



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

**February 9, 2021**

I would like to begin by thanking this subcommittee for convening this hearing and would further like to thank and commend the members of the Committee 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.

I am here to talk about Apple's systemic abuse of market power that has stifled innovation and competition in this state and around the world. While Tile is not domiciled in North Dakota, our experience with Apple's anti-competitive practices is—quite unfortunately—not unique. The abuses that have unfolded over the years have affected virtually all developers and consumers of mobile app stores. Yet, few feel comfortable speaking up about their experiences for fear of retaliation or retribution by Apple. Indeed, speaking up is difficult for us too. Apple in many ways controls the fate of its app ecosystem.

However, I am not here today to ask for protection or relief. Instead, I'm here because right now, we have a unique opportunity to begin to restore innovation, competition, consumer choice and freedom to the app ecosystem. I'm here to share our story in favor of a level playing field and in favor of SB 2333 which will help drive competition and help North Dakota consumers get the benefit of great services and new innovations at fair prices.

## **About Tile**

Tile helps people find lost items. Our devices work with the Tile App to provide an interface to help people find their keys, wallet, purse—really anything. And we also embed our software into third party products like headphones and laptops.

Tile is a small company. We only have around a hundred and twenty five employees. But we have a successful digital subscription business, over a hundred and eighty patent assets and much of our success relates to our collaboration with a diverse group of technology partners. This includes Hewlett-Packard, Google, Amazon and importantly, Apple who was a critical platform partner since 2013.

However, our partnership with Apple has taken a sharp turn in the wrong direction.

## **Apple's Developer Terms**

For context, it's helpful to take a look at Apple's developer terms. The developer terms are the rules that developers must follow to offer their apps on the AppStore on your iPhone. From time to time, our engineers get a pop up message from Apple alerting them that there are new terms.<sup>1</sup> When new terms appear, we are blocked from updating our app until we agree to

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<sup>1</sup> See Exhibit A.

them.<sup>2</sup> The new terms are offered on a take it or leave it basis without meaningful notice and without an opportunity to negotiate.

Those terms currently require apps to be distributed on Apple's App Store. No competing app stores are allowed. Essentially the only 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 imposes a requirement that most digital purchases be made via its in-app payment system. No competing payment systems for applicable digital purchases are allowed. 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.

Congressional findings indicate that there is no nexus between the 30% fee and the cost of Apple running the App Store.<sup>3</sup> Apple App Store revenues are in the billions- but the former director of app review for the App Store, Philip Shoemaker, estimated that Apple's costs for running the App Store are less than \$100 million.<sup>4</sup> It's pure exploitation. An exercise of the complete control they now have over access to iPhone users.

Yet because of Apple's prohibition on competition, owners of iOS devices have no alternative means to download apps other than the App Store. Developers are forced to relinquish thirty percent of their revenue in exchange for what is really just a payment processing service.<sup>5</sup> Imagine a small coffee shop in North Dakota being forced to hand over 30 cents to a processor in order to sell a \$1 cup of coffee. That's the reality for a lot of us in Apple's App Store.

More importantly, Apple's artificial and unilateral prohibition on competition leaves no alternatives for customers. Without regulatory intervention, Apple will be free to increase its fees over time-further crushing developers and consumer pocketbooks.

But that's just the beginning. For many developers like Tile, Apple isn't just the owner of the App Store. Apple is also a competitor, which makes the App Store fee dynamic that much more critical to address.

### **Apple Manipulates Its Ecosystem to Disadvantage Competitors**

After years of being a critical platform partner, and even featuring us on stage at Apple's World Wide Developer Conference, reports started surfacing that Apple was going to release a Tile-like competing hardware device.<sup>6</sup> Shortly afterward, they decided to no longer carry our products in their retail stores.

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<sup>2</sup> *Id.*

<sup>3</sup> *Investigation of Competition in Digital Markets*, Majority Staff Report and Recommendations, Subcommittee on Antitrust, Commercial and Administrative Law of the Committee on the Judiciary, October 2020, p. 344-355.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at p. 345-346.

<sup>6</sup> See, e.g., 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; Gallagher, William. "Apple's Tile-like tracking device named 'AirTag' in iOS

To be clear, we welcome competition, but it has to be FAIR competition. And over the past year or so, Apple has exploited its market power to advance its own interests at our expense in numerous ways. Here are just a few examples:

- They copied our app. A new FindMy app was introduced with iOS 13 in late 2019 that included Tile features.<sup>7</sup> FindMy is installed by default on all Apple phones and cannot be deleted;
- At the exact same time, Apple made changes to their operating system that denigrated our user experience, while leaving theirs streamlined and otherwise intact;<sup>8</sup>
- Apple started sending prompts encouraging our customers to essentially turn Tile off. But they serve no prompts to turn off FindMy;<sup>9</sup>
- Apple hired an engineer we sent to work with them on a Tile/Siri integration;
- Apple refused to give us access to certain technology that we could use to enhance our user experience. Instead, they are reserving it only for customers of their anticipated competing Tile product;
- Apple launched a FindMy Network program whereby they withhold critical data unless we abandon our app and join the FindMy app.<sup>10</sup> They could easily grant Tile access if they were interested in fair competition.

Taken together, these examples demonstrate that Apple acts as the gatekeeper of third party access to data and technology in ways that favor its own interests.

### **Anti-Competitive Effects 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

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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.

<sup>7</sup> 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. 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

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*; 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-users-again-and-again-of-being-tracked-11577799336>, accessed 1/10/20

<sup>10</sup> *Investigation of Competition in Digital Markets*, Majority Staff Report and Recommendations, Subcommittee on Antitrust, Commercial and Administrative Law of the Committee on the Judiciary, October 2020, p. 358, fn. 2273 (citing the FindMy Network Specification).

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, email apps, remote payments. It's happening now to health apps, fitness apps, news apps and more. And all the while, these small 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, 4, 5 trillion dollar company. Innovation will continue to suffer and consumers will ultimately be left with even less choice, lower quality and higher prices.

While testifying on similar behavior during a Congressional hearing last year, I used an analogy that may be helpful here. It's like playing a very warped game of football. You might have the best team in the league, but you're playing against a team that owns the field, the ball, the crowd and the league, and that can change the rules of the game in its own favor at any time. That's the field everyone in America is playing against Apple on.

### **Apple's Privacy Defense Is A Smokescreen**

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. This is simply not true for many reasons, but the most obvious and indisputable reason 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 bottom line is that this is what happens when you have a monopolist private company acting as a de facto regulator. The regulations will always tip the scale in favor of the monopolist and consumers lose the benefit of choice and fair prices.

### **Conclusion**

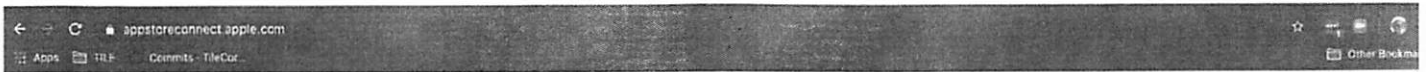
The functioning of a robust, healthy app distribution ecosystem is dependent upon open platforms that do not favor the owner. SB 2333 is a critical first step toward restoring innovation, competition and consumer choice in North Dakota and will serve as an example of what good looks like to regulators around the world struggling with how to free their citizens from the reign of Big Tech. Tile commends this subcommittee for its leadership on this critical

issue and is looking forward to the bright future of North Dakota consumers who will be so well served by this bill.

I would like to again thank you for your time. I look forward to answering any questions that you may have.

# Exhibit A

Exhibit A



## App Store Connect



### Review the updated Paid Applications Schedule.

In order to update your existing apps, create new in-app purchases, and submit new apps to the App Store, the user with the Legal role (Account Holder) must review and accept the Paid Applications Schedule (Schedule 2 to the Apple Developer Program License Agreement) in the Agreements, Tax, and Banking module.

To accept this agreement, they must have already accepted the latest version of the Apple Developer Program License Agreement in their account on the developer website.



My Apps



App Analytics



Sales and Trends



Payments and Financial Reports



Users and Access



Agreements, Tax, and Banking



Resources and Help