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Comments of

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to

**The European Commission's Directorate-General for Communications Networks,
Content and Technology**

on its

**Inception Impact Assessment, "Fairness in Platform-to-Business Relations":
Ares(2017)5222469**

I. Introduction and Statement of Interest

ACT | The App Association (App Association) appreciates the opportunity to contribute to the European Commission's (EC's) Inception Impact Assessment (Assessment) on the role of government in the digital platform economy.¹ We thank the EC for its efforts to address these important issues; we hope these comments will help inform its Assessment on the harmonious partnership between software application (app) companies and digital platforms. Moreover, the App Association provides the following input to ensure the EC's Assessment reflects a true understanding of the nuanced way in which platforms and apps engage. We wish to support and guide the EC in the development of its Assessment, and proffer the following considerations before the EC takes further action.

The App Association represents more than 5,000 small and medium-sized software app companies and informational technology firms across the €122 billion app ecosystem.² Our members leverage the connectivity of smartphones and devices to create innovative solutions that make our lives better. The App Association advocates for an environment that inspires and rewards innovation while providing resources to help our members utilise their intellectual assets to raise capital, create jobs, and promote growth.

The App Association performed an economic analysis of European app market. In the European Union (EU), we estimate that the European Union's (EU) app economy contributes:

- 794,000 jobs across the whole economy;
- 529,000 direct app economy jobs, 60 percent of which are software development jobs;
- 22 percent of the global production of app-related products and services;
- More than €10 billion in revenue per year.³

¹ European Commission, *Fairness in Platforms-to-business relations*, found here: [file:///Users/joelthayer/Downloads/PART-2017-484496V1%20\(2\).pdf](file:///Users/joelthayer/Downloads/PART-2017-484496V1%20(2).pdf).

² Brian Scarpelli, Nick Miller, & Roya Stephens, *State of the App Economy*, ACT | THE APP ASSOCIATION (5th ed., Apr. 21, 2017), at https://actonline.org/wp-content/uploads/App_Economy_Report_2017_Digital.pdf.

³ The App Association, *The European App Economy: Creating Jobs and Driving Growth*, Report, <https://actonline.org/wp-content/uploads/2013/07/The-European-App-Economy.pdf> (Sep. 2013).

Today, economists estimate smartphone users in the EU will reach 240.3 million by 2019,⁴ and found that the app economy added roughly 1.64 million jobs to the EU economy as of January 2016.⁵

The EC reported that since May 2016, it has aggregated and collected “facts on platform-to-business practices” to develop conclusions that there may be “trading practices [in the online platform economy] with the potential to create high-impact damages.” Further, its assessment finds that these impacts directly affect small businesses. Given the composition and interests of our 5,000 members, we hope this submission adds constructively to the EC’s ongoing investigation to better inform its subsequent Assessment. In this submission, we call the EC’s attention to the positive economic impact digital platforms have on small business app companies throughout the European economy.

The EC’s request for comment seeks input on a range of issues, which we believe stem from the Assessment’s loose definition of the term “platform.” Upon our review, we are concerned that the Assessment’s conclusions do not make meaningful distinctions between mobile platforms, search engines, or digital marketplaces. These distinctions are important, because each platform represents uniquely different entities that are operating in different industries and using different business models.⁶ Jumping to any conclusion based on a blanket characterisation of platforms will proffer pseudo-remedies that do not address the realities of the app ecosystem and will ultimately hurt app innovators, or worse, stifle their innovation and success.

Apps are the drivers of the mobile economy, but they maintain a symbiotic relationship with mobile platforms. Mobile platforms provide apps with:

- **lowered overhead costs,**
- **greater consumer access,**
- **simplified market entry, and**
- **strengthened intellectual property protections.**

The EC should not promulgate any policy prescriptions that disrupt the nature of this mutually beneficial exchange enjoyed by both app developers and mobile platforms. For the EC’s review, we provide the following insights and suggestions:

⁴ Statista, *Number of Smartphones Users in Western Europe from 2014 to 2019*, found here: <https://www.statista.com/statistics/494554/smartphone-users-in-western-europe/> (2017).

⁵ http://www.progressivepolicy.org/wp-content/uploads/2016/11/2016.06-Mandel_The-App-Economy-in-Europe_Leading-Countries-and-Cities-final.pdf.

⁶ Morgan Reed, *There Is No “Tech Industry”*, ACT | The App Association (24 Oct. 2017) <http://actonline.org/2017/10/24/there-is-no-tech-industry/>

II. The EC Should Observe the Meaningful Distinctions Between Platform Types

Within the digital ecosystem, platforms differ widely based on the business model they maintain, the industries they serve, and the utility they provide.⁷ The EC's Assessment intends to build upon its "Digital Single Market" strategy that uses the EC's alleged antitrust authority under Article 114 of the Treaty of the Functioning European Union to enforce against platforms it feels is causing harm to competition. However, the Assessment's use of the term "online platform" fails to make any meaningful distinctions to measure the variety amongst platforms, which is a necessary component to measure markets for purposes of antitrust enforcement. The EC should not move forward or conclude that a harm to competition exists until it better defines the various platform types and their respective business models.

The Assessment's definition of an online platform mirrors that of France's Digital Republic Act (DRA), which applies to any company that uses the internet to provide a service. Under Article 49 of France's DRA, an online platform is "any natural or legal person offering, on a professional basis, in a paid or unpaid way, an on-line public communication service" that uses "computer algorithms, content, goods or services offered or put online by third-parties."⁸ The DRA's definition ignores the unique structure and nuanced offerings of each platform, in favor of a uniform, monolithic interpretation of these entities. This interpretation by France, akin to the EC's in this proceeding, encourages a "one size fits all" style regulation that would inevitably harm the utility and potential of all players within the ecosystem. We strongly urge the EC to consider a regulatory framework tailored to the unique type of service each platform provides.

For instance, eBay and Amazon provide a digital marketplace platform to enable consumers and companies to exchange goods effectively and efficiently. In many ways, their business model and the services they provide resemble traditional retail stores, like an IKEA. This platform is starkly different from Google, a business where 90 percent of its revenue comes from advertising. Driven by an advertising business model, these search engine platforms have more in common with TV stations and newspapers like *Le Monde* or *The Financial Times*, than with retailers like Amazon and Carrefour. Whether through its search engine, its YouTube video platform, or apps on their Android operating system, Google's mobile platform is in the business of using targeted advertising to link consumers with the products they want or need. Advertising is also Facebook's revenue driver, but the social networking platform operates differently in how it gathers information and protects its users. The Apple mobile platform is yet another kind of entity – unique in its ability to provide consumers with hardware like phones, tablets, computers, and watches, while also serving as a reliable portal for innovative apps, products, and games.

⁷ See *id.*

⁸ Art. L. 111-7. - I.

In the context of mobile platforms, companies like Apple and Google provide app developers an access point to consumers around the globe. However, they remain distinct from one another, especially with regard to their respective business models and revenue generation models. For example, Google receives a large share of its revenue through selling anonymised data analytics, in part, by using third-party apps on its platform.⁹ This is contrary to Apple's model, which receives almost all of its revenue from the sale of its devices (e.g., iPhone, iPad, and Apple Watch).¹⁰ This is to say that Apple does not generate much revenue from ad sales, which is why it took a more consumer-focused approach when crafting its privacy features for its iOS.¹¹ These distinctions are important, because it greatly impacts how and why platform companies engage with third-party app developers. The various business models dictate the curation and collection practices of each platform; it truly depends on the source of the revenue stream.

It is essential that the EC account for the nuanced and different offerings of each platform when creating its report and refrain from categorising distinct platforms in a single group when considering regulations. We use the following sections of this comment to provide more detail about how app developers interact with, and benefit from, mobile platforms.

III. The Harmonious Partnership Between App Companies and Platforms

In nearly a decade of existence, the app economy has grown exponentially alongside the rise of the smartphone. Last year alone, 3.4 billion people spent 1.6 trillion hours using apps across a variety of platforms,¹² and the reach of apps continues to grow. Valued at €122 billion,¹³ the app ecosystem is driven by app developers and innovators who depend on platforms to reach consumers around the globe. In fact, 30 percent of the Apple App Store's global revenue comes from European-based developers.¹⁴

Since its emergence, the app ecosystem has evolved to influence industries and enterprises across the economy. Beyond the popularity of consumer-facing apps, apps also represent the interface of the €6.8 trillion¹⁵ internet of things (IoT) revolution. App-

⁹ Statista, *Google's Ad Revenue from 2001 to 2016* (2016)

<https://www.statista.com/statistics/266249/advertising-revenue-of-google/>.

¹⁰ Skye Gould, *Here's Where Apple Really Makes Money*, Business Insider, <http://www.businessinsider.com/heres-where-apple-really-makes-its-money-2015-7> (22 Jul. 2015, 2:10 PM).

¹¹ Joseph Hall, *Apple iOS and Privacy*, CDT, <https://cdt.org/blog/apple-ios-6-and-privacy-1/> (2012).

¹² Hugo Delgado, *The App Economy Forecast: A \$6 Trillion Market in the Making*, App Annie (2017) Available at: <http://bit.ly/2xfDqtB>.

¹³ Brian Scarpelli, Nick Miller, & Roya Stephens, *State of the App Economy*, ACT | The App Association (2017) Available at: <http://bit.ly/2o7EyOB>.

¹⁴ Brian Williamson, Yi Shen Chan, & Sam Wood, *A Policy Toolkit for the App Economy – Where Online Meets Offline*, Plum, found here: file:///Users/joelthayer/Downloads/A_Policy_Toolkit_for_the_App_Economy.pdf (2016).

¹⁵ Andy Noronha, Robert Moriarty, Kathy O'Connell, & Nicola Villa, *Attaining IoT Value: How To Move from Connecting Things to Capturing Insights*, Cisco (2014). Available at: <http://bit.ly/23Xa0rY>.

driven IoT tools that collect data from sensors in real time have already enabled manufacturers, farmers, and other service providers to operate more efficiently, and have contributed significantly to the economy. For example, the value of the app-driven, m-health solutions market is expected to top €77.1 billion by 2022.¹⁶ With a projected worth of €816 billion by 2019,¹⁷ we are just experiencing the beginning of the IoT.

Moreover, the EU's app ecosystem continues to grow at an exponential rate. The EC estimates that the app economy alone could contribute €63 billion and add 4.8 million jobs to the EU economy by 2018.¹⁸ In France, app companies have revolutionised retail markets by providing essential data that supports the growing consumer demand for online shopping (e.g., Leboncoin).¹⁹ The success of these innovative, market-driving app services is directly linked to the ubiquity of smartphones and their ability to leverage digital platforms.²⁰ Maintaining the integrity of the harmonious, symbiotic partnership between apps and platforms is integral to the future and the potential of the app ecosystem.

IV. Platforms Help App Innovators Overcome Extraordinary Barriers to Entry

The app ecosystem at large has brought great benefits to society, and platforms enable smaller app companies to broaden their reach to new markets and customers. However, the EC's Assessment suggests that platforms impose non-negotiable provisions on small businesses innovators and even exercise undue power in relationships with independent app developers. These allegations are not only unproven, but they also largely ignore the symbiotic relationship between platforms and app developers. We feel the Assessment underappreciates digital mobile platforms' role in reducing barriers to market entry for countless European startups and introducing a marketplace that enables consumers and enterprises to access innovative products at competitive prices.

For example, when smartphone devices were first introduced, app developers did not have the benefit of a centralised software distribution network that platforms provide. In the PC-driven world that preceded the smartphone platform, early app companies were

¹⁶ Cision, *mHealth Solutions Market Worth 90.49 Billion USD by 2022*, PR Newswire (03 Aug. 2017, 7:30 ET) <https://www.prnewswire.com/news-releases/mhealth-solutions-market-worth-9049-billion-usd-by-2022-638289523.html>.

¹⁷ "Internet of Things Market and M2M Communication by Technologies, Platforms and Services (RFID, Sensor Nodes, Gateways, Cloud Management, NFC, ZigBee, SCADA, Software Platform, System Integrators), by M2M Connections and by IoT Components - Global Forecasts to 2019," MarketsandMarkets (November 2014), *available at* http://www.marketsandmarkets.com/Purchase/purchase_report1.asp?id=573.

¹⁸ European Commission, *The €63 billion app boom. Nearly 5 million jobs in European app sector by 2018, says EU report*, Press Release (2014) http://europa.eu/rapid/press-release_IP-14-145_en.htm.

¹⁹ Ecommerce News Europe, *80% of All French Internet Users Buy Online*, (10 Dec. 2014) <https://ecommercenews.eu/80-of-all-french-internet-users-buy-online/>.

²⁰ Nigel Wright, *Consumer Goods and Digital: A Huge Opportunity for the French Economy, but Can It be Realized?* <http://fr.nigelwright.com/media/2203/6214-france-consumer-goods-and-digital-may-2016.pdf>.

forced to develop, market, sell, and ship their products to reach consumers. The app companies, often with teams of one or two developers, were not only responsible for writing code, but also:

- 1) managing their public websites,
- 2) hiring third-parties to handle financial transactions,
- 3) employing legal teams to protect their intellectual property, and
- 4) contracting with distributors to promote and secure consumer trust in their product.

Small app companies' core competencies often did not include the skillsets required to manage the overhead of online software distribution. To successfully bring their product to market, app companies had to establish relationships with publishers, hire firms to develop costly and time-consuming marketing campaigns, and contract with companies to process their financial transactions.²¹ These additional steps took valuable money, resources, and time away from product development. Without centralised platforms, app developers were forced to absorb significant costs, manage various relationships, and were beholden to costly rules and agreements even *before* their products were made available to a wide consumer base.

In simplest terms, before platforms, software developers either absorbed the costs and uncertainty of their sales, or they were forced to offload the overhead to a third-party publisher. These barriers to entry impacted hundreds of thousands of software developers and companies and resulted in higher prices and fewer choices for consumers around the globe.

Platforms have established one-stop shops that manage publishing, marketing, and distribution services, and mitigate costs for software developers of all sizes.²² For example, the Apple App Store platform provides a service that facilitates financial transactions such as customer billing and ensures the sale of all apps are compliant with relevant tax codes. Popular platforms also absorb credit card fees to prevent the cost from being transferred to the developer. Before platforms, every software company had to undertake these cumbersome tasks for every customer in every country where their software was sold. The service and security provided by platforms enables app companies to focus their valuable resources on developing and updating their products. For this reason, platforms have become one of the most innovative spaces in the internet-enabled ecosystem.²³

Platforms' ability to lower and eliminate barriers to entry has enabled consumers to enjoy the products and innovations of the dynamic app ecosystem. For example,

²¹ Adam Jaffe & Benjamin Jones, *The Changing Frontier: Rethinking Science and Innovation Policy*, National Bureau of Economic Research, p. 234 (2015) Available at: <http://bit.ly/2fY637e>.

²² See *id.* At p. 238 (2015) (writing "[t]he rapid emergence of many demanders, together with the very low barriers of entry created by the platform providers, has led to a rapid and very substantial expansion in the number of overall apps.").

²³ See *id.*

French small business app company L'escapadou has been able to reach consumers around the globe through its use of mobile platform companies, like Google, Microsoft, Apple, and Amazon. In addition, the App Store provides the company with up-to-date analytics, which app developers have used to develop reports on app sales and trends.²⁴

V. Platforms Increase Competition in the App Economy

Apps have played an integral role in the evolution of mobile platforms. The app ecosystem has come a long way since the smartphone was first introduced to consumers in 2007, particularly when most of the apps on mobile platforms were oriented towards supplementing the functionality the device itself lacked.²⁵ Fast forward 10 years, and apps are making smartphones “smart” and enabling users to monitor their health, manage finances, and complete other tasks on the same device that once only used to make their calls and send their texts. In a world whose population is outnumbered by mobile phones,²⁶ platform-supported apps provide a hand-held portal to the digital economy and add never-before experienced value to mobile devices for consumers around the globe. As noted earlier, in 2016, economists estimated smartphone users in the EU would reach 240.3 million by 2019,²⁷ and found that the app economy added roughly 1.64 million jobs to the EU economy.²⁸

The emergence of the platform also had life-changing benefits for software developers and the app economy at large. For example, Google Play currently hosts approximately 2.8 million apps,²⁹ and by 2016, Apple's registered 13 million developers.³⁰ The establishment of platforms as a trusted network allows developers to directly engage with consumers and end users and provides an important framework that lowers overhead costs, helps open market access, secures consumer trust, supports developer autonomy, and provides dispute resolution and consumer analytics.

VI. Apps Have Instant Access to Foreign Markets

Successful platforms, like Apple's iOS or Google Play, have changed the app ecosystem by providing app developers ubiquitous access to a broader swath of consumers. Platforms provide a centralised framework for app developers to engage

²⁴ E.g., L'Escapadou, 2016 Report, Medium, <https://medium.com/@PierreAbel/2016-report-7a8d2a12e9ef> (2016).

²⁵ E.g., Our board member and member, Mike Sax, created an app that enabled the iPhone's keyboard to turn sideways—a stock feature in every app and device maintaining an SMS capability.

²⁶ Zachary Davies Boren, *There are officially more mobile devices than people in the world*, The Independent (2014), Available at: <http://ind.pn/1xlKiif>

²⁷ Statista, *Number of Smartphones Users in Western Europe from 2014 to 2019, found here:* <https://www.statista.com/statistics/494554/smartphone-users-in-western-europe/> (2017).

²⁸ http://www.progressivepolicy.org/wp-content/uploads/2016/11/2016.06-Mandel_The-App-Economy-in-Europe_Leading-Countries-and-Cities-final.pdf.

²⁹ <https://www.statista.com/statistics/263795/number-of-available-apps-in-the-apple-app-store/>.

³⁰ King, Rachel, *Apple Has Paid Almost \$50 Billion to App Developers*, Fortune (June 13, 2016) Available at: <http://for.tn/2w77aY2>

and secure visibility with the 3.4 billion app users³¹ worldwide. With lower costs and barriers to entry, both fledgling and established app developers can succeed. For example, French educational app company L'escapadou secured 1.3 million downloads and earned more than €1.3 million from app sales,³² a success attributed to the centralised nature of platforms. Founder Pierre Abel specialised the language, content, and pricing of each of his apps based on consumer and market needs, and marketed them on different platforms to reach a variety of consumers around the world. For instance, Apple's App Store is available in 155 countries around the globe.³³ Without having to establish a brick-and-mortar store or budget for an expensive international marketing campaign, platform-supported app companies pay a nominal fee and can have immediate access to millions of international consumers, on a variety of mobile devices.

VII. The Curation of Apps on Mobile Platforms Instills Immediate Consumer Trust for Small Business App Products

The App Association provides insight to assist the EC in its research to uncover how platforms help to build consumer trust for app developers. As part of our advocacy, we provide our members a forum where they work with platforms to develop ways to better showcase their product and thrive. We also host developer education seminars that bring the mobile platform and app developer communities together to promote a discussion where both can outline their respective needs and collaborate on great products for consumers. Through these developer education events, we witness first-hand the symbiotic relationship at work. Thus, our real-world experience with these communities allows us to be better advisors and advocates to policymakers on our members' behalf. We are eager to share our experiences with the developer community to better advise the EC on its upcoming report.

In one instance, the App Association held a mobile summit in Cincinnati, Ohio, where more than 150 established app companies, emerging startups, and local entrepreneurs gathered at a bright and vibrant space at the heart of the city's tech community called Union Hall.³⁴ The participants gained insights on industry trends, engaged in candid conversations about new market opportunities, and networked with national and local leaders in the mobile economy. Attendees also had the opportunity to speak with a representative from Apple, who shared wisdom about creating engaging apps and maximising success on the App Store. The Apple presentation focused

³¹ Delgado, *supra* note 2.

³² Steve Young, *Making \$1.5 Million with Educational Apps with Pierre Abel*, App Masters (Apr. 30, 2015) Available at: <http://bit.ly/2hgDzZH>

³³ Ketan Pratap, *Apple Says Developers Earned Over \$70 Billion Since App Store's Launch*, Gadget 360 (Jun. 1, 2017) <http://gadgets.ndtv.com/apps/news/apple-says-app-store-earned-developers-70-billion-since-launch-1706781>.

³⁴ The App Association, *Queen City Summit Highlights Cincinnati as a Mobile Tech Hub*, Press Release, <http://actonline.org/2016/02/23/queen-city-mobile-summit-highlights-cincinnati-as-mobile-tech-hub/> (2016)

on strategies to develop and market apps, as well as the analytics tools that help developers thrive on the App Store.

In 2015, *Business Insider* interviewed a dozen European app developers to see how a startup could get “featured”³⁵ on Apple’s App Store.³⁶ From the survey, the startups shared key recommendations that are consistent with our general findings to accomplish that goal. The article is important because it dispels the myth that only the most popular apps (e.g., Facebook, Gmail, or Instagram) get favorable treatment on the App Store. The results are not surprising, because a recommendation from all of the startups was “have a really great product.”³⁷ These companies also recommended that a developer build an app that fits the device on which Apple will feature it to ensure it is compatible with its software so as to not affect other functionalities of the device, or harm other third-party apps. This makes perfect sense given Apple’s business model, because Apple is a device manufacturer that receives almost all its revenue from the sale of its various devices (e.g., iPhone, iPad, and Apple Watch).³⁸ If a third-party app disrupts the consumer experience with the device, both Apple and app developers lose customers. This practice is why consumers trust Apple products and the apps on its platform (featured or not), because Apple’s vetting system assures its customers that any app on its platform will not affect their experience with its product. More importantly, app developers directly benefit from this practice because it also builds instant trust with their products.

This curation process assists smaller app companies directly by providing almost instantaneous consumer trust in our members’ products. In the internet economy, immediate consumer trust is almost impossible without a substantial online reputation; not attaining that initial consumer trust spells death for any app company. However, what does “trust” mean? In this context, trust refers to an established relationship between the app company and consumer where the consumer demonstrates confidence to disclose otherwise personal information to an app company. Consider the types of personal information app companies need to provide their innovative services to customers—geolocation data, financial information, health data, etc. Most consumers would rightfully have the highest of reservations to disclose such information to a traditional brick-and-mortar company. What makes apps different?

For one, brick-and-mortar retailers can still operate without the use of personal information, but apps require this data to perform basic functions. Without trust, consumers are unlikely to disclose essential information to an app company. Moreover,

³⁵ The term “featured” in this context is a promotional program developed by Apple where it showcases a new app on a selected list on its App Store’s homepage.

³⁶ Jim Edwards, *How European Tech Startups Get Featured at the Top of Apple’s App Store*, *Business Insider*, <http://www.businessinsider.com/how-apple-app-store-rankings-work-2015-5> (27 May 2015, 9:45 AM).

³⁷ *See id.*

³⁸ Skye Gould, *Here’s Where Apple Really Makes Money*, *Business Insider*, <http://www.businessinsider.com/heres-where-apple-really-makes-its-money-2015-7> (22 Jul. 2015, 2:10 PM).

if app developers cannot access such data, then it spells an end-of-life event for the company if the trend continues. Therefore, consumer trust and willingness to share information is critical for an app developer to succeed in the market.

Even before the advent of digital commerce, consumer trust was a critical aspect of a software developer's ability to bring a product to market.³⁹ Prior to platforms, software developers often had to hand over their products to companies with a significant reputation to break through the trust barrier. Even "shareware" products that could be digitally distributed would end up partnering with trusted brands to gain consumer trust.⁴⁰ For example, in 1996, the developers of computer game *Ultimate Doom* contracted with Chex cereal to augment its consumer base. Developers converted their game software to create the child-friendly game "Chex Quest."⁴¹ Today, most of these games are free to download on platforms like Apple iTunes, Google Play, or Steam (a game-specific, independent platform). These platforms not only lower cost, but can reach consumers beyond those who buy a particular brand of cereal or another trusted product.

But the trust mechanism provided by the platforms is not merely an aspect of size. Consumer trust requires constant maintenance and vigilance because loss of trust hurts platforms and the developers that depend on them.⁴² The immediate consumer trust embedded into platforms' brands, worth billions of dollars,⁴³ allows developers to clear the critical hurdle of achieving trust from consumer adoption.

VIII. Platforms Provide Strengthened Intellectual Property Protections

Before the age of platforms, software developers struggled to safeguard their intellectual property against piracy and theft. Software companies faced serious challenges in protecting their products in retail stores because the licensing codes remained active and easy to steal. Once developers overcame significant barriers to bring their products to market, they were faced with the threat of piracy and theft which limited their volume of business, and hurt their bottom line

Piracy is still a serious issue for app developers – every year, the app economy loses €3.4 billion from the "sale" of pirated apps. However, app developers leverage dispute resolution mechanisms provided by platforms to confront entities that have

³⁹ Erik Brynjolfsson & Michael Smith, *Frictionless Commerce? A Comparison of Internet and Conventional Retailers*, MIT (1999) Available at: <http://bit.ly/2yrEJ8W> (writing "[r]ecent scholars have argued that trust is among the most important components of any effective Internet marketing program.").

⁴⁰ Stew Chyou, *The History of Shareware*, Thunderbolt (May 5, 2011) Available at: <http://bit.ly/2xvPuJ7>.

⁴¹ See *id.*

⁴² Zack Whittaker, *Millions of Steam game keys stolen after hacker breaches gaming site*, ZDNet (2016), Available at: <http://zd.net/2byBRLV> "The data also includes an estimated 3.3 million unique site and forum accounts."

⁴³ *The Economics Of Trust*, Forbes (2010), Available at: <http://bit.ly/2wJr76Y> "The reason why the U.S. is richer than Somalia is mostly not because of culture. The great thing about formal systems, when well designed, is that they make a little bit of public spirit, altruism or professionalism go a long way," says Paul Seabright, an economics professor at the University of Toulouse."

allegedly infringed their intellectual property. Without these mechanisms, developers are left with the oppressive burden of copyright infringement litigation around the globe, which can leave the legitimate IP owner with several thousand dollars per month in legal fees, and months or years of time diverted from company matters. App developers and copyright holders have benefited from platforms' cost-effective avenues to distribute and protect the integrity of their products.

IX. The EC Should Not Impose Burdensome Regulations Because of Their Propensity to Disrupt the Virtuous Cycle Between Platforms and Apps

Platforms have enabled a diversity of app companies to compete and succeed in the digital economy. By 2021, the dynamic app ecosystem, the product of the fruitful and symbiotic relationship between app companies and platforms, is projected to be worth €5.1 trillion.⁴⁴ The internet has long run on the consensus amongst platforms, app companies, and other stakeholders to engage in a manner that supports competition, which in turn supports market access, creates legitimacy, fosters consumer choice, and nurtures consumer trust.⁴⁵ As a result, all players in the ecosystem are guided by the economic principles of supply and demand, rather than encumbered by government bureaucracies.⁴⁶ Commitment to these pro-competitive values has created an environment that is flexible and supportive of ever-evolving innovations in technology.⁴⁷

The EC's Assessment merely assumes that terms and conditions within developers' contract with mobile platforms are unfair—a notion we categorically disavow for all of the reasons provided above.⁴⁸ Moreover, the EC has undertaken efforts to regulate online platforms in the hopes of subjecting companies to a rate-based regulation, often titled "platform neutrality."⁴⁹ This movement already presumes certain companies, like Amazon, Apple, Google, and Facebook, monopolise the platform ecosystem;⁵⁰ which

⁴⁴ Hugo Delgado, *The App Economy Forecast: A \$6 Trillion Market in the Making*, App Annie (2017) Available at: <http://bit.ly/2xfDqtB>.

⁴⁵ Stuart Brotman, *Multistakeholder Internet Governance: A Pathway Completed, and the Road Ahead*, Brookings Institute Center for Technology and Innovation (2015) Available at: <http://brook.gs/2yuG6DZ>.

⁴⁶ Nancy Vallejo & Pierre Hauselman, *Governance and the Multi-Stakeholder Processes*, Internat'l Institute for Sustainable Development, at p. 5 (2004) (writing "[t]he viability of a multi-stakeholder process is not only determined by its inclusiveness, but also its capacity to deliver its objectives, that is, its effectiveness. Better, the process should be efficient, i.e., able to deliver the objectives well and fast.")

⁴⁷ Internet Society, *Internet Governance – Why the Multistakeholder Approach Works*, Website (2016) Available at: <http://bit.ly/2xVGkXz>.

⁴⁸ European Commission, *Fairness in Platforms-to-business relations*, found here: [file:///Users/joelthayer/Downloads/PART-2017-484496V1%20\(2\).pdf](file:///Users/joelthayer/Downloads/PART-2017-484496V1%20(2).pdf).

⁴⁹ E.g., Frank Pasquale, *Platform Neutrality: Enhancing Freedom of Expression in Spheres of Private Power*, 17 THEORETICAL INQUIRIES IN LAW 2, 487 (2016), available at: <http://www7.tau.ac.il/ojs/index.php/til/article/view/1428/1493>.

⁵⁰ French Digital Council, *French Digital Council Publishes Report on Platform Neutrality* (2014) (writing "[t]he analysis contends that the platforms maintain their dominant position by three main operations: acquisition, diversification, and exclusion. Platforms buy innovative start-ups that could threaten their dominance in the long run and/or that can be fruitfully integrated in the already existing infrastructure in order to provide a more diversified platform. The report lists the acquisitions of the GAFTAM (Google, Apple, Facebook, Twitter, Amazon, Microsoft) from 2010 to January 2014, which unequivocally shows

we maintain is a mischaracterisation due to the EC not providing a more nuanced definition of the term “platform” as we described above. The premise of “platform neutrality” is to regulate all platforms under a monopoly-style framework to thwart a set of theoretical, unproven harms. This approach would be contrary to the current success of apps on platforms, and it would hurt small business app companies in Europe and around the world. Thus, we strongly encourage the EC to consider our aforementioned suggestions before reaching any conclusions in this regard.

Applying antiquated monopoly regulations to the platform ecosystem, and by default the nascent app economy, would disrupt the virtuous cycle between these two entities. Not only would it implement unnecessary barriers to entry for app companies, but it would also spark a decrease in competition and harm to the job market. Innovators want to grow the roughly 1.64 million jobs added to the EU market by the app economy in 2016,⁵¹ however, burdensome regulations only complicate job opportunities in the EU’s digital economy,⁵² and hinder job creation for downstream app developers.

In other parts of the world, a “light-touch” regulatory framework has enabled platforms to provide market-driven, diverse pricing structures for small business app companies. App developers have autonomy on platforms to dictate their own marketing and pricing models, whether they be free with in-app purchases, subscription-based sales, or one-time purchase.⁵³ In exchange for absorbing the costs of financial transactions, protecting intellectual property, building in marketing opportunities, and enabling distribution to consumers around the world, platforms charge a nominal fee to app companies.⁵⁴ Though 90 percent of apps made available on the Apple iOS platform are free,⁵⁵ the platform provides tangible, cost-saving benefits for revenue-based app developers. Apple issues a 30 percent fee on revenue from apps that have an upfront cost or provide in-app purchases, which is later lowered to 15 percent each year thereafter for subscriptions.⁵⁶

Platforms also do not proscribe developers from selling their apps on multiple platforms.⁵⁷ App companies maintain sole ownership and creative rights to the apps

that these platforms have been engaging in acquisition and diversification.”), *available at*:

<https://edri.org/french-digital-council-publishes-report-platform-neutrality/>.

⁵¹ http://www.progressivepolicy.org/wp-content/uploads/2016/11/2016.06-Mandel_The-App-Economy-in-Europe_Leading-Countries-and-Cities-final.pdf.

⁵² Roslyn Layton, *Which Open Internet Framework is Best for Mobile App Innovation*, Aalborg University, p. 204-211 (2017) http://vbn.aau.dk/files/255922611/PHD_Roslyn_Layton_E_pdf_rettet.pdf.

⁵³ Apple, *App Store Review Guidelines*, Apple (2017) Available at: <http://apple.co/2w60QA5> (Apple Guidelines)

⁵⁴ Brief for ACT | The App Association as Amicus Curiae, p. 11, *Apple, Inc, v. U.S.*, Case No. 15-565 (2015).

⁵⁵ Sarah Perez, *Paid Apps on the Decline: 90% of iOS Apps Are Free, Up From 80-84% During 2010-2012, Says Flurry*, TechCrunch (July 18, 2013) Available at <http://tcrn.ch/2xkMYoC>

⁵⁶ See Apple Guidelines.

⁵⁷ Statista, *Number of Apps Available in Leading App Stores as of March 2017*, Statista. (Sep. 19, 2017) Available at: <http://bit.ly/2dycQpS> (finding 2.8 million apps on Google Play, 2.2 million on Apple’s App Store, 669,000 apps on Windows Store, and 600,000 apps on Amazon).

they make available on platforms, allowing them to remain unencumbered by their host platforms and enabling them to reach a broader consumer base.

Ultimately, if governments take on the responsibility to regulate and set the rates platforms can charge app developers, then companies lose their autonomy to make market-based decisions based on the company and consumer needs. Unfortunately, if the EC does not judiciously observe the nuanced relationship between apps and mobile platforms, their efforts could influence European policy and turn the virtuous cycle between platforms and apps into a linear pathway towards true platform monopolisation. In a platform neutrality paradigm, all terms are dictated by the government or the monopolist, leaving app developers and innovators without autonomy and jeopardising their avenues to success. In the dynamic digital ecosystem, monopoly-style regulation has never yielded an increase in competition or innovative outcomes.

X. The EC's Assessment for Online Platform Ignores the Nuanced Relationship Between Platforms and App Companies

The EC Assessment's suggestion of the existence of a contractual imbalance that favors mobile platforms demonstrates a clear misunderstanding of the agency-sale relationship existing between app companies and mobile platforms. We do not believe the Assessment fully encompasses the benefits adherence contracts bring to negotiations between app companies and mobile platforms. In its Assessment, the EC suggests that contracts of adherence are a point of contention between app developers and platform companies because they were created only to serve the benefit of the platform companies. However, these contracts assist small business app developers as much as platforms because they streamline the negotiation process and help to place smaller app companies on the same footing as larger companies. This is because all on the platform are subject to the same terms. Thus, Facebook is given no more negotiating power than French app company L'escapadou when utilising a platform. This practice allows for more open competition within the app economy.

We believe that it is important the EC understand that when a consumer purchases an app, the consumer is customer of the app company, *not* the platform. By the nature of their name, mobile platforms merely provide a platform, a helpful access point, for small business app developers and tech innovators to reach a wide set of customers. When mobile apps were first introduced, app developers and companies did not have the benefit of centralised platforms to showcase their products to consumers. As outlined above, app developers were required to manage their website, handle financial exchanges like credit card transactions, and implement promotions and advertisements to build consumer trust in their products, or hire third-party contactors to do so. These tasks were not part of an app company's core competencies, and they cost small app shops valuable time and money. Today, platforms provide a centralised framework to showcase, sell, and distribute apps, while allowing app companies to maintain ownership of their products and relationships with their consumers. Platforms serve as an important, resource-saving alternative to other modes of consumer engagement.

In addition, we firmly believe that the agency-sale relationships espoused by platforms are procompetitive arrangements that lower costs for consumers. These relationships provide platforms with a nominal fee for the services they provide, and enable app developers to maintain control over their business model and pricing structure. Successful platforms, like Apple's iOS, have largely changed the app ecosystem by connecting app innovators with consumers and users around the globe, providing incredible benefits to the small businesses we represent.⁵⁸

We strongly advise the EC to refrain from imposing burdensome regulations that jeopardise the harmonious relationship that sustains app companies and platforms.

XI. Discrimination Related to the Use of Algorithms

The App Association believes the issues related to bias results from search engines serves as the catalyst for the EC's inquiry within this area. We urge the EC not to advocate for any measure that would proscribe app developers and innovators from utilising volume purchasing, which allows them to provide discounted rates to educational institutions or providing favorable rates to reward long-time customers. We believe both of these methods add value to their respective businesses and society at large

⁵⁸ Chuck Jones, *Apple's App Store Generating Meaningful Revenue*, FORBES (Jan. 6, 2017, 2:10 PM), <https://www.forbes.com/sites/chuckjones/2017/01/06/apples-app-store-generating-meaningful-revenue/#305d93011eb6> (reporting developers receiving \$20 billion in revenue).

XII. Conclusion

The App Association respectfully requests the EC incorporate these considerations into any conclusions it reaches in its Assessment.

Sincerely,

A handwritten signature in black ink, appearing to read "Brian Scarpelli". The signature is fluid and cursive, with the first name "Brian" and last name "Scarpelli" clearly distinguishable.

Brian Scarpelli
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