

January 24, 2022

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Washington, D.C. 20510

Senator Chuck Grassley
Ranking Member
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Senator Amy Klobuchar
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Senator Mike Lee
Ranking Member, Subcommittee on Competition
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Dear Senators,

As the Judiciary Committee considers the “Open App Markets Act” (S.2710), I write on behalf of the Information Technology and Innovation Foundation (ITIF) to raise concerns for your consideration about the unintended consequences of the bill. This bill aims to promote competition—namely, to “reduce gatekeeper power in the app economy, increase choice, improve quality, and reduce costs for consumers.” Yet it will achieve none of its stated objectives. On the contrary, the bill will i) damage the app economy, ii) decrease choice, iii) decrease quality, and iv) increase costs for consumers.

1. Damaging the App Economy

After launching the first iPhone in 2007 without any third-party apps, Apple sparked the creation of the “app economy” on July 10, 2008, when it opened the App Store to businesses. In other words, Apple opened its proprietary assets and its revolutionary innovation to app developers. The App Store was launched with 500 apps. Today, Apple’s App Store has more than 2 million apps available, thereby demonstrating the incredible growth of the app economy. And yet, Google’s app store—Google Play—dwarfs Apple’s app store with almost 3.5 million apps. Meanwhile, these two leading app stores also compete with other app stores, such as Windows Store’s 600,000 apps and Amazon’s 460,000 apps.

These numbers illustrate the vibrancy of the app economy and the competitive landscape it offers. The app economy has created millions of jobs, led to unprecedented app entrepreneurship, and provided consumers with innovative services and products.

The Open App Markets Act is based on the false premise of an uncompetitive app economy dominated by two players. First, a duopoly does not necessarily mean a lack of competition. One need only consider the intense competition between Boeing and Airbus to grasp the rivalry inherent to duopolies. Second, the app economy does not count just two app stores but hundreds of them, most of which are operated by Chinese

behemoths such as Tencent App Store, Huawei App Store, and Alibaba App Store, each already having hundreds of millions of users.¹

App developers can easily create apps using multiple stores, and it is widely predicted that alternative app stores will continue to gain popularity, and that the companies using them will be on track to see exponential growth.²

Consequently, by targeting Apple’s App Store and Google’s Play store, the Open App Markets Act will damage a vibrant app economy that currently benefits app developers and consumers—and stands as one of America’s flagship digital innovations—only to offer unregulated Chinese app stores a comparative advantage over U.S.-based app stores. Senators should not try to fix an app economy that is not broken.

2. Decreasing Choice

The bill will not increase choice, especially for apps. If choice refers to the choice between apps available to consumers, then the millions of apps available to consumers and the hundreds of billions of app downloads bluntly undermine this claim. If choice refers to the number of app stores, again, the app economy is not made of a sluggish duopoly but instead made of fiercely competitive app stores and, most importantly, competitive business models.

Indeed, while Apple’s mobile operating system uses a closed model (i.e., users can only install apps from its approved app store), Google’s mobile operating system uses an open model (i.e., users can install any app, either from Google’s app store or any other). However, the bill forces app stores not to “take punitive actions or otherwise impose less favorable terms and conditions against a developer for using or offering pricing terms or conditions of sale through another In-App Payment System or on another App Store.” Consequently, Apple will be less able to tightly curate the quality of the apps on its App Store. The differences between the closedness of Apple’s App Store and the relative openness of Google’s Play store will fade away, thereby providing less choice for consumers and app developers between two different business models regarding app stores’ management and two different consumer experiences.³

By ensuring users can only install approved apps from its app store, Apple prioritizes user privacy and security. In contrast, by allowing users to install any apps on their devices, even ones not approved for the Google Play Store, Google prioritizes user customization. Unfortunately, the bill will provide lower choices for app developers and consumers as the forced openness will align Apple’s approach to Google’s.

¹ Elad Natanson, “The ‘Other’ Android App Stores—A New Frontier for App Discovery,” *Forbes*, September 3, 2019.

² Forbes Technology Council, “How To Move Beyond Google and Apple and Expand Into Alternative App Stores,” *Forbes*, January 19, 2022.

³ Daniel Castro, “Banning ‘Closed’ Mobile Ecosystems Would Hurt Consumer Choice and Competition,” ITIF *Innovation Files*, January 23, 2022, <https://itif.org/publications/2022/01/23/banning-closed-mobile-ecosystems-would-hurt-consumer-choice-and->

3. Decreasing Quality

Perhaps the most concerning aspect of the bill is that it will lead to lower-quality apps: As the bill imposes a wide range of preemptive obligations precluding app stores from policing scams, malware, and other poor-quality apps, consumers will download apps that are, at best, not providing satisfactory quality of service, and at worst giving them viruses, among other harms.

Indeed, the bill requires app stores to enable consumers to “install third-party Apps or App Stores through means other than its App store.” This practice, known as “sideloading,” presents considerable risks and threatens the security of consumers’ smartphones. Aware of these risks, the drafters of the bill nonetheless provided insufficient safeguards in Section 4: App stores will not be able to invoke any argument related to security or privacy whenever these arguments are “used as a pretext to exclude, or impose unnecessary or discriminatory terms” and are not “narrowly tailored and could not be achieved through a less discriminatory and technically possible means.”

These exceptionally stringent cumulative conditions will prevent any argument raised by app stores from being effective. Indeed, any app developer who develops an app containing malware or spyware as an alternative to a first-party app that an app store is already offering will effectively be able to claim that any refusal is a “pretext to exclude.” Also, any app developer who develops a dangerous app may always be able to claim that “less discriminatory and technically possible means” were available, hence raising the threat of complaint and litigations for any app’s refusal.

These unfortunate provisions will effectively force app stores to accept apps populated with malware given the risks of litigation, thereby providing ill-intentioned, domestic and foreign app developers an ideal statutory avenue for access to the app stores at the expense of consumers’ safety.

4. Increasing Costs for Consumers

When Apple launched the app store for business, Steve Jobs promised that most apps would be available for less than \$9.99. Today, the average price for an app is less than \$1. The fact that app prices in Apple’s App Store and Google’s Play store is so incredibly low indicates solid competitive constraints on both the app developers’ side and the app stores’ side of the market.

Google’s Play store fees are 15 percent, while Apple’s App Store fees are set at 15 percent for the first \$1 million of a developer’s earnings and 30 percent above that threshold. However, most app developers are subject to a 15 percent cut for in-app purchases—a rate deemed common in the industry when one looks at Samsung’s Galaxy Store’s 30 percent cut, Amazon Appstore’s 30 percent cut, and Microsoft’s Xbox cut of 30 percent.

Despite these reasonable rates of app store fees and the meager prices for final consumers, large app developers complain in court about the pricing strategies of Apple’s App Store and Google’s Play store. As a judge

recently stated about Apple’s App Store, “success is not illegal.”⁴ In-app purchases are the business models that both Google and Apple rely on, allowing app developers to offer consumers many low-priced or free apps, and later paying to unlock additional features.

Should in-app purchases be prohibited or marginalized as the legislation provides, consumers might find there are fewer low-priced or free apps available. And if the number of app stores significantly increases, the costs to curate those app stores will increase as well, and these higher costs will ultimately be passed on consumers.

In conclusion, the bill aims to “promote competition” in a highly competitive app economy in a manner consistent with the dystopian view of reaching “perfect competition” where there is no duopoly but instead an app economy populated with small and medium-sized app stores dedicated to supporting app developers rather than consumers.

But, as the economist Joseph Schumpeter once wrote:

The actual efficiency of the capitalist engine of production in the era of the largest-scale units has been much greater than in the preceding era of small or medium-sized ones. This is a matter of statistical record... How modern capitalism would work under perfect competition is hence a meaningless question.⁵

The Open App Markets Act attempts to reach a state of perfect competition in the app economy against the inevitable network effects that characterize, and generate value to, app stores. This attempt would fall short of achieving the bill’s stated objectives and instead would decrease the overall efficiency of the app economy, leaving everybody worse off—consumers, app developers, digital ecosystems, and U.S. leadership in digital innovation. A much more reasonable approach is warranted.

Sincerely,



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cc: Members of the U.S. Senate Committee on the Judiciary

⁴ The Wall Street Journal, “An Antitrust Victory for Apple”, *Wall Street Journal*, September 12, 2021.

⁵ Thomas K. McCraw, *Prophet of Innovation: Joseph Schumpeter and Creative Destruction* (Harvard University Press, 2009), p. 353.