “continue” is simply wrong because there is none currently. Moreover, as discussed above, the *look and feel* of desktop DJ software is homogenous to a point because every DJ needs to perform generally the same techniques. Other factors, however—such as depth of hardware integration, reliability, and quality of advanced functionality—can vary greatly.⁴³ Accordingly, NERA’s rote analysis of features, without any reference to the quality and/or user acceptance of them, creates the wrong impression that non-Serato/rekordbox offerings are truly comparable. Serato and rekordbox are plainly each other’s closest competitor – by some margin. NERA also notes, but seeks to downplay, that Serato and rekordbox are already generally more expensive than their competitors⁴⁴, but the biggest misconception is that competitors can simply reposition themselves in response to the merged entity increasing prices, decreasing quality and/or reducing innovation. History reveals this is not the case.

⁴¹ NERA Report at [58].

⁴² NERA Report at [60].

⁴³ For example, Serato is considered “most reliable” and has the “lowest latency” on the market. See <https://serato.com/dj>.

⁴⁴ NERA Report at [71].

- ii. Constraint from Mobile Apps. NERA, who are not experts in DJ technology or the DJ software market, goes to great lengths to explain the technical capabilities of mobile DJ app suppliers to *possibly* compete with the merged entity. Like ATC’s Application, NERA’s analysis is pure speculation and is detached from present reality where mobile apps—even ones that have existed as long or longer than rekordbox has—cannot compete effectively. Most end users simply want desktop software, not mobile apps. inMusic has previously addressed mobile apps⁴⁵ and will not repeat that argument here. It should be further noted, however, that NERA’s touting of Algoriddim undermines, rather than supports, its position. Algoriddim, which has existed since 2006, produces a wonderful mobile DJ software product that is stable and mature. Nevertheless, it has only managed to capture just over 2% of the market.⁴⁶ This makes sense since less than 2% of DJ use a mobile device as their primary setup.⁴⁷ Algoriddim’s recent foray into desktop after many years of trying to gain market share with an industry-best mobile app reflects an apparent understanding that desktop DJ software remains the biggest revenue producer, and mobile apps are unlikely to compete. This is further reflected in the fact that Serato does not have a mobile app (it abandoned its one attempt)⁴⁸, and ATC has focused very little on its WeDJ app.⁴⁹ If ATC sincerely believed that mobile apps are the future, ATC would not be paying 100 million dollars for a company without an app and would have invested more extensively in its own app. NERA also refers to the possibility there could be a “chain of substitution.”⁵⁰ inMusic submits that there is clearly a substantial break or gap as between mobile and desktop apps which undermines any such chain existing as between desktop and mobile apps. In fact, notwithstanding the various arguments NERA advances, it ultimately concludes that “mobile apps tend to be cheaper, targeted at beginners, and include less functionality than desktop software (while still including most essential features)” and that “all else equal, we would expect the merged entity’s desktop products to face more competitive constraints from other desktop developers than from mobile-only developers.”⁵¹
- iii. Constraint from DJ Hardware Suppliers. NERA postulates that DJ hardware manufacturers will constrain the merged entity either by enhancing their existing software offerings or, in the case of DJ hardware providers that do not currently offer software, by entering the DJ software market. Again, NERA’s analysis is hypothetical and does not consider the significant time and cost to do

⁴⁵ inMusic’s Submission at [II(j)-(p)]. In addition to inMusic’s written submissions, the Commission may recall that Mr. O’Donnell spoke about mobile apps during the interview that occurred on 9 November 2023.

⁴⁶ See the 2023 Digital DJ Tips Global Census.

⁴⁷ See the 2023 Digital DJ Tips Global Census.

⁴⁸ inMusic’s Submission at [II(o)].

⁴⁹ inMusic’s Submission at [II(o)].

⁵⁰ NERA Report at [95].

⁵¹ NERA Report at [108].

so. The merged entity would dominate the DJ software market (with close to no meaningful constraint in relation to software relied upon by professional DJs) and, as discussed previously, will have substantial resources and options at its disposal to grow that even larger. The current second-tier DJ software providers (which have not themselves been able to gain market share before this acquisition) have mature codebases and experience developing DJ software. The notion that a DJ hardware supplier will look at the competitive landscape and decide that it is a good investment to try to chase market share is absurd. [redacted].

- iv. Constraint from Music Production Software Providers. NERA suggests that music production software providers may expand their offerings to include DJ software. NERA essentially repeats ATC’s prior argument. As inMusic previously discussed, this analysis ignores key facts. There is no indication that any music production software provider has plans to expand into DJ. The two notable prior examples are Avid (with its Torq software) and FL Studio (with Deckadance). Both quickly exited the market.⁵² Indeed, there is little incentive for music production software providers to move into DJ. Music production software is a multi-billion dollar industry.⁵³ The DJ software market is likely closer to \$100 million. The incentives for DJ software providers to expand into music production software are far more attractive, and in fact, Serato has done just that.
- d. ATC Leveraging its DJ Software Position to Foreclose DJ Hardware Competition. NERA claims that the merged entity would have neither the ability nor incentive to foreclose DJ hardware competitors. In doing so, NERA dismisses that Serato is a “must have” DJ software and dismisses that the revenue ATC would gain from additional hardware sales would outweigh the loss of Serato software sales, although the manner in which this is expressed suggests that, *in fact*, ATC may well have the incentive to do so in relation to high-end hardware,⁵⁴ being the very hardware that professional DJs typically purchase. More generally though, NERA’s analysis is too narrow. The question is not whether Serato as it exists now is a “must have” or whether the factors currently constraining ATC in DJ hardware suggest that it has the ability and incentive to foreclose DJ hardware competition. The question is whether the merged entity will have the ability and incentive to foreclose. It unquestionably will.
 - i. ATC’s Ability to Foreclose. inMusic notes firstly that most of the data NERA relies on is redacted, and therefore, inMusic cannot fully respond to its calculations. Nevertheless, a few key assumptions made by NERA are

⁵² See <https://www.digitaldjtips.com/avid-drops-torq-but-is-it-end-of-the-line/#:~:text=All%20of%20its%20consumer%20electronics,equipment%20and%20other%20product%20lines%E2%80%9D> and <https://www.image-line.com/fl-studio-news/gibson-acquires-deckadance/>.

⁵³ inMusic’s Submission at [V(a)(ii)].

⁵⁴ NERA Report at [174].

incorrect. For higher-end controllers typically used by professional DJs, such as inMusic’s Rane controllers—Serato is absolutely a “must have.” This explains why ATC pays license fees to, and continues to offer, only Serato in addition to its own rekordbox.⁵⁵ If ATC sincerely believed that Serato was not a “must have,” to sell its high-end DJ controllers, it would make no sense to pay Serato license fees when its rekordbox offers essentially the same functionality. All the more so given it foregoes ongoing subscription revenue when users of its hardware use Serato rather than rekordbox. Of course, Serato’s importance is even higher for competing hardware suppliers who do not even have desktop software such as rekordbox.

NERA references the royalties Serato earns from hardware sales in its discussion at 4(c)(i) as to the evidence of a lack of market power. Text is redacted, but in stating that Serato is “facing competitive pressure,” we can only assume ATC is arguing that those royalties have fallen.⁵⁶ Proper context is required here. First, the mix of hardware has changed over time. Serato charges a lower fee for cheaper hardware. Therefore, looking at the *average* Serato hardware fee does not represent an accurate one-to-one comparison of fees over time. When looking at fees for comparable hardware, however, there is no evidence that Serato’s fees have diminished from competitive pressure. [redacted]. Secondly, Serato’s business model has evolved such that it now looks to monetize Serato via end user subscriptions alongside hardware royalties. It must therefore have regard to the flow-on impacts its pricing has on the competitiveness of inMusic’s hardware, relative to Pioneer DJ’s (for which a consumer may use rekordbox).

- ii. ATC’s Incentive to Foreclose. Most of this portion of NERA’s Report also utilizes data that inMusic cannot see. However, it is worth pointing out at the outset that NERA states that, because DJ hardware sales are higher margin than DJ software there is a “high incentive to foreclose”⁵⁷ given it leads to a low critical diversion ratio—i.e., comparatively few consumers need to switch from (say) inMusic to Pioneer to make the strategy profitable (even putting to one side the longer-term strategic rationale).

While the relevant conclusions are redacted, it appears the unredacted conclusions reveal that NERA’s vertical arithmetic suggests that ATC would in fact have an incentive to foreclose in relation to higher end hardware. NERA seek to address this by claiming that:

⁵⁵ inMusic’s Submission at [II(s)(vii)]; inMusic’s Cross-Submission at [IV(d)(ii)].

⁵⁶ NERA Report at [151].

⁵⁷ NERA Report at [4(c)(ii)(a)].

- embedded software would be a constraint – a point which inMusic has submitted extensively on, and in relation to which even NERA itself states only provides “a degree” of constraint⁵⁸; and
- the costs to switch hardware would be particularly high, making users more likely to switch software instead of buying hardware. This point is particularly perplexing, given the only practical alternative to Serato for these high-end users is rekordbox, which requires the user to switch to ATC/Pioneer DJ hardware.

In addition to the pure vertical arithmetic, there are plainly longer term, strategic incentives for ATC/Pioneer to leverage its newfound software market power to harm inMusic over time. Even if ATC had to sacrifice some short term profits (which we dispute) doing so is a rational strategy where there are longer term pay-offs. Amazon.com is the classic example of this. It continually favored growth over profits, and it has paid off in market dominance. Similarly, ATC is well-positioned to leverage its overwhelming dominance in DJ hardware and newfound dominance in DJ software to force customers who prefer its hardware into software/hardware bundles. Even if not profitable initially (which inMusic doubts), ATC can make it very difficult to impossible for its DJ hardware competitors to succeed. inMusic’s Rane—ATC’s closest competitor at the high end of the market—in particular would not survive if it could not be deeply integrated with Serato.

- e. ATC Leveraging its DJ Hardware to Foreclosure DJ Software Competition. On this point, inMusic agrees with NERA that neither ATC presently, nor the merged entity, is likely to leverage its dominant DJ hardware position to foreclose DJ software rivals. The margins on hardware are such that if an end user desires to use an ATC controller with non-compatible DJ software and is willing and able to undertake the lengthy, complex and highly-technical, yet imperfect, process to map an ATC controller to non-rekordbox/Serato software, ATC is wise to let them. As discussed above, the merged entity will have far greater alternative means to foreclose DJ software and hardware competitors. By permitting users to map ATC hardware to non-compatible software, it will allow ATC to continue to capture the small minority of users that may still opt for non-ATC software options.

IV. Conclusion

Neither ATC’s Cross-Submission nor NERA’s Report changes the calculus for this transaction. Contrary to the unsubstantiated assertions by the parties, inMusic has submitted significant evidence and argument showing that the proposed acquisition will substantially lessen competition by foreclosing DJ hardware competitors from partnering with Serato thereby increasing ATC’s already dominant market share in hardware. ATC also will control a dominant share of the DJ software market. Prices will rise. Neither ATC nor NERA substantively rebut

⁵⁸ NERA Report at [4(b)(iii)].

inMusic's arguments or offer compelling independent evidence sufficient for the Commission to be satisfied that the proposed acquisition is not likely to substantially lessen competition. Accordingly, Clearance should not be granted.