



Testimony of
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Antitrust Applied: Examining Competition in App Stores

Before the Senate Committee on the Judiciary
Subcommittee on Competition Policy, Antitrust, and Consumer Rights

Washington, DC
April 21, 2021

Thank you, Chairwoman Klobuchar, Ranking Member Lee, and the members of the Subcommittee on Competition Policy, Antitrust, and Consumer Rights for convening this critical hearing on the app ecosystem. I would also like to commend the members of the subcommittee and your staff for the commitment that you have shown to promoting competition in the digital marketplace.

Introduction/Executive Summary

My name is Kirsten Daru, and I am the General Counsel and Chief Privacy Officer of Tile, Inc. Tile is a Silicon Valley-based software and hardware manufacturer that creates products that allow consumers to find lost items, and we are one of numerous similarly situated companies that have been impacted by anti-competitive practices on the Apple platform.

Specifically, I'm here to talk about Apple's systemic abuse of its market power and platform dominance that has stifled innovation and competition in this country and around the world. The abuses that have unfolded over the years have negatively impacted innumerable developers and consumers of the Apple App Store. Yet, few feel comfortable speaking up about their experiences for fear of retaliation or retribution by Apple.¹ Indeed, speaking up has been difficult for us too. Apple exercises absolute control over its app ecosystem, thereby controlling the fate of all those who seek to innovate in that space.

I was honored to testify before the House Judiciary Committee, Antitrust Subcommittee in early 2020 about Tile's experience with Apple.² Tile was gratified when the House Majority and Minority Reports later that year validated nearly all of the concerns we had expressed, coming to the conclusion that Apple's exploitation of its dominance over the app ecosystem provides it with an anticompetitive advantage over Tile.³

Fast forward to now, and things are worse. Far worse. Apple's anticompetitive conduct has continued unabated despite the House findings, despite our many attempts to work with all levels of Apple's organization to find solutions.

¹ *Investigation of Competition in Digital Markets: Majority Staff Report and Recommendations*. Subcommittee on Antitrust, Commercial and Administrative Law of the House Committee on the Judiciary. Oct. 6, 2020. [hereinafter House Antitrust Report], p. 27, https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf?utm_campaign=4493-519

² *Online Platforms and Market Power, Part 5: Competitors in the Digital Economy: Hearing Before the Subcommittee on Antitrust, Commercial and Administrative Law of the House Committee on the Judiciary*, 116th Congress (Jan. 17, 2020), statement of Kirsten Daru, General Counsel and Chief Privacy Officer, Tile, Inc., <https://docs.house.gov/meetings/JU/JU05/20200117/110386/HHRG-116-JU05-Wstate-DaruK-20200117-U1.pdf>

³ House Antitrust Report, p. 358; see also *The Third Way*. Minority Report. Subcommittee on Antitrust, Commercial, and Administrative Law of the House Committee on the Judiciary. Oct. 6, 2020, pp. 4-5. https://buck.house.gov/sites/buck.house.gov/files/wysiwyg_uploaded/Buck%20Report.pdf

Today, we are here to tell the rest of our story; a story that has far reaching implications for the future of app innovation and consumer choice. These implications all stem from Apple's ongoing abuse of its platform dominance to put competitors at a sharp competitive disadvantage, and specifically include:

- Apple's propensity to replicate apps on its platform, with access to competitively sensitive data garnered through its platform and app store operation to build optimal competing software;
- Apple's intent to create a closed ecosystem that "hooks" consumers in and deprive them of choice;
- Apple's rampant self-preferencing of its own apps and services (while replicating competitors and/or denigrating the user experience of competitive apps) to artificially restrain or prohibit competition by reserving information and technology for use in its own products; and
- Apple's demonstration that it will not change its anticompetitive behavior absent regulatory intervention.

This subcommittee has before it a unique opportunity to address Apple's exploitation of its unbridled market power in the app ecosystem to develop and enact updated antitrust legislation that prohibits artificial restraints on competition in the tech sector and elsewhere.

Apple's significant hold on the app ecosystem makes regulation difficult, yet the need for updated antitrust legislation in the short term is paramount. Without statutory action, ongoing innovation, fair competition and consumer choice in the mobile app store markets will suffer.

The Sherman Antitrust Act passed in 1890. American antitrust laws did not contemplate--and certainly have not kept pace with--changes in the digital marketplace. The United States has long been the world leader in tech innovation. Likewise, the US should be the world leader in antitrust innovation, in order to foster the ongoing vitality of our tech sector.

If we wait, the dominance and market power of Apple will only grow, making enforcement and regulation even more difficult than it is today, to the lasting detriment of competition, innovation and consumer choice.

We acknowledge that Google has the same power in its own app market, although our experience to date suggests that in the App Store context, Google has thus far exercised its dominance in a more benevolent manner. However, the structural imbalance still remains and there is nothing preventing Google from changing its behavior at a moment's notice. Accordingly, any new laws should apply to both equally.

About Tile

Tile helps people find lost items. People spend on average 365 days of their lives searching for lost items, and Tile was founded to solve that universal pain point.

In particular, we developed a finding service powered by software and hardware that helps people find lost items such as their keys, wallets, remote controls, purses, etc. Our Tile devices come in many form factors--even a credit card-sized device--that seamlessly attach to most anything. They work with our Tile app, which provides a user-friendly interface to help keep track of your belongings. We also embed our software into third party products like headphones, laptops and wearables.

Tile pioneered this category, and we lead the sector in the face of significant competition from a broad range of competitors ranging from other start-ups to Fortune 50 companies. Our apps have earned high ratings and a loyal consumer base. In fact, earlier this month, our Tile Mate product was named best Bluetooth finder by New York Times Wirecutter.

Much of our success also relates to the interoperability of our technology with a broad range of consumer platforms. We believe that consumers should be able to have a seamless finding experience interoperable with whatever devices and technology that work best for them. You can install the Tile App on your Android phone, your iPhone or iPad, and can even find your items with all the major voice assistants thanks to integrations with Alexa, Siri and Google Assistant.

Tile's Experience With Apple

Tile and Apple originally had a mutually beneficial, symbiotic relationship. We launched our iOS app in 2013, Apple distributed our products in its stores beginning in 2015, and we were regularly featured as a top app on the App Store. In the initial years of our partnership with Apple, we'd had the good fortune of investing in innovative new experiences with the company. For example, at Apple's 2018 Worldwide Developers' Conference (WWDC), our Siri integration was featured on stage during the keynote.

In 2019, however, our relationship with Apple took a very sharp turn in a different direction. A number of things happened unexpectedly in short succession that were uncharacteristic of our relationship to date, and signaled the anticompetitive challenges ahead:

- Reports started surfacing that Apple was going to release a competing software and hardware product;
- In the midst of planning our Apple store assortment for the 2019 holiday period, we were summarily and without explanation kicked out of all physical Apple stores;

- Apple hired away one of our star engineers who had been required to be on site at Apple for an extended period to co-develop the Tile/Siri integration that had been revealed during WWDC;
- Shortly thereafter, a new FindMy app was introduced with iOS13 that included Tile-like features.⁴ FindMy is installed by default as part of its operating system on all Apple phones, and cannot be deleted;⁵
- At the exact same time that it was tying this new finding capability to its operating system, Apple made changes to its operating system that denigrated our user experience, in sharp contrast to their new capabilities that had been seamlessly integrated into its operating system;⁶
- Apple started sending Tile customers confusing prompts encouraging our customers to essentially turn off Tile. No corresponding prompts to turn off FindMy were sent to Apple users;⁷
- Tile invested significant development cycles to address the unexpected issues caused by Apple's changes and attempted to engage with the company's leadership to no avail.

I was honored to testify about our experience in January 2020 before the House Antitrust Subcommittee. In response to the hearing, Apple announced that they would reverse course on some of the changes that negatively impacted Tile (i.e. by bringing the "Always Allow" prompt back to the initial permissions set up). Its statement read in relevant part:

We're currently working with developers interested in enabling the "Always Allow" functionality to enable that feature at the time of set up in a future software update.⁸

⁴ In iOS 13, Apple introduced offline finding, which helps find lost devices even if they're not connected to the Internet via networked Bluetooth community crowdsourcing nearly identical to Tile's solution. Albergotti, Reed. "Apple says recent changes to its operating system improve user privacy, but some lawmakers see them as an effort to edge out its rivals." The Washington Post, Nov. 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; see also The Verge, "9 apps and products Apple copied for iOS 13 and macOS Catalina" <https://www.theverge.com/2019/6/4/18651190/apple-ios-13-macos-catalina-third-party-apps-products-copy-wwdc-2019>.

⁵ 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, Nov. 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

⁶ *Id.*

⁷ *Id.*; Haggin, Patience. "iPhone Update Reminds Users – Again and Again – of Being Tracked." Wall Street Journal, Dec. 31, 2019. <https://www.wsj.com/articles/iphone-update-reminds-usersagain-and-againof-being-tracked-11577799336>, accessed 1/10/20

⁸ Potuck, Michael. "Tile Goes to Congress to battle Apple before AirTags competitor even gets unveiled." 9To5Mac, Jan. 17, 2020, quoting Apple's statement to CNBC in response to Tile's testimony. <https://9to5mac.com/2020/01/17/tile-apple-antitrust-opening-statement>

Apple did not follow through on this commitment.

Later in 2020, when the House reports regarding their investigation of Big Tech were released, we were gratified that the House agreed with and validated each and every one of our antitrust concerns. We were hopeful that Apple would make changes to address the House's concerns.

Apple did not.

Since Tile's Testimony In January 2019, Apple Has Made Matters Worse

The House reports have seemingly done nothing to deter Apple's behavior. Since Tile's testimony, Apple has continued to exploit its market power in its own favor to the detriment of Tile. For example:

- Instead of restoring the "Always Allow" permission to the first launch of the app, Apple made further changes to our user flow that only added confusion and required our engineers to spend several cycles addressing.⁹
- After we explained that we fit within exceptions to their requirement to use Apple's in-app purchase mechanism for our digital subscription (and thus are not subject to the 30% Apple payment processing fee), they disagreed **for reasons that aren't in their guidelines**.¹⁰
- Apple announced their competing hardware product, AirTags, available April 30.¹¹
- Apple AirTags will use a technology called Ultra-Wide Band (UWB) which can enhance the finding experience by adding additional precision.¹² Whereas Bluetooth can tell you which room an item is located in, UWB can tell you precisely where it is in that room. Apple has not given Tile access to the technology to use for the benefit of its customers, despite repeated requests.

⁹ See *Tile Responses to Questions for the Record*, available at <https://judiciary.house.gov/calendar/eventsingle.aspx?EventID=2386>.

¹⁰ Section 3.1.3(e) of Apple's Developer Guidelines say: "[I]f your app enables people to purchase physical goods or services that will be consumed outside of the app, you must use purchase methods other than in-app purchase to collect those payments, such as Apple Pay to traditional credit card entry." The majority of Tile's subscription service provide goods and services consumed outside the app like battery replacements, extended warranties and lost item replacement. Apple still insists that Tile use Apple in-app purchase because those goods and services come with additional digital services, a distinction that is not in the Developer Guidelines.

¹¹ Warren, Tom. "Apple announces \$29 AirTag, a new Tile-like item tracker." *The Verge*, April 20, 2021. <https://www.theverge.com/2021/4/20/20844326/apple-airtags-bluetooth-tracker-keys-tile-features-price>, accessed April 20, 2021.

¹² *Id.*

- AirTags will also use a seamless onboarding flow that allows connection to phones without even opening the FindMy app. This flow is unavailable to competing products;
- Apple otherwise continues to ignore our suggestions for a level playing field.

Most importantly though, Apple has slowly unveiled its true intentions: to enhance its closed ecosystem by edging out rivals at the app level in the finding space. The recently launched “FindMy Network Accessory Program” was originally couched in the media as a pro-competitive concession to Tile’s concerns, whereby third parties like Tile could enjoy the same rights and privileges as Apple’s FindMy App, including access to Apple’s “Finding Network” (i.e. encrypted location data from Apple’s installed base of iOS devices that are using bluetooth to locate devices not otherwise connected to the internet via wifi or cellular connections).¹³ But the fine print reveals something VERY different:

- A condition of consumers getting the benefit of the Apple Finding Network is that we abandon our own finding network and app and direct our users to Apple’s FindMy App to locate missing items.¹⁴
- To add insult to injury, in order to enjoy the “benefits” of the Apple Finding Network, competitors have to agree to one-sided terms contained in the MFi (Made for iPhone) Agreement whereby we give Apple unprecedented control over our business. In fact, we were told recently that we needed to sign this agreement to even get up-to-date information about what the program entails. Unfortunately, we can’t reveal the details of the agreement because Apple considers it “Confidential Information” protected by our non-disclosure agreement.

The bottom line is that the FindMy Network Accessory Program deprives customers of the choice to use the same data and APIs used by Apple for FindMy to power Tile features. Apple could easily grant Tile customers access to that same data if they were interested in fair competition.¹⁵

In other words, Apple has once again exploited its market power and dominance to condition our customers’ access to data on effectively breaking our user experience and directing our

¹³ Albergotti, Reed. “Amid Antitrust Scrutiny, Apple Makes Quiet Power Moves Over Developers,” Washington Post. <https://www.washingtonpost.com/technology/2020/07/24/apple-find-my-competition/>; Statt, Nick. “Apple Opens Up Its Network of iPhones to Help You Find Tile-like lost Gadget Trackers,” The Verge. <https://www.theverge.com/2020/6/22/21299712/apple-find-my-iphone-network-third-party-devices-support-location-tracking>; Bradshaw, Tim. “Apple Makes Concessions to Developers At Annual Conference,” Financial Times. <https://www.ft.com/content/3d2adf55-29f4-4459-ae50-8d74ed9b6a1e>.

¹⁴ House Antitrust Report, p. 358, fn. 2273 (citing the FindMy Network Specification).

¹⁵ Apple could enable this by allowing our devices to beacon the FindMy format/API. The data would be encrypted such that only the customer could access his or her location information. Tile would not have access, rendering privacy a non-issue. This would work similarly to the way that it allows other similar finder companies to reveal location data, but it would just appear to the user in the Tile app rather than FindMy.

users to FindMy. To be clear, this move **disincentivizes** competition at the app level. And it's working. One competitor, Chipolo, has already announced that its newest devices will be available **exclusively within FindMy**.¹⁶

Furthermore, joining the FindMy Network Accessory Program would break the interoperability that ensures our customers have a seamless finding experience no matter what technology they choose to invest in. It would break our user experience, render some of our features inoperable and render our customers unable to **choose** to use FindMy data to enjoy the unique features and interoperability of Tile. And this is relevant to Apple's true intentions.

As the House Antitrust Subcommittee's investigation reveals, Apple gives its own products and services a leg up over the competition and builds features into its products and services that can only be realized if you pair it with other Apple products. For example, Apple's public APIs default to Apple's pre-installed applications.¹⁷ As a result, when an iPhone user clicks on a link, the webpage opens in the Safari Browser, a song request opens in Apple Music, and clicking on an address launches Apple Maps.¹⁸

In the context of the Epic litigation, an Apple employee admits that their goal is to create a closed ecosystem that "locks" consumers in and makes it hard to leave.¹⁹ FindMy Friends is in fact mentioned as an app that is part of that strategy, designed by Apple to work exclusively with iOS.²⁰ Tile is the antithesis of that vision, believing in an open Internet and enabling consumers to seamlessly move across consumer platforms. With that in mind, it's not surprising that Apple has done an about face and used its market dominance to disadvantage Tile.

Implications of Apple's Behavior

Apple owns and controls the entire commercial iOS ecosystem. They own the hardware, the operating system, the retail stores and the app store marketplace. This gives Apple access to competitively sensitive information, including identity of our iOS customers, subscription take rate, retail margins and more. And Apple's control over the ecosystem generally enables it to

¹⁶ Apple, Inc., Newsroom. (2021, April 07). Apple's Find My network now offers new third-party finding experiences [Press release]. Retrieved April 08, 2021, from <https://www.apple.com/newsroom/2021/04/apples-find-my-network-now-offers-new-third-party-finding-experiences/>

¹⁷ House Antitrust Report, p. 353.

¹⁸ *Id.*

¹⁹ "Findings of Fact and Conclusions of Law Proposed by Epic Games, Inc." Epic Games, Inc. v. Apple, Inc. (US District Court, Northern District of California, Oakland Division. April 07, 2021). [hereinafter Epic Games Findings of Fact and Conclusions of Law], paragraphs 53 and 58, pp. 14 and 15. https://www.scribd.com/document/502036985/21-04-08-Epic-Games-Proposed-Findings-of-Fact-and-Conclusions-of-Law#from_embed

²⁰ *Id.* at paragraphs 55 and 59, pages 14 and 16; See also Albergotti, Reed. "Amid Antitrust Scrutiny, Apple Makes Quiet Power Moves Over Developers," Washington Post ("Another limitation imposed by the Find My network is that, by cutting off the ability of customers to simultaneously use other services o control hardware devices, Apple is blocking them from connecting to other devices on Android phones. That's because Find My is only available on Apple devices."); <https://www.washingtonpost.com/technology/2020/07/24/apple-find-my-competition/>.

identify any successful app category and take it over by manipulating the ecosystem to give itself a sharp competitive edge.

Apple has done this in one way, shape or form to categories like screen time apps, flashlight, news, email apps and music, to name a few.²¹ And all the while, these smaller competing app developers line Apple's pockets with as much as thirty percent of their digital revenue to help fuel more anti-competitive behavior. If left unchecked, Apple will become a 3, 5, 10 trillion-dollar company, while countless other viable competitors will be unfairly marginalized and harmed. Innovation will continue to suffer and consumers will ultimately be left with all of the cornerstones of an unchecked monopoly: less choice, lower quality and higher prices.

At Tile we always have and always will welcome fair competition. Competition fuels innovation, keeps quality high while ensuring the lowest possible prices for consumers. When a platform like Apple decides to enter a category and use its platform position to advantage its own service while disadvantaging third party services like Tile, this is patently **unfair** competition. The good news is that the House Antitrust Subcommittee considered this precise question and agrees: "Apple's [FindMy Network] solution would continue to put Tile and other apps and hardware developers offering finder services at a competitive disadvantage."²² But it hasn't stopped Apple from proceeding with its anti-competitive conduct.

Perhaps even more importantly, if Apple turned so abruptly on Tile after such a close beneficial relationship, it could turn on **anyone**. In fact, I can confidently say it CAN and WILL. Apple's behavior today doesn't necessarily reflect its actions tomorrow. Its power is so vast that it could set even higher in-app payment processing fees, give itself even more discretion to cherry pick apps to include and exclude from its app store and impose even more disparate restrictions on competition.

Apple has also shown no intent of changing unless they are forced to change. Current antitrust legislation could take decades to resolve these critical issues and by then our prediction is that it will be too late as damage to competition and innovation in our country will be irreparable.²³

Apple's Excuses

²¹ The Verge, "9 apps and products Apple copied for iOS 13 and macOS Catalina," <https://www.theverge.com/2019/6/4/18651190/apple-ios-13-mac-os-catalina-third-party-apps-products-copy-wwdc-2019>; Albergotti, Reed. Washington Post, "How Apple uses its App Store to copy the best ideas," <https://www.washingtonpost.com/technology/2019/09/05/how-apple-uses-its-app-store-copy-copy-best-ideas/>.

²² House Antitrust Report, p. 358.

²³ Andeer, Kyle. Letter from Apple, Inc. for the Record. Letter written February 17, 2020 to House Judiciary Committee. [hereinafter Andeer Letter] <https://docs.house.gov/meetings/JU/JU05/20200117/110386/HHRG-116-JU05-20200117-SD004.pdf> (Per Apple, the app industry employs 1.9 million people in the United States. But the industry is in decline.); House Antitrust Report, pp. 18, 47, 48, 50. (Venture capitalists are less willing to invest in new market entrants. And there is a decline in the number of startups and the "lack of competitive pressure in the US economy has reduced innovation and business formation.")

Apple's responses to our concerns have changed over time. None of them hold water.

1. "*FindMy is part of the OS*"²⁴

In a move that harkens back to the browser wars of the 80's, Apple originally said that FindMy could enjoy additional rights and privileges because it was "part of the OS."²⁵ Apple quickly moved away from this argument.

2. Privacy

In a common refrain in response to concerns about Apple's anti-competitive conduct, Apple claims that prohibiting or impeding competition on its platform is necessary to ensure the privacy and security of Apple users.²⁶ Tile holds privacy and security in the highest importance. A service like ours can't be successful unless we take the necessary steps to safeguard our consumers and their data. We are aligned with Apple's position on this. But Apple also uses privacy as an excuse for its blanket restraints on competition. The most obvious example of that is the following.

Nowhere does Apple say: "If an App Store or payment method can meet these certain reasonable and objective standards for privacy and security, then they may compete with us." Instead, the rule is: "No app store or payment method may compete with us." The blanket prohibition on competition has no reasonable nexus to privacy or security. There are many third party sellers and payment methods with excellent privacy and security practices. And the policy isn't consistent with Apple's own policy on Mac's or even for excluded assets purchasable on the iPhone, where it's perfectly fine for customers to purchase from any online merchant using any form of payment they choose on iOS or otherwise. The existence of third party payment mechanisms hasn't disrupted the integrity of the Apple ecosystem.

Same holds true for Tile. We and many other developers are subjected to different rules, constantly changing interfaces and unequal access to data and technology because "privacy." But it ultimately doesn't matter how good our privacy is. Nowhere does Apple list the privacy requirements we need to fulfill in order to play on a level playing field. We are artificially restrained from competing fairly due to artificial restraints on competition that have ***no reasonable nexus to privacy or security at all.***

Privacy and fair competition are not mutually exclusive. Apple can easily define the standards that would enable the highest level of privacy and security AND fair competition or better yet, let customers decide for themselves. Apple doesn't do that. Instead, Apple uses privacy as an

²⁴ Tilley, Aaron. "Developers Call Apple Privacy Changes Anti-Competitive," The Information. (Aug. 16, 2019), <https://www.theinformation.com/articles/developers-call-apple-privacy-changes-anti-competitive>. ("Apple says FindMy and other apps are built into iOS and that it doesn't see a need to make location-tracking requests from users for the apps after they install the operating system.")

²⁵ *Id.*

²⁶ Andeer Letter, p. 3.

excuse to impose artificial restraints on competition to give its products an advantage and collect supra competitive fees.

This is what happens when you have a monopolist acting as a de facto regulator. The regulations will always tip the scale in favor of the monopolist.

3. We Don't Compete With Tile

Apple has also excused its conduct by saying that we don't compete because FindMy is installed by default on all iPhones rather than sold as a separate service. As explained to the House Antitrust Subcommittee, Apple advertises FindMy as part of the iPhone, and they sell iPhones. It's a different business model, but still competition all the same. And now, with the introduction of AirTags, their direct competitive stance cannot be refuted.

4. We Built The Ecosystem, Have IP Rights in Our API's And We Can Exercise Those Rights As We Please.

In another move that harkens back to the browser wars, Apple has taken the position in the Epic litigation and otherwise that they own the ecosystem so they are entitled to give its own products the preferences and privileges that it does.²⁷ Not so.

The reason iOS is so valuable as an ecosystem is because so many developers like Tile "make an app for that." Apple cannot on the one hand benefit from the fruits' of developer labor that enhance the value of its ecosystem and then on the other, treat them in an anticompetitive manner. *US v. Microsoft* used a colorful analogy along the lines of the fact that just because you have a baseball bat doesn't mean you can hit someone over the head with it.²⁸ In other words, Apple can't reap the benefit of a lucrative app ecosystem, then at the same time use their market dominance to give its own products an unfair and unreasonable competitive advantage. This is long settled.

5. Interference With Private Negotiations

²⁷ "Apple Inc. Proposed Findings of Fact and Conclusions of Law." Epic Games, Inc. v. Apple, Inc. (US District Court, Northern District of California, Oakland Division. April 07, 2021). [hereinafter Apple Findings of Fact and Conclusions of Law], p. 1, 2, 17-18. https://www.scribd.com/document/502128201/Epic-Games-v-Apple-Inc-Apple-s-Proposed-Findings-of-Fact-Documents#download&from_embed (The 30% commission are part of "contractual terms on the licensed use of Apple's intellectual property. Apple, as the property owner, has chosen to make its property available to others--but only on its own terms.")

²⁸ *US v. Microsoft*, U.S. Court of Appeals for the District of Columbia Circuit, 253 Fed. Rep. 3d at 63. ("Microsoft's primary copyright argument borders upon the frivolous. The company claims an absolute and unfettered right to use its intellectual property as it wishes: "[I]f intellectual property rights have been lawfully acquired," it says, then "their subsequent exercise cannot give rise to antitrust liability." Appellant's Opening Br. at 105. That is no more correct than the proposition that use of one's personal property, such as a baseball bat, cannot give rise to tort liability. As the Federal Circuit succinctly stated: "Intellectual property rights do not confer a privilege to violate the antitrust laws." *In re Indep. Serv. Orgs. Antitrust Litig.*, 203 F.3d 1322, 1325 (Fed.Cir.2000).")

Apple has also argued that legislation would interfere in the private contractual relationships between sophisticated parties. Not so. Apple's contracts are one-sided contracts of adhesion that provide developers no bargaining power. As Apple itself acknowledges, it enables developers to use its platform "only on its own terms."²⁹

For context, it's helpful to take a look at Apple's developer agreement and guidelines. The developer agreement and guidelines are the rules that developers must follow to offer their apps on the App Store on your iPhone. From time to time, our engineers get a pop up message from Apple alerting them that there is a new developer agreement. When that happens, we are blocked from updating our app until we agree to them. The new terms are offered on a take it or leave it basis without meaningful notice and without an opportunity to negotiate. Similarly, Apple's Developer Guidelines can change at any time with no notice.

Those terms contain numerous concerning requirements. For instance, they currently require apps to be distributed on Apple's App Store. No competing app stores are allowed. Essentially the only reasonable way to make an app available to an iPhone user is to agree to these terms and offer the app through the App Store. Apple also gives itself the right to use developer information for any purpose, including to compete with them.³⁰ Apple also imposes a requirement that most digital purchases be made via its in-app payment system.³¹ No competing payment systems for applicable digital purchases are allowed.³² And for the "privilege" of using Apple's in-app payment system, we have to pay Apple as much as **30%** of our digital revenues.

6. Apple Is A Good Actor And Does Not Need Regulation

Apple may say no regulation is needed because it won't exercise its market power in nefarious ways. And its fees have not gone up since their inception. But just as Apple did an about face on Tile, it could do an about face on other competitors and even the American people. There is currently nothing stopping Apple from raising its in app purchase fees, imposing more unfair restraints on competition and employing further "hooks" to lock consumers into an ecosystem.

7. iOS Users Are Not Limited to The App Store--They Can Use The Web

Another excuse Apple has raised to the anticompetitive nature of the app stores is that developers who do not want to agree to its terms can distribute their apps via the web. Again, not so. Many apps, including Tile, could not operate via a website. Even if it was possible, iOS doesn't allow users to install application files from outside the App Store.³³ "While it's possible to use a shortcut to a website to iOS screens to make them look like apps, in the end, they're

²⁹ Apple Findings of Fact and Conclusions of Law, pp. 1-2.

³⁰ Apple Developer License Agreement, Section 11.

³¹ Apple Developer Guidelines, Section 3.1.1.

³² *Id.*

³³ Maring, Joseph. "Apple Says iOS Users Are Not Limited To The App Store, But Is That True?" ScreenRant. <https://screenrant.com/apple-ios-app-store-alternatives-iphone-user-dev-restrictions/>.

just a shortcut to a website.”³⁴ Regardless, because apps are distributed via the App Store, any app that needs to be sought out on the web will be at a large disadvantage. *US v. Microsoft*, makes clear that such restraints on competition are not justifiable.³⁵

Regulatory Intervention is Needed

Right now, we have a unique opportunity to begin to restore innovation, competition, consumer choice and freedom to the app ecosystem. Apple has demonstrated time and again that it won't change unless someone makes them. Under the current antitrust laws, that could take years if not decades to address the multitude of abuses in the app marketplace. In another few years, it will be too late to prevent further irreparable damage to consumer choice and innovation in this country.

What do we do about it? The solution is quite simple. If Apple chooses to compete against developers reliant on its platform, it should do so fairly and according to the same rules. More precisely, app store legislation should address the anticompetitive behaviors that have been identified as needing to be addressed. For Tile in particular, and non-Apple app developers generally, that means:

- Requirements to treat all developers equally, including Apple's own apps and services;
- Prohibitions on self-preferencing, exclusionary and discriminatory behavior and lifting artificial restraint on competition, including but not limited to the payment processing and app store industries;
- Equal interoperability with the platform's permissions to ensure a smooth user experience for Apple and competing products alike;
- Prohibitions on dominant platforms from using information they glean from and about apps on their platforms to compete with them;
- Equal access to the iOS interface (i.e. enable consumers to choose which apps, if any, to install by default);
- Equal access to technology, including enabling our customers to get the benefits of UWB in the context of the Tile finding experience;

³⁴ *Id.*

³⁵ *US v. Microsoft*, 253 Fed. Rptr. 3d at 64. (“[Microsoft] argues that, despite the restrictions in the OEM license, Netscape is not completely blocked from distributing its product. That claim is insufficient to shield Microsoft from liability for those restrictions because, although Microsoft did not bar its rivals from all means of distribution, it did bar them from the cost efficient ones.”)

- Equal access to data and API's, including enabling our customers to use encrypted FindMy Network location data to power Tile's app and features.

In the meantime, Tile, it goes without saying, will not participate in Apple's FindMy Network Accessory Program. Doing so would be at odds with our commitment to our customers and partners. We pioneered the finding category, and we will continue to innovate and build world-class products that solve the universal pain point of misplaced items.

But no amount of innovation on our part can compete with Apple's misuse of its platform dominance. If Apple wants to replicate the functionality of a competitive app, it can utilize all the critical data it gathers across its platforms to extract critical information and construct the optimal competitive offering, which it then seamlessly integrates into its operating system. This is why, as stated by the House Majority Report that, "there is an innovation 'kill zone' that insulates dominant platforms from competitive pressure simply because investors do not view new entrants as worthwhile investments."³⁶

I would again like to thank you Madame Chair Klobuchar and Ranking Member Lee, and other members of the subcommittee, for your time and attention to this matter. Tile decided to come forward and again tell our story, despite ongoing retaliation from Apple, because we see Apple's actions as an existential threat--to Tile and countless other app offerings like us.

We know that we are not unique among app providers. We also know that absent statutory changes to the antitrust regime, Apple will continue to exploit its market dominance to replicate the functionality of competitive apps, while simultaneously denigrating their performance on the Apple platform.

The ongoing vitality of the app ecosystem is at stake. We are hopeful that this subcommittee will take the necessary legislative action to preserve competition and protect consumer choice, and look forward to working with all of you toward that end. Thank you.

³⁶ House Antitrust Report, p. 18.