

March 18, 2021

The Honorable David Cicilline
Chairman
House Committee on the Judiciary
Subcommittee on Antitrust, Commercial, and
Administrative Law
Washington, District of Columbia 20515

The Honorable Ken Buck
Ranking Member
House Committee on the Judiciary
Subcommittee on Antitrust, Commercial, and
Administrative Law
Washington, District of Columbia 20515

Reviving Competition, Part 3: Strengthening the Laws to Address Monopoly Power

Dear Chairman Cicilline, Ranking Member Buck, and Members of the Subcommittee,

We applaud this Subcommittee (ACAL) for its thorough investigation into tech-driven markets, including those that feature software platform companies. ACT | The App Association (the App Association) is the leading trade group representing small mobile software and connected device companies in the app economy, a \$1.7 trillion ecosystem led by U.S. companies and employing 15,900 people in Rhode Island and 58,010 in Colorado alone.¹ Our member companies create the software that brings your smart devices to life. They also make the connected devices that are revolutionizing healthcare, education, public safety, and virtually all industry verticals. They propel the data-driven evolution of these industries and compete with each other and larger firms in a variety of ways, including on privacy and security protections.

Although spotlighting a separate (but related) category of proposals to the present hearing, your first antitrust session of the 117th Congress helped define some of the issues important to App Association member companies.² The hearing, titled "Reviving Competition, Part 1: Proposals to Address Gatekeeper Power and Lower Barriers to Entry Online," zeroed in on policy proposals aimed at software platforms in particular. The ideas are especially consequential for app developers because software platforms are the app store / operating system combination that our member companies leverage to reach their clients and consumers. These platforms are distinct from social media platforms (like Facebook and Twitter), retail platforms (like the Amazon marketplace), and search / advertising platforms (like the Google search engine).

Competition or Nondiscrimination Rules?

In "Reviving Competition, Part 1," at least one witness highlighted a proposal in ACAL's Antitrust Report from last year³ to adopt a nondiscrimination regime.⁴ While it may sound like a pro-small

¹ ACT | THE APP ASSOCIATION, STATE OF THE U.S. APP ECONOMY: 2020 (7th Ed.), *available at* <https://actonline.org/wp-content/uploads/2020-App-economy-Report.pdf>.

² Reviving Competition, Part 1: Proposals to Address Gatekeeper Power and Lower Barriers to Entry Online: Hearing Before the H. Judiciary Comm., Subcomm. on Antitrust, Commercial, and Admin. L., 117th Cong. (2021).

³ H. JUDICIARY COMM., SUBCOMM. ON ANTITRUST, COMMERCIAL, AND ADMIN. L., INVESTIGATION OF COMPETITION IN DIGITAL MARKETS (OCT. 2020), *available at* https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf?utm_campaign=4493-519 (ACAL Report).

⁴ Reviving Competition, Part 1: Proposals to Address Gatekeeper Power and Lower Barriers to Entry Online: Hearing Before the H. Judiciary Comm., Subcomm. on Antitrust, Commercial, and Admin. L., 117th Cong. (2021) (Statement of Dr. Hal Singer).

business proposal at first, a set of nondiscrimination regulations on software platforms would degrade competition and likely marginalize App Association members. We went into a little more depth on these points in a separate piece.⁵

First, a nondiscrimination regime would insert a federal agency between app development companies and software platforms in a way that helps the largest developers to the detriment of smaller app companies. Under current circumstances, one-person developer shops routinely work directly with the platforms to resolve disputes. A nondiscrimination regime like the Program Carriage rules at the Federal Communications Commission (FCC) would require platforms to focus primarily on challenges (or credible threats to bring challenges) through that formal, federal process. This system would even further elevate the largest companies selling products and services on software platforms, while marginalizing the concerns of App Association members. If the Program Carriage rules are any indication, challenging software platform conduct in such a tribunal would be costly, requiring a company to retain counsel to babysit a petition for months or years. App Association member companies are generally not able to retain lawyers or lobbyists in DC, so for them, a mechanism like this is just another way for Epic Games or Spotify to try and avoid their obligations to pay for the developer services from which all developers benefit. In fact, those companies could potentially challenge Apple's Small Business Program and recently announced commission changes to the Google Play store because it is only available for the smallest app makers and thus could advantage Apple or Google's own offerings by charging only larger companies more. This *may* not be an intended use of a nondiscrimination regime but serves to illustrate that it is mainly a handout to the complainants already petitioning through the press and court system.

Second, a nondiscrimination regime is not a great fit because the relevant developer services market is competitive. Software platforms are not standard-essential technology or otherwise created as a public commons, nor do their owners have monopolies over the markets in which they compete. We heard commenters refer to multiple competitors in a single market as "monopolies," which is kind of like calling your band "The Lone Rangers." These companies invest substantially in their respective platforms and compete vigorously with each other to provide better developer services. The Antitrust Report claims the app stores don't compete for consumers, but it doesn't address the market for developer services, and in that market the platforms are plainly trying to outdo one another. The most recent example of that competition is Apple's Small Business Program, which reduces the App Store commission to 15 percent for developers making \$1 million or less per year through the platform. In March 2021, Google announced it will institute a similar program for the Play store, reducing its commission to 15 percent for developers making \$1 million or less per year. If competition exists—and it does in this case—it's far preferable and better suited to producing the optimal outcomes for developers and consumers than a set of rules that locks the platforms in place via compliance.

Third, not only do the app stores compete with each other for developers, they also compete with each other for consumers. Consumers commonly switch between Apple and Google devices and the costs of doing so are not prohibitive. During last week's hearing, one witness commented that consumers will not want to switch out an expensive device because a single app is not available on the platform they currently use. Maybe so, but consumers do switch platforms all the time if not

⁵ ACT | THE APP ASSOCIATION, THE HOUSE JUDICIARY ANTITRUST REPORT: APP STORE COMPETITION AND NONDISCRIMINATION (Mar. 2021), available at <https://actonline.org/wp-content/uploads/Antitrust-Report-App-Stores-Nondiscrimination.pdf>.

because of the availability of a single app, then for the overarching differences between devices, operating systems, and app stores. The two platforms are competitively differentiated, with Google's open model—allowing software outside the Google Play store to be downloaded—versus Apple's App Store exclusivity. Add to this the competition from videogame platforms like the Epic Games Store and Microsoft Xbox—and even the open internet and progressive web apps—as partial substitutes and the market is broader and more competitive than at first blush.

Lastly, a nondiscrimination regime could force homogeneity in already differentiated developer services and app store markets. For example, removing a software platform's ability to object to a product or service on privacy grounds would force the platform to allow apps and devices that fail to meet high privacy standards, subordinating privacy to variety. The current market, meanwhile, allows one platform to prioritize privacy while another prioritizes variety. For example, when Tile and Apple hit a bump in the road, Google not only responded by accepting Tile on its platform but engaged in a robust integration with the device. If all platforms follow the open model, developers lose the option of a more privacy protective and exclusive marketplace.

Other Restrictions on "Gatekeeper" Functions

In the software platform context, policymakers are considering a variety of structural, behavioral, and access remedies. We appreciate that ACAL is probing the ability and "incentive to impede competition in lines of business dependent on" platforms.⁶ This is a worthy line of inquiry with a framework that should respect the fact-driven analysis involved with identifying and stopping harms to competition and consumers. Accordingly, an important step in this process is to examine the benefits for smaller software competitors of ongoing and recent activities by software platforms that have drawn antitrust scrutiny in light of proposals to separate them from adjacent markets or restrict their functions as platforms. Those in favor of access and behavioral remedies in software markets seem to target two areas of perceived "gatekeeper" power: 1) control over the kinds of software that can be downloaded onto a device's operating system; and 2) control over the kinds of software that can be offered via an app store.

Several state legislatures have considered or are actively considering proposals that would impose a kind of behavioral or "access remedy"⁷ at the operating system level by prohibiting software platforms from acting as gatekeeper for software installed on a device.⁸ Among other things, the bills bar operating systems from prohibiting software unless it is distributed exclusively through a certain app store marketplace and outlaw "retaliation" against software developers that circumvent approval through that distribution channel.⁹ Although this may sound like it lowers a barrier to entry by weakening the platforms' gatekeeper capabilities, it does the exact opposite and removes a steppingstone to the market. Moreover, the proposals' supporters are some of the largest companies on the app stores that openly seek to avoid their obligations to pay *at all* for the

⁶ ACAL Report at 35 (citing report accompanying Antitrust Reform Act of 1992).

⁷ European experts have classified "access remedies" as a subset that does not fit neatly into structural or behavioral remedies but addresses competition concerns with limiting access to a "network" or "technology," for example. See CPI ANTITRUST CHRONICLE APRIL 2020, COMPETITION POLICY INT'L (Apr. 2020), *available at* https://www.nera.com/content/dam/nera/publications/2020/PUB_CPI_Remedies.pdf.

⁸ See, e.g., SB 2333, 67th North Dakota General Assembly (2021), *available at* <https://www.legis.nd.gov/assembly/67-2021/documents/21-1044-01000.pdf>.

⁹ *Id.*

software platforms' developer service bundles.¹⁰ The bundles include a wide variety of services for developers and, contrary to how some are characterizing them, are not just a "payment processing fee."¹¹ From these services, small app companies obtain easy access to a global market, the ability to offload overhead (like managing payment options and preventing piracy), but most importantly, they **can leverage consumer trust**. Consumer trust is fundamental for competitors in the app economy, especially for smaller firms that may not have substantial name recognition.

The state bills reflect a view that takes for granted the platform functions necessary to fuel a trusted ecosystem that lives on our smart devices now. Consumers now depend on mobile devices to store their most important information, and the ability to protect that data is vital. Banning software platforms' gatekeeping function puts users' most vital data at risk. App Association member companies—much more so than the large companies selling software on the app stores—depend on strong privacy, security, and IP protections at the platform level. Therefore, proposals to require platforms to allow circumvention of these protections would harm consumers and app economy competitors alike. Platforms currently work to keep apps that violate user trust out of their stores.

In one example, some bad actors market their device monitoring apps designed to track children's mobile device use as a way to track anyone, including adults, without their knowledge or permission. These "stalker apps" operate outside the bounds of what is allowable in app stores or mobile operating systems by accessing troves of personal data including location, messaging, and calls. In 2019, The Federal Trade Commission (FTC) pointed to the important function device makers perform in its first ever action against a purveyor of stalker apps, Rentina-X. The FTC stated in its enforcement action that "the purchasers were required to bypass mobile device manufacturer restrictions, which the FTC alleges exposed the devices to security vulnerabilities and likely invalidated manufacturer warranties."¹² Similarly, as the FTC has investigated and enforced against consumer protection harms on the app stores, the contemplated—and actual—remedies required the platform to act as gatekeeper.¹³ Consumer protection efforts encounter difficulty in these marketplaces unless a platform is able to enforce the requirements it imposes on apps, including platform-level controls that prevent videogame companies from taking advantage of children's tendencies toward in-app purchasing if left unchecked. If state law or a federal provision *bans* app stores from removing bad actors or enforcing terms of service that disallow harmful content, violations of the FTC Act and state consumer protection laws would be even harder to trace and stop than they are now.

¹⁰ Order Granting in Part and Denying in Part Motion for Preliminary Injunction, *Epic Games v. Apple Inc.*, Case No. 4:20-cv-05640-YGR (N.D. Cal. Oct. 9, 2020) ("Epic Games moves this Court to allow it to access Apple's platform for free while it makes money on each purchase made on the same platform. While the Court anticipates experts will opine that Apple's 30 percent take is anti-competitive, the Court doubts that an expert would suggest a zero percent alternative. Not even Epic Games gives away its products for free.").

¹¹ The full set of developer services software platforms provide includes immediate distribution to tens of millions of consumers globally; marketing through the platform; platform level privacy controls; assistance with intellectual property protection; security features built into the platform; developer tools; access to hundreds of thousands of application programming interfaces, or APIs; and payment processing.

¹² Press Release, Fed. Trade Comm'n, FTC Brings First Case Against Developers of "Stalking" Apps (Oct. 22, 2019), *available at* <https://www.ftc.gov/news-events/press-releases/2019/10/ftc-brings-first-case-against-developers-stalking-apps>.

¹³ See, e.g., Press Release, "Apple Inc. Will Provide Full Consumer Refunds of At Least \$32.5 Million to Settle FTC Complaint It Charged for Kids' In-App Purchases Without Parental Consent," Fed. Trade Comm'n (Jan. 15, 2014), *available at* <https://www.ftc.gov/news-events/press-releases/2014/01/apple-inc-will-provide-full-consumer-refunds-least-325-million>.

Software Platforms and Exclusionary Conduct

To ameliorate perceived issues with self-preferencing on software platforms, policymakers are considering amendments to antitrust law that fall somewhat short of a set of nondiscrimination rules but expand liability for categories of exclusionary conduct. Again, pointing to the "incentive and ability to abuse"¹⁴ their dominant position against third parties, the ACAL Report recommends consideration of an "abuse of dominance" standard applied to software platforms (and generally).

Setting aside the particulars of existing proposals, we urge ACAL to consider a couple of factors when contemplating such an expansion of liability. First, many of the actions of software platforms that have drawn antitrust criticism also have countervailing benefits. For example, Apple's decision to require opt-in consent for ad tracking between apps caught attention in the antitrust space but has a powerful justification in privacy protection. In a stark example of privacy versus antitrust interests, the French Competition Authority recently rejected a competition complaint to enjoin Apple's opt-in framework, noting that it is part of "Apple's long-standing strategy to protect the privacy of iOS users."¹⁵ Second, self-preferencing activities on software platforms that appear to harm some competitors often benefit others and consumers. For example, the installation of pre-loaded apps on smart devices can greatly benefit developers by enabling them to rely on a single default functionality like a camera app while making the device itself more attractive to the consumers App Association members wish to reach. Said Parag Shah of App Association member Vemos in a recent antitrust panel discussion, consumers "want to be able to buy [a smart device] from a store, they want to be able to turn it on, and they want it to work on the basic levels of 'I can text someone, I can call someone, I can open up a web browser . . . I want some basic functionality.'"¹⁶ In this case, although the pre-installation of apps plainly advantages a software platform's own offerings over alternative camera, messaging, or browser apps, the benefits to consumers and other competitors of doing so are equally evident. The considerations here weigh against tilting liability for exclusionary conduct too far such that conduct that appears to harm a certain class or classes of competitors is foreclosed or strongly discouraged, even though it is ultimately better for App Association members, competition, and consumers.

More Resources and Enforcement in Standards-Setting

We support ACAL's recommendation to "[i]ncreas[e] the budgets of the Federal Trade Commission and the Antitrust Division."¹⁷ Antitrust cases are a highly resource-intensive undertaking and federal enforcers are underequipped to carry out their important task.

One area we urge ACAL to focus on in particular, and where the federal enforcement agencies must bring those resources to bear, is the applicability of antitrust law to standard-essential patent

¹⁴ ACAL Report.

¹⁵ Press Release, "Targeted advertising / Apple's implementation of the ATT framework. The Autorité does not issue urgent interim measures against Apple but continues to investigate into the merits of the case," Autorité de la concurrence (Mar. 17, 2021), *available at* <https://www.autoritedelaconcurrence.fr/en/press-release/targeted-advertising-apples-implementation-att-framework-autorite-does-not-issue>.

¹⁶ "Antitrust in the Digital World: Does it Work? Episode 2, Antitrust in America: How a New Administration Tackles Digital Platforms," Competition Policy Int'l and ACT | The App Association (Mar. 4, 2021), *available at* <https://www.competitionpolicyinternational.com/episode-2-antitrust-in-the-digital-world/>.

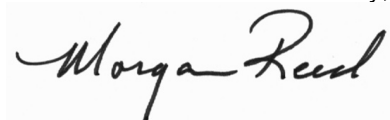
¹⁷ ACAL Report, at 403.

(SEP) abuse. In your respective states and districts, the ability for innovators to create jobs and produce cutting-edge products and services in an increasingly broad set of industry verticals depends on strong technical standards like USB, Wi-Fi, 4G, and 5G. However, in order to safeguard the continued growth and success of these key industries and to protect the consumers of their end products and services, Congress must ensure that antitrust law effectively prevents SEP licensing abuses. Incorporating a patent declared as essential into a standard typically confers market power on a SEP owner, so SEP owners make voluntary commitments pursuant to those declarations to license those SEPs on fair, reasonable, and nondiscriminatory (FRAND) terms.¹⁸ These commitments balance the market power SEP owners obtain with the need for innovators to license the patented inventions essential to use the standard. When kept, FRAND commitments prevent anticompetitive licensing behavior. The SEP context is distinct from situations where companies own unencumbered patents or are vertically integrated and competing with each other to provide the best product or service. Through standards-setting, stakeholders circumvent part of the competitive process to create interoperability, necessitating closer antitrust involvement. Unfortunately, some SEP owners break their FRAND promises and engage in activities that harm competition and consumers by increasing prices, reducing the quality and variety of products and services, and reducing innovation.¹⁹ Breaking these promises implicates antitrust law, in addition to other sources of law.

Conclusion

As ACAL continues its work on antitrust in tech-driven markets, we hope the perspective of small mobile software and connected device companies that leverage software platforms helps guide your work. Antitrust is rightfully a fact-intensive inquiry that must assure the competitive process serves consumers as well as possible. To that end, we support providing more resources for the two federal agencies tasked with enforcing antitrust law—they are woefully under-resourced to carry out the important and extremely costly task of stopping antitrust harms. In general, our member companies are worried that large, well-resourced companies may successfully create for themselves a new avenue for bending the market in their favor by reorienting antitrust law so that it protects certain (large, well-resourced) competitors to the detriment of smaller companies and consumers. We appreciate this opportunity to weigh in on ACAL's important investigation and look forward to further engagement with you throughout the 117th Congress and beyond.

Sincerely,



Morgan W. Reed
President

ACT | The App Association

¹⁸ See Brian T. Yeh, “Availability of Injunctive Relief for Standard-Essential Patent Holders,” CONG. RESEARCH SERV. Summary (Sept. 7, 2012), *available at* https://www.everycrsreport.com/files/20120907_R42705_9c71ac36b1c0030af0d1bd97b53e8b7ba6fd3e73.pdf.

¹⁹ See Findings of Fact and Conclusions of Law, *Fed. Trade Comm’n v. Qualcomm, Inc.*, Case No. 17-CV-00220-LHK (N. D. Cal., 2019), *available at* https://www.essentialpatentblog.com/wp-content/uploads/sites/64/2019/05/2019-05-21-Findings-dckt-1490_0.pdf; *Broadcom Corp. v. Qualcomm Inc.*, 501 F.3d 297 (3d Cir. 2007), *available at* <https://caselaw.findlaw.com/us-3rd-circuit/1069408.html>.