

February 13, 2023

The Honorable Maria Cantwell
Chair
Committee on Science, Commerce, and
Transportation
United States Senate
Washington, District of Columbia 20510

The Honorable Ted Cruz
Ranking Member
Committee on Commerce, Science, and
Transportation
United States Senate
Washington, District of Columbia 20510

Dear Chair Cantwell and Ranking Member Cruz:

We deeply appreciate your leadership in the 117th Congress and seek to support your efforts as the Senate Commerce, Science, and Transportation Committee plots a course for the 118th Congress. As part of these efforts, we ask that you continue the important legislative work of crafting a single set of rules governing the privacy and data security practices of entities that generally fall under the Federal Trade Commission's (FTC's or Commission's) jurisdiction. This Committee's examination of privacy advanced the ball significantly toward this important goal. However, we believe further work is necessary,¹ and we stand ready to assist as negotiations continue.

Unfortunately, recent events—including consumer protection settlements and the general increase in online activity accelerated by the pandemic—have underscored the need to act decisively to better protect consumers. Similarly, these events highlight the urgency of opposing antitrust proposals to prohibit platform management activities designed to protect consumers, especially children.

ACT | The App Association (the App Association) is a trade group representing thousands of mobile software and connected device companies in the app economy. Our industry is a \$1.7 trillion ecosystem led by U.S. companies and supporting millions of American jobs, including about 185,000 in Washington and 412,350 in Texas.² Consumer trust is fundamental for competitors in the app economy, especially for smaller firms that may not have substantial name recognition. Strong privacy protections that meet evolving consumer expectations are a key component of developing consumer trust in tech-driven products and services. The App Association helps shape and promote adherence to privacy and other consumer protection laws and best practices in a variety of contexts, including for apps directed to children.

The recent settlement between the FTC and Epic Games (Epic) illustrates vividly why the FTC's efforts to enforce unfair or deceptive acts or practices (UDAP) and Children's Online Privacy Protection Act (COPPA) prohibitions are more important than ever. The settlement covers two separate complaints from the Commission, one alleging that Epic engaged in unfair acts or

¹ See Graham Dufault, "The 4 Ps of Privacy: What Small Businesses Need in a Privacy Bill," ACT | THE APP ASSOCIATION BLOG (Sept. 13, 2022), available at <https://actonline.org/2022/09/13/the-4-ps-of-privacy-what-small-businesses-need-in-a-privacy-bill/>.

² ACT | THE APP ASSOCIATION, STATE OF THE APP ECONOMY: 2020 (7th Ed.) (2020), available at <https://actonline.org/wp-content/uploads/2020-App-economy-Report.pdf>.

practices and violated COPPA,³ and the other alleging that Epic employed dark patterns to extract money from consumers deceptively.⁴ In both complaints, Epic's conduct may run afoul not only of federal law, but also the major app stores' guidelines, highlighting how the Open App Markets Act (OAMA, H.R. 7030/S. 2710, 117th) and American Innovation and Choice Online Act (AICOA, H.R. 3816/S. 2992, 117th) would subvert your Committee's consumer protection aims and efforts.

Complaint 1: COPPA and Default Voice and Text Communications. Epic's conduct as described in this complaint evinces a familiar posture of simultaneously marketing products or services aggressively to kids while trying to avoid COPPA requirements by pretending not to know kids under 13 use them. For example, Epic apparently failed to notify parents directly of their kids' attempts to create Fortnite accounts and declined to seek verifiable parental consent (VPC). Epic took this path even though there is strong evidence its employees knew which kids were under 13 for purposes of cross-console play, to comply with a Microsoft Xbox requirement.⁵ Of course, under COPPA, even if the Commission were unable to prove actual knowledge, COPPA would nonetheless obligate Epic to obtain VPC *before collecting any personal information from children* because Fortnite is "directed to children."⁶ In this case, Epic not only declined to require VPC before collecting kids' information, but it also imposed obstacles well in excess of VPC's requirements when parents sought to delete or review their children's data after the fact.⁷ In other words, Epic took active measures to keep parents out of the loop, even as the platform exposed their kids to abusive and even dangerous communications from other players by default.⁸

For years, the App Association has worked closely with the Commission and developers to clarify COPPA requirements, ensure that compliance is possible, and establish that conduct like Epic's could be prevented and punished.⁹ Software platforms like the Xbox console, Apple App Store, and Google Play store have an important role in protecting consumers from privacy harms that may violate UDAP or COPPA prohibitions. But they are equally important insofar as they help parents manage their kids' access to and use of digital services. Xbox's requirement that Epic use its application programming interface (API) UserAgeGroup to block children under 13 from the platform is one example of a platform-level control. Presumably, the control was put in place to avoid complicity in Epic's decision not to comply with COPPA or the FTC Act, and Microsoft could have conceivably taken measures to facilitate the collection of VPC instead of completely blocking child Xbox users' access. Either way, Microsoft sought some consistency with COPPA's requirement to protect children online.

Ultimately, Microsoft's ability to enforce its requirement or a similar one depends heavily on its ability to remove Fortnite from Xbox altogether or at least limit Fortnite's access to the platform. Otherwise, Fortnite could potentially ignore the API and continue operating on Xbox. Conversely, a

³ Fed. Trade Comm'n v. Epic Games, Inc., complaint for perm. Injunction, civ. penalties, and other relief (W.D. N.C. 2022), *available at*

https://www.ftc.gov/system/files/ftc_gov/pdf/2223087EpicGamesComplaint.pdf [Complaint 1].

⁴ Fed. Trade Comm'n, Epic Games, Inc., administrative complaint (published Dec. 19, 2022), *available at* https://www.ftc.gov/system/files/documents/cases/flo_health_complaint.pdf [Complaint 2].

⁵ Complaint 1 at paras. 48, 51-53.

⁶ 16 C.F.R. Sec. 312.3.

⁷ Complaint 1 at para. 50.

⁸ Complaint 1 at paras. 16, 41.

⁹ See Morgan Reed, "ACT welcomes FTC changes to COPPA," ACT | THE APP ASSOCIATION BLOG (Jul. 16, 2014), *available at* <https://actonline.org/2014/07/16/act-welcomes-ftc-changes-to-coppa/>; COPPA – THE BASICS, ACT | THE APP ASSOCIATION (Dec. 21, 2016), *available at* <https://actonline.org/coppabasics/>.

requirement that Xbox carry Fortnite with exceedingly limited exceptions would essentially block Xbox's ability to make such a demand and actually enforce it. Unfortunately, OAMA and AICOA would have exactly that effect on the major mobile app stores' ability to enforce child protections and parental controls against actors (like Epic) that sought to avoid them. For example, the Apple App Store's developer guideline 1 prohibits "Chatroulette-style experiences" similar to Fortnite's default allowance for voice communications, while guideline 1.3 clearly requires an app to comply with privacy laws relating to the "collection of data from children online."¹⁰ In this case, if OAMA or AICOA were federal law, neither the App Store nor the Google Play store could remove Fortnite for failure to address its conduct that runs afoul of these rules—not to mention COPPA and Section 5 of the FTC Act.

Complaint 2: Dark Patterns. In this complaint, the Commission describes Epic's practice of billing consumers for unauthorized charges while simultaneously preventing them from undoing purchases or banning them for disputing charges.¹¹ For example, Epic enables in-game purchases in Fortnite without a confirmation pop-up (or other prior authorization) in a manner that makes it easy to accidentally incur charges; it then adds friction and difficulty to the process of undoing the purchase, restricting users to three refunds over the *lifetime* of a user's account.¹² Similar to the major app stores' requirements that apps take steps to protect kids, the major app stores also generally prohibit dark patterns that "rip off customers, trick them into making unwanted purchases," or engage in "any other manipulative practices within or outside the app."¹³ Epic's conduct in this case seems likely to fall short of the bar the app store guidelines set. As a result, AICOA and OAMA would similarly have the perverse effect of forcing the app stores to carry Fortnite despite Epic's illegal conduct, which harms consumers, according to the evidence the FTC cites in its second complaint.

¹⁰ See 2022 ANNOTATED APP STORE GUIDELINES, ACT | THE APP ASSOCIATION 5, 7 (2022), available at <https://actonline.org/wp-content/uploads/act-app-guidelines-2022-04-19-final.pdf>.

¹¹ Complaint 2 at paras. 26 – 52.

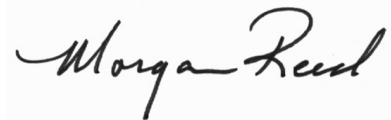
¹² *Id.*

¹³ See APPLE, APP STORE REVIEW GUIDELINES 5.6, available at <https://developer.apple.com/app-store/review/guidelines/#legal>; see also GOOGLE, POLICY CENTER, MONETIZATION AND ADS, PAYMENTS 6, available at https://support.google.com/googleplay/android-developer/answer/9858738?hl=en&ref_topic=9857752 (requiring developers to "clearly notify users that payment is required" to access features that result in a charge).

Conclusion

Some platforms may not wish to impose child protection requirements on developers or sellers, and it is beneficial for App Association members to have those options. But often, developers pick distribution options like the major app stores because they do actively review and sometimes remove bad actors that trick consumers or expose kids to undue risks. App Association members do not want Congress to force them to appear in the major app stores alongside apps that blatantly flout federal consumer protection requirements, especially those intended to protect children. Doing so limits their options to a single must-carry distribution model and devalues the trust-building benefits they currently derive from software platforms. We urge you to reject proposals like OAMA and AICOA that impose antitrust must-carry mandates on platforms and look forward to working with you on privacy and related consumer protection efforts in the 118th Congress.

Sincerely,

A handwritten signature in black ink that reads "Morgan Reed". The signature is written in a cursive, flowing style.

Morgan Reed
President

ACT | The App Association

Cc:

The Honorable Chuck Schumer, Majority Leader, United States Senate
The Honorable Mitch McConnell, Minority Leader, United States Senate
The Honorable Richard Durbin, Majority Whip, United States Senate
The Honorable John Thune, Republican Whip, United States Senate