



Testimony of
Kirsten Daru
Chief Privacy Officer and General Counsel for
Tile, Inc.

On Online Platforms and Market Power
Part 5: Competitors in the Digital Economy

Before the House Committee on the Judiciary
Subcommittee on Antitrust, Commercial and Administrative Law

Boulder, CO
January 17, 2020

I would like to begin by thanking Chairman Cicilline, Ranking Member Sensenbrenner, and the members of the Subcommittee on Antitrust, Commercial and Administrative Law for convening this field hearing, and Vice Chair Neguse for hosting. Additionally, I would like to thank and commend the members of the subcommittee and your staff for the commitment that you have shown to promoting competition in the digital marketplace.

Introduction

My name is Kirsten Daru, and I am the Chief Privacy Officer and General Counsel of Tile, Inc. Tile is one of several similarly situated companies that have been impacted by anti-competitive practices on the Apple platform. Importantly, I am here today not to ask for protection, but in support of a level playing field on the Apple platform, where competitors can fairly develop great services and great products at fair prices for American consumers.

Tile is a software and hardware company that helps people find lost or misplaced items. In particular, Tile sells devices that attach to items like your keys, wallet or purse and also embeds its finding software into 3rd party products. All Tile-enabled devices are compatible with the Tile app, which provides a simple user interface enabling customers to find their items.

Tile has over one hundred employees in the United States and over one hundred and eighty patent assets. In all, we help our customers find over 5 million items every day.

Much of our success can be attributed to our ability to work collaboratively with a diverse group of partner companies. Tile has partnered with some of the biggest technology companies in the world to integrate our software into their own products—including Bose, Hewlett-Packard, Google, Amazon and, importantly, Apple. However, beginning early last year, our partnership with Apple took an ominous turn.

Tile's Relationship With Apple

For background, Tile enjoyed a productive and mutually beneficial partnership with Apple for years. Our app is available on the Apple App Store and Apple began selling Tile devices in its retail stores in 2015. In 2018, Tile sent an engineer and a designer to Apple's headquarters to help develop a feature where Siri could help consumers find their Tiles with their voices. That feature was showcased on stage at Apple's biggest annual event, its Worldwide Developers Conference (WWDC).

In April of 2019, however, reports started surfacing that Apple was launching a competitive "Tile-like" hardware product and was enhancing its "Find My iPhone" app into something more resembling our service.^{1,2} In June of 2019, Apple informed us that they would no longer be carrying our products in their stores. Apple has since hired the Tile engineer we sent to help them develop the Tile/Siri integration featured at WWDC.

¹ Warren, Tom. "iOS 13.2 reveals Apple's Tile-like device could be called AirTag." *The Verge*, 10/28/19, <https://www.theverge.com/2019/10/28/20936650/apple-airtag-tile-device-reference-ios-13-2-rumors>, accessed 1/10/20

² Gallagher, William. "Apple's Tile-like tracking device named 'AirTag' in iOS 13.2." *AppleInsider*, 10/28/19, <https://appleinsider.com/articles/19/10/28/apples-tile-like-tracking-device-named-airtag-in-ios-132>, accessed 1/13/20

Changes Imposed by iOS 13

Another worrisome event was the introduction of iOS 13 last September, which introduced a host of concerning changes.

- It introduced a new FindMy app that competes even more directly with Tile;
- It made it difficult for consumers to enable their Tile devices. They did this by burying required permissions (called “Always Allow”) deep within the iOS settings;³
- Once permissions are enabled, Apple also began sending frequent prompts encouraging our customers to turn them off, causing customer frustration and implying that Tile shouldn’t be trusted;^{4,5}

By contrast, permissions for Apple’s native location services—including FindMy—are activated by default as part of “Express Settings” during iOS installation.⁶ And Apple surfaces neither reminders of FindMy’s data collection, nor prompts for its customers to disable it. These changes increased the “friction” a user faces when initializing and using third-party apps, while simultaneously decreasing the relative friction for (and transparency of) Apple’s own location tracking services.

This is all even more troubling given that Apple owns and controls the hardware, the operating system, retail stores and the App Store marketplace, upon which third party app makers like Tile rely. For instance, FindMy is also installed natively on Apple hardware—to the exclusion of competing apps—and can’t be deleted. This not only gives Apple significant control over the ecosystem but also gives Apple access to competitively sensitive information, including the identity of our iOS customers, subscription take rates, retail margins and more.

Apple has attempted to justify its own collection of sensitive information and disparate treatment of competitors because FindMy is “part of the OS,” as well as due to a need for enhanced consumer privacy.⁷ But the changes don’t meaningfully improve or enhance privacy of third party app developers; they do, however, make it more difficult for customers to exercise choice and cause confusion and friction for customers of third party competing apps. The practical reality is that this is a prime example of Apple using consumer privacy as a shield to place third party apps at a competitive disadvantage.

Additional Concerns

Apple’s new line of iPhones also include a technology called Ultra Wide Band (or UWB) which can enhance the Tile finding experience. While reports of Apple’s competing hardware devices include leveraging UWB for Apple’s own benefit, Apple has given us no indication that they will enable Tile to leverage the technology for its consumers.

³ Appendix I, Figures 1,2

⁴ Haggin, Patience. “iPhone Update Reminds Users – Again and Again – of Being Tracked.” Wall Street Journal, 12/31/19, <https://www.wsj.com/articles/iphone-update-reminds-usersagain-and-againof-being-tracked-11577799336>, accessed 1/10/20

⁵ Appendix I, Figure 4

⁶ Appendix I, Figure 3

⁷ Tilley, Aaron. “Developers Call Apple Privacy Changes Anti-Competitive.” The Information, 08/16/19, <https://www.theinformation.com/articles/developers-call-apple-privacy-changes-anti-competitive>, accessed 01/04/2020

In addition, around the time that iOS was introduced, Apple began aggressively bidding on our branded search terms, serving what look like *Tile* advertisements, and driving customers to the iOS app store. This drove up our cost of advertising significantly and hindered the effectiveness of our advertising during the top two sales periods of the year. It also allowed Apple to know more about the kinds of customers searching for device tracking services.⁸

Tile Brought It's Concerns To Apple's Attention

We've brought our concerns to Apple's attention in a number of ways. Over the course of several months, we filed what are called "Radars" with Apple, engaged with Apple's developer relations team and sent emails to Apple executives. Our CEO, along with the CEOs of seven other similarly situated tech companies, sent a letter to Tim Cook outlining our concerns.⁹ It was only after the *Washington Post* ran an article on November 26 bringing some of these practices to light¹⁰ that Apple contacted us to let us know that the company would eventually restore the "Always Allow" consumer option sometime in 2020. Many other concerns remain unaddressed, we don't know if we will have access to UWB technology on iOS, Apple's aggressive search term bidding has resumed and we still don't know when in 2020 permissions will be restored for our customers. Moreover, we don't know what changes will be coming next.

Impacts on Tile

Apple's iOS 13 changes had the practical impact of making it more difficult for consumers to use our products than Apple's own. The iOS changes degraded the user experience for our customers, who must now navigate deep within their settings to enable their Tile products to function and gives users the impression that Tile's services should not be trusted. These changes caused and continue to cause confusion among our customers and resulting in a material decline in the efficacy of our products. Apple's advertising practices increased our cost of advertising and affected its efficacy. All of these changes occurred during the most critical time of the year for Tile – draining our engineering resources and forcing us to develop a new onboarding experience with no prior consultation or meaningful notice.

Conclusion

As Apple expands into additional services, some of which compete with developers like Tile, the need for a level playing field that fosters innovation and healthy technological partnerships becomes ever more critical for innovation and consumer choice. The functioning of a robust, healthy app ecosystem is dependent upon open platforms that do not favor the owner of the platform. It is our hope and preference to work collaboratively with Apple to resolve these concerns and restore competitive integrity to their platform. But in the meantime, it is our hope that Congress will continue to explore how any disparate treatment of competitive software apps, as well as other structural inequities—

⁸ Albergotti, Reed. "Apple says recent changes to operating system improve user privacy, but some lawmakers see them as an effort to edge out its rivals." *The Washington Post*, 11/26/2019, <https://www.washingtonpost.com/technology/2019/11/26/apple-emphasizes-user-privacy-lawmakers-see-it-an-effort-edge-out-its-rivals/>, accessed 01/13/2020

⁹ Tilley.

¹⁰ Albergotti.

including those inherent to the new iOS platform— could be utilized by Apple to hinder competition and limit consumer choice.

I would like to again thank you, Chairman Cicilline, Ranking Member Sensenbrenner, Vice Chairman Neguse, and the other members of the committee, for your time. And I want to repeat an important point. Tile is not looking for protection. We're here to simply advocate for consumers, and by that, I mean a level playing field for competitors in the Apple ecosystem.

I look forward to answering any questions that you may have.

Appendix I

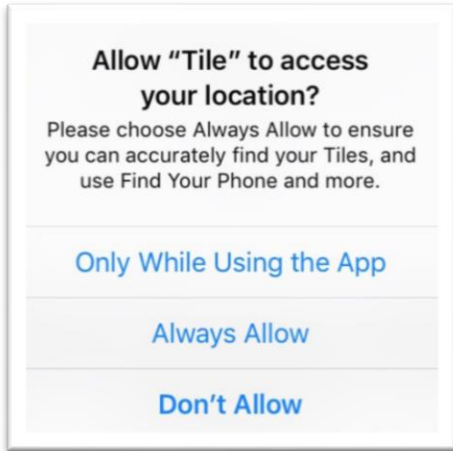


Figure 1 - Old iOS Location Permission Flow: Tile

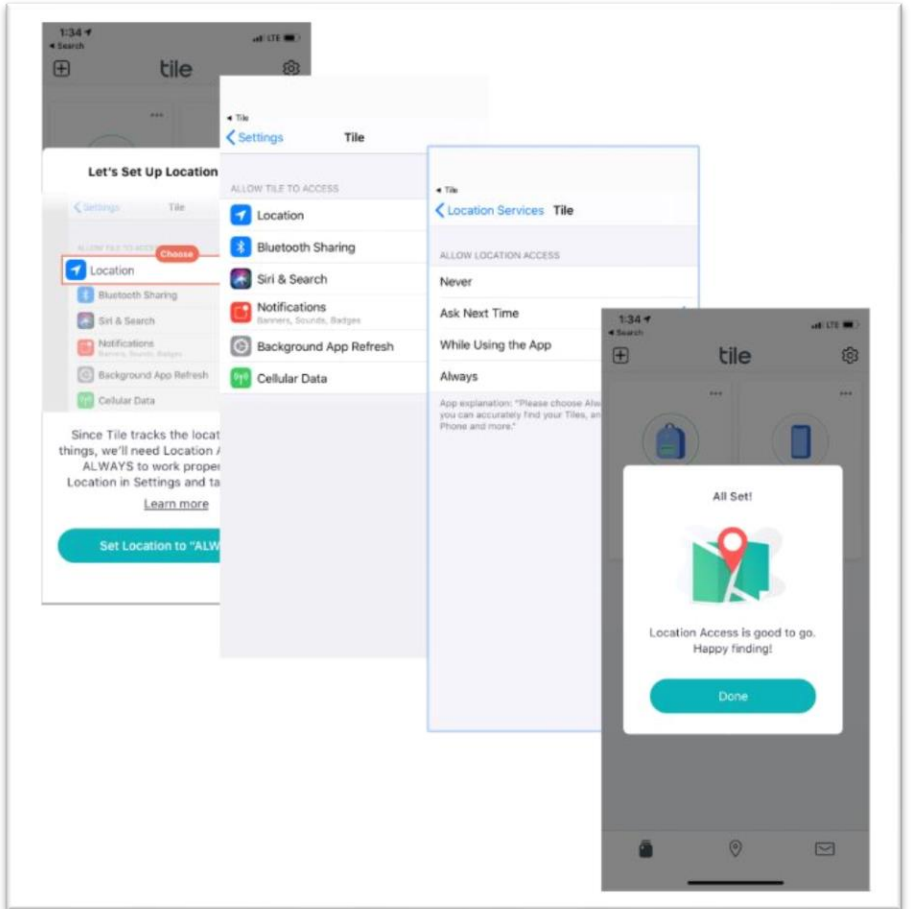


Figure 2 - New iOS 13 Location Permissions Flow: Tile

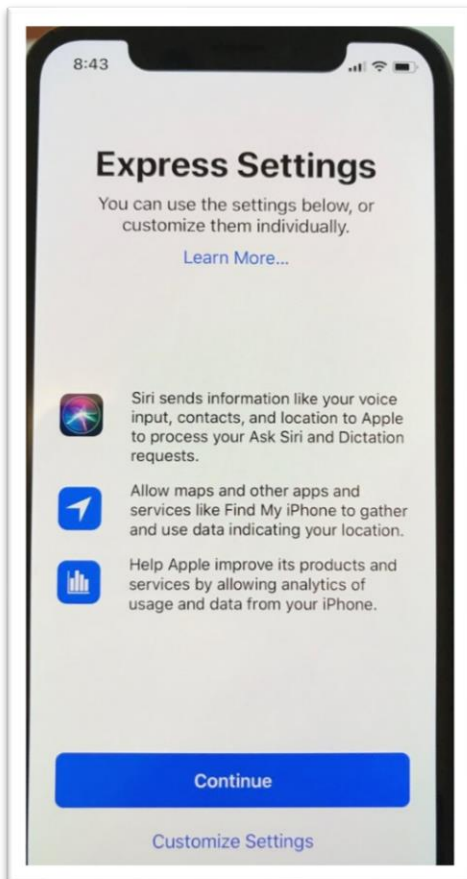


Figure 1 - New iOS 13 Location Permissions Flow: FindMy

Appendix I (cont.)

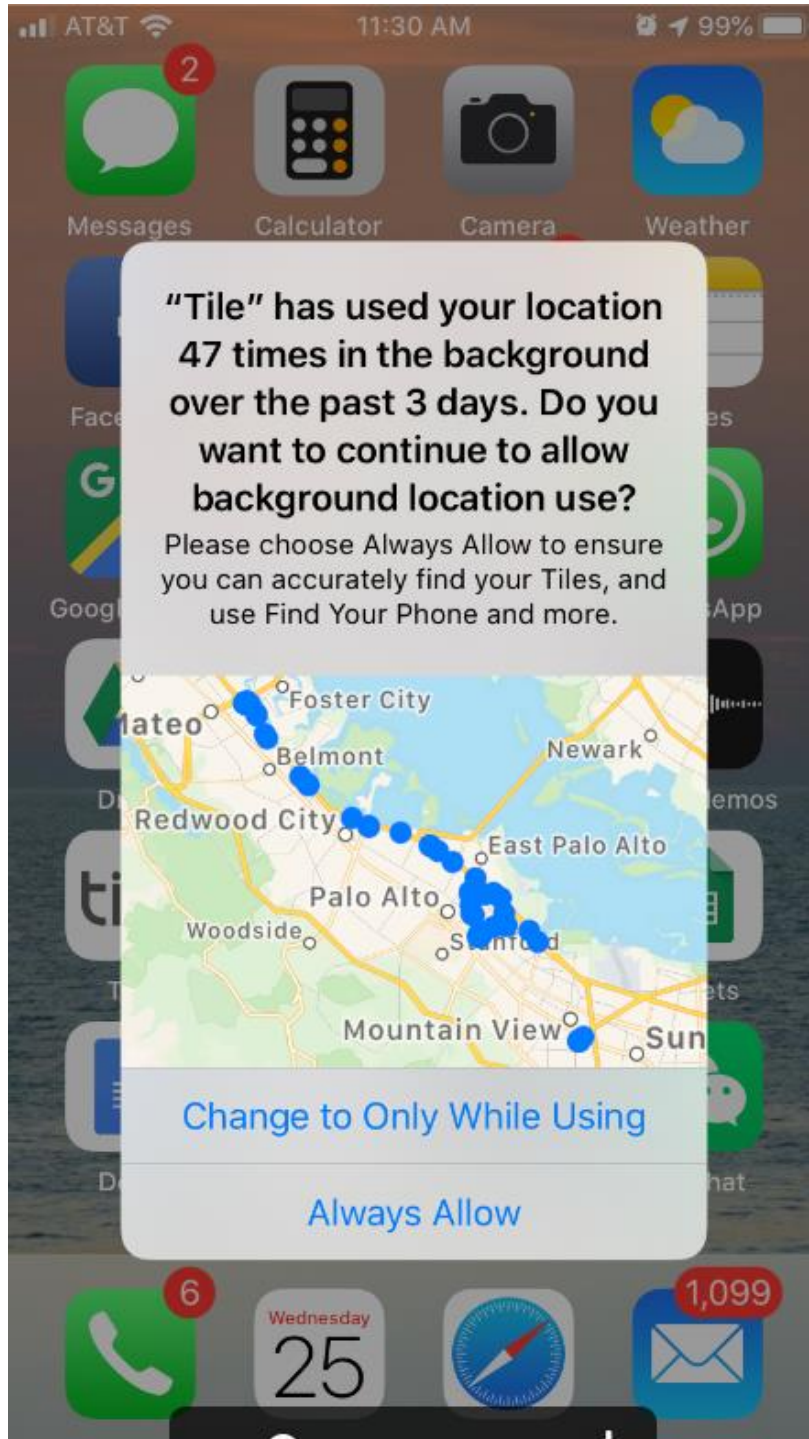


Figure 2 - Location Data Reminder