July 11, 2019

The Honorable David Cicilline
Chairman
House Judiciary Subcommittee on Antitrust, Commercial and Administrative Law
United States House of Representatives
2233 Rayburn HOB
Washington, DC 20515

The Honorable Jim Sensenbrenner
Ranking Member
House Judiciary Subcommittee on Antitrust, Commercial and Administrative Law
United States House of Representatives
2449 Rayburn HOB
Washington, DC 20515

The Honorable Jerrold Nadler
Chairman
House Judiciary Committee
United States House of Representatives
2131 Rayburn HOB
Washington, DC 20515

The Honorable Doug Collins
Ranking Member
House Judiciary Committee
United States House of Representatives
1504 Longworth HOB
Washington, DC 20515

Dear Chairman Cicilline, Ranking Member Sensenbrenner, Chairman Nadler and Ranking Member Collins:

Thank you for your bipartisan exploration into competition in digital markets. Ahead of your Subcommittee hearing titled, "Online Platforms and Market Power, Part 2: Innovation and Entrepreneurship," I wanted to be sure you were aware of the anti-competitive practices Spotify has encountered and how it could affect many others in the digital markets. We know we are not alone in experiencing these anticompetitive practices and hope you will continue to look into this issue to ensure innovation, competition and consumer choice.

In recent years Apple has introduced rules to the App Store that purposely limit choice and stifle innovation at the expense of the user experience—essentially acting as both a player and referee to deliberately disadvantage other app developers.

Apple operates a platform that, for over a billion people around the world, is the gateway to the internet. Apple is both the owner of the iOS platform and the App Store—and a competitor to services like Spotify. In theory, this is fine. But in Apple's case, they continue to give themselves an unfair advantage at every turn.

To illustrate what I mean, let me share a few examples. Apple requires that Spotify and other digital services pay a 30% tax on purchases made through Apple's payment system, including upgrading from our Free to our Premium service. If we pay this tax, it would force us to artificially inflate the price of our Premium membership well above the price of Apple Music, putting us at a clear disadvantage in the market. And to keep our price competitive for our customers, that isn't something we can do.[1]

[1] Apple's current practice is to require app developers to pay Apple 30% of their revenue for in-app purchases in the first year and 15% every year thereafter. The 30% fee imposes a huge disincentive to acquiring new subscribers. The subsequent lower fee does not alter the substantial barrier Apple imposes to growing Spotify's business.

As an alternative, if we choose not to use Apple's payment system, forgoing the charge, Apple then arbitrarily and unilaterally applies a series of technical and experience-limiting restrictions on Spotify. For example, they limit our communication with our customers—including our outreach beyond the app. In some cases, we aren't even allowed to send emails to our customers who use Apple. Apple also routinely blocks our experience-enhancing upgrades. Over time, this has included locking Spotify and other competitors out of Apple services such as Siri, HomePod, and Apple Watch, or significantly delaying or degrading access.

We aren't seeking special treatment. We simply want the same treatment as numerous other apps on the App Store, like Uber or Grubhub, who aren't subject to the Apple tax and therefore don't have the same restrictions. What we are asking for is the following:

- First, apps should be able to compete fairly on the merits, and not based on who owns the App Store. We should all be subject to the same fair set of rules and restrictions—including Apple Music.
- Second, consumers should have a real choice of payment systems, and not be "locked in" or forced to use systems with discriminatory tariffs such as Apple's.
- Finally, app stores should not be allowed to control the communications between services and users, including placing unfair restrictions on marketing and promotions that benefit consumers.

This is not a Spotify-versus-Apple issue. We want the same fair rules for companies young and old, large and small. It ***is*** about supporting and nurturing the healthy ecosystem that made our two companies successful in the first place.

Consumers win and our industry thrives when we're able to challenge each other on fair footing. That's what competition on the merits is all about. I have included a few articles on this topic attached to this letter and hyperlinked below and more information can be found at TimeToPlayFair.com.

Why Does Apple Control Its Competitors? - New York Times, May 2, 2019
Even Apple's ex-head of app reviews says App Store is unfair to Spotify, Netflix – CNET, May 29, 2019

We would like to request that this letter be included in the record. Thank you again for your attention to this very important topic that is critical to a vibrant, innovative and thriving marketplace.

Regards,

Horacio Gutierrez
General Counsel and VP, Business & Legal Affairs, Spotify

CC: Members of the House Judiciary Committee

Full Articles

New York Times
Why Does Apple Control Its Competitors?
Regulators should take a close look at the iPhone App Store.
By The Editorial Board
May 2, 2019
https://www.nytimes.com/2019/05/02/opinion/apple-app-store-iphone.html

Of the 17 most popular screen-time and parental-control apps in the App Store, 11 have been removed or restricted by Apple. The app makers believe they are being punished for competing with Apple's own screen-time control tools, or worse, for weaning people off Apple devices. Many of the apps had more stringent controls than Apple's in-house alternatives. Apple says that the applications — specifically, the parental-control apps — were removed because of their use of Mobile Device Management, a technology that gave third parties access to information such as "user location, app use, email accounts, camera permissions and browsing history." In other words, Apple says it removed the apps to protect the privacy of the children and parents who installed them.

The actions by Apple highlight the inherent tension in the company's fierce control over its mobile operating system: On the one hand, the closed environment is a boon to consumer privacy because the company has the leverage to insist upon it; on the other hand, that environment fosters a kind of monopoly.

[As technology advances, will it continue to blur the lines between public and private? Sign up for Charlie Warzel's limited-run newsletter to explore what's at stake and what you can do about it.]

This isn't the first time that the company has cracked down on products sold in its App Store. In January, the company revoked Facebook's control over an app that collected data on minors, which temporarily resulted in havoc at Facebook headquarters, since the revocation applied to several custom-made apps (like calendars) used internally within the company. Apple's caution around Mobile Device Management is reasonable — in a post-Cambridge Analytica world, third parties need not have overbroad access to user information.

But Apple's management of the App Store is also dangerously reminiscent of the anti-competitive behavior that triggered United States v. Microsoft, a landmark antitrust case that changed the landscape of the tech industry.

In the mid-1990s, Microsoft began to bundle its Internet Explorer browser with Windows, moving to elbow competing browsers — primarily, Netscape — out of the picture. This triggered a lawsuit from the Department of Justice and a coalition of state attorneys general in 1998. Microsoft ultimately lost.

The lawsuit is credited with opening up the marketplace for upstarts like Google and Facebook. Now, the companies that shot up to the top while Microsoft was busy fending off the Justice Department are engaging in similar anti-competitive tactics. In some ways, Microsoft's conduct was more egregious than Apple's appears to be today — internal documents outlined a clear strategy to "leverage" Windows to increase Internet Explorer's market share and ultimately dominate the browser market. The company also entered into agreements with various service providers to optimize sites for Internet Explorer but not other browsers. Yet Microsoft never banned the installation of other browsers outright — how could it? If a user wanted to, they could still use Netscape.

But Apple's operating system for mobile devices makes it almost impossible to get an app outside of the App Store that will work on an Apple phone. Ultimately, the company controls what a user can or cannot do on their own iPhone. Apple also takes up to a 30 percent cut of in-app revenue, including revenue from "services" fulfilled in-app — like buying a premium subscription or an ebook. Because all apps go through the App Store, this 30 percent cut is nearly unavoidable.

Apple doesn't ban apps like Amazon Kindle or Spotify, which compete with Apple Books and Apple Music, respectively. But the 30 percent fee still stings. That's the reason you currently can't buy a Kindle ebook through the Kindle mobile app. Spotify, a much smaller company, now pays Apple between 15 and 30 percent of its in-app revenue in order to serve streaming music to its premium subscribers. Spotify recently filed a complaint with European regulators, accusing Apple of anticompetitive practices. In the United States, an antitrust lawsuit pending before the Supreme Court alleges that the 30 percent cut drives up prices for consumers.

Apple isn't the only company leveraging a mobile operating system for an unfair advantage. Last year, the European Union fined Google $5.1 billion for bundling the Chrome browser and Google Search with other Android apps.

Even if we take Apple at its word that it was only protecting the privacy and security of its users by removing screen-time and parental-control apps, the state of the app marketplace is troubling. Why is a company — with no mechanism for democratic oversight — the primary and most zealous guardian of user privacy and security? Why is one company in charge of vetting what users can or cannot do on their phones, especially when that company also makes apps that compete in a marketplace that it controls? Senator Elizabeth Warren's proposal to bar Apple from competing in its own app marketplace is too drastic, and doesn't take into consideration how intertwined the physical phone is with Apple's in-house apps. For example, iMessage competes with Facebook's WhatsApp and Google Hangouts, but what's a cellphone without text messages?

Still, the status quo is untenable. It's time for American regulators to take a good hard look at app stores and mobile operating systems. It might be time for another United States v. Microsoft.

CNET
Even Apple's ex-head of app reviews says App Store is unfair to Spotify, Netflix
BY JOAN E. SOLSMAN, SHARA TIBKEN
MAY 29, 2019
https://www.cnet.com/news/apple-app-store-is-unfair-to-spotify-netflix-former-app-reviews-head-shoemaker-says/

Apple's former head of App Store approvals believes his former team is the best in the world -- but the policies it enforces aren't.

"Over the years, Apple has struggled with using the App Store as a weapon against competitors," Phillip Shoemaker, who ran Apple's third-party app reviews for seven years, said in a Medium post Tuesday.

Apple is facing intensifying scrutiny over how its App Store policies treat services, like Spotify and Netflix, that directly compete with its own. Earlier this year, Spotify lodged a complaint with Europe's antitrust watchdog, saying Apple uses its App Store policies as a cudgel to stifle Spotify, the main competitor to Apple Music.

The App Store is the biggest moneymaker in Apple's services business, but the issue will only grow thornier this year, as Apple launches subscription services in new arenas like video, with its Netflix competitor Apple TV Plus, and video games, with Apple Arcade set to compete against Google Stadia.

Apple didn't immediately respond to a request for comment. In the past, it has rejected Spotify's claims. Wednesday morning, the company also launched an App Store explainer page that noted how Apple operates "a store that welcomes competition."

Dumb readers

Shoemaker called on Apple to change two policies. One, known as the dumb reader rule, prevents third-party apps from using any payment system other than Apple's own in-app purchases, all of which pay Apple a 30% fee in the first year and a 15% fee after that. Another policy, known as the no-linking-out rule, prohibits apps from including any buttons, links or other directions that would help potential subscribers find other sign-up options.

Spotify and others have complained that the two policies give Apple the power to put its rivals at an unfair competitive disadvantage.

"With the App Store being the only way to install apps onto your iPhone and iPad, Apple has complete and unprecedented power over their customer's devices," Shoemaker said. "The decisions they make with regards to third-party apps needs to be above reproach, and currently are not."

Shoemaker called on Apple to create a limited exception to both policies, specifically for apps that directly compete with Apple. He suggested allowing external links to other purchasing options only for apps that directly compete with Apple in areas with tight margins, where a 30% fee hits the app maker hard. That would include things like news services, books, movies, music and cloud storage.

"Some may argue that this is generally difficult to police, and that it is a slippery slope," said Shoemaker, who was Apple's senior director of App Store review until his departure in 2016. "Slippery slopes and policing is what the App Store review team does, and during my time, they did it better than anyone else in the world."

The US Supreme Court ruled iPhone customers could sue Apple for allegedly operating the App Store as a monopoly that overcharges people for software.

Apple came under fire for removing parental-control apps that compete with iPhone's own screen-time features.
Europe's antitrust watchdog, which has doled out billions in fines against Google, reportedly planned to launch a formal investigation into Spotify's complaints.

In the midst of these squalls, Apple launched an App Store explainer page ahead of its biggest annual event for app developers, its Worldwide Developers Conference set to start Monday. The site notes that Apple operates "a store that welcomes competition," as listed apps in the App Store compete with Apple's own. The page also breaks down the steps it takes to "make sure apps are respectful to users with differing opinions" and reject apps that are "over the line."

But the page didn't directly address any of the recent claims alleging Apple abuses the App Store's power.

"Apple needs to own up to their irresponsibilities and fix these significant problems," Shoemaker said in his post. "If they don't, the regulators just might."

Originally published May 29, 8:49 a.m. PT.
Update, 10:35 a.m. PT: Adds details about App Store explainer page.