

March 14, 2022

The Honorable Zack Stephenson
Chair
House Commerce Finance and Policy Committee
Minnesota House of Representatives
St. Paul, MN, 55155

RE: Opposition to HF 1184

Dear Chair Stephenson and members of the Committee,

ACT | The App Association (the App Association) is the leading trade group representing small mobile software and connected device companies in the app economy, a \$1.7 trillion ecosystem led by U.S. companies and employing 108,260 people in Minnesota.¹ Our member companies create the software that brings your smart devices to life, by providing mobile and digital solutions for a variety of industry verticals. They propel the data-driven evolution of these industries and compete with each other and larger companies in a variety of ways. We have serious concerns with the proposal you are considering, HF 1184. We believe the bill would devalue the services App Association member companies purchase from software platforms, while increasing their costs of doing business and exposing consumers to greater privacy and security risks.

I. Payment Processing

The provision that forces platforms to allow other payment mechanisms on the app stores would do little to improve—and could actually diminish—the products and services Minnesotans receive. Instead, the provision would amount to a governmental intervention to enrich the largest companies doing business on the app stores.

Currently, smaller companies that distribute their software through the app stores benefit from the bundle of services they get from software platforms like the App Store. Those services include:

- Immediate distribution to hundreds of millions of consumers across the globe;
- Marketing through the platform;
- Accessibility features;
- Platform level privacy controls;
- Assistance with intellectual property (IP) protection;
- Security features built into the platform;
- Developer tools;
- Access to hundreds of thousands of application programming interfaces, or APIs; and
- Payment processing.

Some of the proponents of HF 1184 have tried to convince policymakers that payment processing is the *only service* in this bundle.² This intentional confusion makes the amount they

¹ ACT | THE APP ASSOCIATION, STATE OF THE U.S. APP ECONOMY: 2020, available at <https://actonline.org/wp-content/uploads/2020-App-economy-Report.pdf>.

² *Online Platforms and Market Power, Part 5: Competitors in the Digital Economy: Hearing Before the H.*

owe the app stores seem outrageous. But the other services in the app store bundle are extraordinarily important to App Association member companies, and a mandate to allow side loaded apps or unbundle payment processing would harm them. Before the entry of software platforms like Google Play and the App Store, our member companies paid a much higher percentage of their revenue to cobble together the services now available in app store bundles. Not only that, but most of them are among the 84 percent of app makers who do not pay the 15 or 30 percent commission on digital goods and services. So, the app stores have lowered their barriers to entry and profoundly strengthened their prospects for growth.

A survey of companies and individuals who develop iOS apps underscores that developers value the rigor with which the app stores review apps and ensure consumer protection, as well as the fact that they have distribution options. On a scale of 0 to 10, the plurality of developers rated the strictness of the App Store's guidelines at 7 and 8.³ However, a plurality of respondents also rated the fairness of the App Store review process at a solid 5.⁴ Meanwhile, over a third of respondents who develop for Apple platforms also made front-end or back-end web applications and/or Android apps in the past 12 months.⁵ Even more eye-opening, a minuscule 2.0 percent of respondents said the App Store should take a 0 percent revenue cut for the services they provide.⁶ Notably, this is the population (of which Spotify and Epic are presumably members) of app developers HF 1184 caters to, against the interests of the other 98 percent. So, while app developers find the App Store requirements to be strict, they also see them as reasonably fair, and almost none of them suffer from the illusion that the services they receive are costless. At the same time, these developers are exercising their options, and those who develop for Apple platforms often also produce applications distributed over the web and on the Android marketplace. These survey responses highlight that the app stores play an important role in vetting and approving software for consumer devices, and that developers choose to make use of those services while also availing themselves of the alternatives. These are attributes of vibrant and competitive marketplaces for developer services and for software.

This bill is part of a wider ranging fight waged by giant companies that sell through the app stores. The companies that want this bill include multi-billion-dollar behemoths looking for a free lunch at App Association members' expense. For them, using a third-party payment processor or being able to bypass the app stores' vetting process are apparently a means of avoiding having to pay the commission on digital goods and services. In fact, one of them purposely broke its contract with an app store to use a third-party payment processor so that it could avoid the 30 percent charge.⁷ But the ability for the app stores to collect the commissions large, established companies owe is important to App Association members because those fees go toward the quality of their service bundle—and providing those services is not costless. We believe government should not put a thumb on the scale so that huge companies can avoid contractual obligations in a way that harms small Minnesota companies.

Judiciary Comm., Subcomm. on Antitrust, Commercial, and Admin. L., 116th Cong. 7 (2020) (statement of David Heinemeier Hansson, CTO & Cofounder, Basecamp) (directly comparing 2 percent credit card processing fees to 30 percent app store commissions).

³ Dave Verwer, *The 2020 iOS Developer Community Survey*, 11. *The App Store*, Q.76 (Feb. 2021), available at <https://iosdevsurvey.com/2020/11-the-app-store/>.

⁴ *Id.* at Q.81.

⁵ *Id.* 2019 at Q.3, available at <https://iosdevsurvey.com/2019/01-apple-platform-development/>.

⁶ *Id.* at Q.77.

⁷ Kyle Orland, "Apple says Epic's *Fortnite* payment scheme "is theft, period.," *ARSTECHNICA* (Sept. 8, 2020), available at <https://arstechnica.com/gaming/2020/09/apple-accuses-epic-of-theft-in-countersuit-over-ios-fortnite/>.

Even if the intent of the bill is not to hand Spotify and Epic Games all of the app store services for free, the provisions would still undermine the platforms' consumer protection efforts. Managing payment processing gives the app stores the ability to track payments made by consumers for digital goods and services. App stores have made arrangements with companies like Netflix to allow third-party processing because Netflix agrees to handle payment processing off the platform on its own. A blanket mandate to allow all apps to use another processor, including fraudulent "stub" apps, removes the app stores' ability to detect and stop efforts to defraud consumers—and to ensure they are made whole if they were defrauded. The ability to manage these functions seamlessly is tied substantially to the payment processing function. Untethering payment processing therefore severs a number of threads that help the software platforms make delivering an app an apparently seamless process for consumers.

Ultimately, at least some of the justification for the payment processing provision lies in equating the 15 or 30 percent commission with a payment processing fee and that the large, established companies should not have to pay that much for payment processing. Again, payment processing is one component of a bundle that is of fundamental importance to App Association member companies. Confusion on this point will only harm small Minnesota competitors on the app stores.

II. Retaliation for Side Loading

Turning to the bill's retaliation provision, we have similar concerns. Prohibiting retaliation against an app maker for using an alternative distribution method effectively imposes a mandate on software platforms to allow side loading of apps and independent app stores. Indirectly requiring the software platforms to allow the side loading of any app—or any app store—onto a device seriously compromises:

- 1) The privacy, security, and safety measures platforms use to protect consumers;
- 2) The intellectual property protection measures platforms use to protect developers; and, most importantly,
- 3) Consumer trust. The erosion of consumer trust would gravely diminish the prospects of growth and success for my member companies.

First, allowing an end-run around software platforms increases costs on small developers. Even after the internet made it possible to distribute software electronically, generating consumer trust in software was incredibly expensive: developers spent up to 50 to 70 percent of their revenue on distribution, paying for magazine ads, marketing costs to publishers, and often buying shelf space at big retailers. This is very costly when compared to fees of 15 percent for developers making \$1 million or less on Apple's App Store and even more costly when compared to the \$99 developer fee and \$0 in commissions over 80 percent of apps--those that are free for consumers--on the app stores pay. A provision that indirectly requires platforms to allow any software or app marketplace on a device's operating system would push these overhead costs upward again. Such a provision would indirectly cause developers to create apps for an increasing set of stores to reach essentially the same customer base. Not only that, but the provision would also seriously erode consumer trust in the app ecosystem, which would be perhaps the most damaging and costly result.

This leads to the second point, that the retaliation provision could weaken cybersecurity, privacy, and safety for app companies and consumers. Consumers now depend on mobile

devices to store their most important information, and the ability to protect that data is vital. Prohibiting “retaliation,” which might include removing an app that is found to steal data or install malware, may put users’ most sensitive personal information, and therefore their safety, at risk. Today’s software ecosystem depends on strong privacy and security protections at the platform level. So, indirectly requiring platforms to allow circumvention of these protections would harm consumers, content creators, and app economy competitors alike. In particular, apps that promote pornography, assist stealing music and movies, and allow for the illicit stalking or tracking of a person are generally banned.

Some bad actors market their device monitoring apps as a way to track anyone, including adults, without their knowledge or permission. These “stalker apps” operate outside the bounds of what is allowable in app stores or mobile operating systems by accessing troves of personal data including location, messaging, and calls. Stalker apps put domestic abuse victims at further risk for harassment and harm by their abusers. In 2019, the Federal Trade Commission (FTC) acknowledged the dangers of allowing third-party apps access to bypass manufacturer restrictions in its first ever action against a purveyor of so called “stalker apps,” Rentina-X.⁸ The FTC stated in its enforcement action that “the purchasers were required to bypass mobile device manufacturer restrictions, which . . . exposed the devices to security vulnerabilities and likely invalidated manufacturer warranties.”⁹ Similarly, as the FTC has investigated and enforced against consumer protection harms on the app stores, the contemplated—and actual—remedies required the platform to act as manager of the app store.¹⁰ Consumer protection efforts encounter difficulty in these marketplaces unless a platform is able to enforce the requirements it imposes on apps, including platform-level controls that prevent videogame companies from taking advantage of children’s tendencies toward in-app purchasing if left unchecked.

Similarly, making it difficult or impossible for software platforms to prevent the installation of unapproved software would impede the ability of platform operators to ubiquitously update devices’ functionality and security. The exclusive distribution prohibition and retaliation provision could therefore make an attack like the one involving SolarWinds easier, as that breach included the installation of software onto personal devices. A key element of our member companies’ ability to reach their markets is built-in trust in the security of software they provide, which the proposal could significantly erode as unsecured apps find their way onto the devices of our members’ clients and customers.

Lastly, the retaliation provision would help IP infringers flourish. Now, as more Americans are consuming content on their smart devices, we need to empower platforms to help content creators enforce their IP rights. Unfortunately, the retaliation provision would help IP infringers circumvent the measures platforms use to stop IP infringing content by removing side loaded apps used to rip streaming content or otherwise steal protected works. IP infringing websites and apps are also notorious purveyors of malware, which is often used to steal identities and use device resources in unauthorized and illegal ways. The provision could therefore put Minnesota content creators and consumers at serious risk.

⁸ Press Release, Fed. Trade Comm’n, FTC Brings First Case Against Developers of “Stalking” Apps (Oct. 22, 2019), *available at* <https://www.ftc.gov/news-events/press-releases/2019/10/ftc-brings-first-case-against-developers-stalking-apps>.

⁹ *Id.*

¹⁰ Press Release, “Apple Inc. Will Provide Full Consumer Refunds of At Least \$32.5 Million to Settle FTC Complaint It Charged for Kids’ In-App Purchases Without Parental Consent,” Fed. Trade Comm’n (Jan. 15, 2014), *available at* <https://www.ftc.gov/news-events/press-releases/2014/01/apple-inc-will-provide-full-consumer-refunds-least-325-million>.

Our member companies and other small companies innovating in the app economy and creating jobs in Minnesota need strong platforms to provide instant access to a global market; privacy, security, and IP protections; and a trusted space for consumers to download software. We urge the Committee to reject HF 1184, which artificially lowers costs for larger competitors on the app store while raising costs for App Association members in Minnesota.

Sincerely,

A handwritten signature in black ink that reads "Morgan Reed". The signature is written in a cursive style with a large, prominent "M" and "R".

Morgan Reed
President

ACT | The App Association

CC. House Commerce Finance and Policy Committee Members