



DIGITAL PLATFORM SERVICES INQUIRY

Issues Paper on app marketplaces

SUBMISSION BY COMMERCIAL RADIO AUSTRALIA

September 2020

Commercial Radio Australia (**CRA**) is the peak industry body representing the interests of commercial radio broadcasters throughout Australia. CRA has 260 member stations, comprising 99% of the Australian commercial radio industry.

CRA welcomes this opportunity to respond to the ACCC's issues paper on app marketplaces (**Issues Paper**).

Many of the issues covered in this paper are aligned with those covered by other aspects of the ACCC Digital Platforms Inquiry, being the consequences of dominance by a small number of players in an app marketplace that media businesses cannot afford to bypass.

The vast majority of commercial radio stations now have station apps, in addition to *RadioApp*, which is the radio industry app. The ability to develop, promote and build audience for commercial radio apps is vital in maintaining the agility and viability of commercial radio into the future.

The commercial radio industry has been at the forefront of app development, creating station and industry specific audio apps, which reinforce the uniquely personal relationship between station and listener. However, the dominance of Apple and Google's app marketplaces have the potential to distort competition between Apple and Google's own apps (or apps in which they have a commercial interest) and those of competing suppliers, to the detriment of Australian consumers and app developers.

CRA's key concerns are:

- The 'gatekeeper' role of the major app marketplaces, which allows Google and Apple to select the apps that users access, with little transparency of algorithms or methodology.
- The requirement that app developers comply with non-negotiable T&Cs and technical requirements of particular app marketplaces. Apple and Google's status as unavoidable trading partners makes it unrealistic for app developers to expect to negotiate these terms or find alternative suppliers.

- A lack of transparency in relation to rankings, Siri searches, app store charts and the iPhone 'today' tab. Google and Apple provide little information as to how these lists are compiled or how app developers might improve their chances of appearing higher on such lists.
- Inadequate notice of changes to algorithms and technical requirements that place independent app developers at a disadvantage when compared with apps in which Apple or Google have a commercial interest.
- Inadequate processes and communication channels in response to content owners' requests to remove infringing apps. This leads to a proliferation of low quality and illegal apps that threaten the investments made by legitimate app developers.
- Control of app users' data by Apple and Google with no ability for app developers to obtain granular data that would help them to improve the product or understand their own app users' behaviour. Apple and Google place themselves between the user and the product, preventing app developers from communicating with their own customers.
- The promotion by Apple and Google of their own products and services – such as Apple subscriptions and Apple radio stations - to app users as part of the app marketplace function.

CRA sets out below its Recommendations followed by further detail on the key issues underlying these proposals.

1. Recommendations

Recommendation 1. The ACCC should seek more transparency from Apple and Google regarding app algorithms, including no less than 30 days' prior notice to app developers of algorithmic changes, to ensure that a wide range of apps are available to Australian consumers on a transparent and non-discriminatory basis.

Recommendation 2. CRA urges the ACCC to:

- (i) limit mandatory terms imposed by Apple and Google to those that are reasonable. To be 'reasonable', the terms must not impose a substantial financial burden upon app developers nor must they discriminate against third party app developers; and
- (ii) require Apple and Google to provide at least 30 days' notice to app developers of all changes to mandatory terms that have the potential to affect user consumption, search or ranking of apps.

Recommendation 3. The ACCC should mandate that Apple and Google must operate their app marketplaces in a non-discriminatory manner. This must include:

- (i) transparency regarding all ranking/chart/search criteria;
- (ii) consistent and non-discriminatory application of ranking/chart/search criteria to first and third party apps; and

- (iii) no less than 30 days' notice to app developers of proposed changes to ranking/chart/search criteria.

Recommendation 4. CRA urges the ACCC to require that Apple and Google provide a straightforward, user friendly take down process for right holders. In particular:

- a quick take down process where right holders provide evidence of infringement (i.e. proof of trade mark registration together with a screen shot of the infringing app's use of that trade mark);
- clear communication points within Google and Apple to assist in expediting the take down process; and
- no requirement for mediation or negotiation where clear evidence of infringement of a trade mark or copyright is provided by the right holder.

Recommendation 5. Apple and Google should be required to remove hyperlinks to copyright protected content within apps upon the request of the right holder.

Recommendation 6. CRA urges the ACCC to compel Apple and Google to:

- disclose the data that they receive from app users to app developers;
- provide non-discriminatory access to apps for users (i.e. users should be able to choose freely which sign in method they use); and
- share such data (subject to user consent) or, alternatively, compensate app developers for the use of such data by Google and Apple.

2. Apple and Google are the 'gatekeepers' of app marketplaces with the ability to select the apps that users access

Apple App and Google Play are unavoidable trading partners with huge market share

The two major app marketplaces – Google Play Store (Android) and Apple App Store (iOS) are controlled by two of the largest multinational companies in the world. Both marketplaces offer global coverage to a huge potential audience and hold 95% of the market between them.¹ Commercial radio stations cannot afford not to place their app products on these marketplaces.

Apple App store spending in the first half of 2020 reached \$32.8 billion, combining money spent on premium downloads, subscriptions and in-app purchases. Google Play generated revenue of \$17.3 billion. This gives a combined consumer spending total of \$50.1 billion worldwide across both marketplaces.² No other app marketplace comes close to matching this level of dominance or consumer spending.

¹ <https://www.afr.com/technology/app-developers-have-love-hate-relationship-with-apple-and-google-20200909-p55tzx>

² <https://sensortower.com/blog/app-revenue-and-downloads-1h-2020>

These levels of consumer spending – combined with the absence of alternative marketplaces – make Google Play and Apple App Store unavoidable trading partners for commercial radio app developers.

The power wielded by Google and Apple looks unlikely to diminish in the near future. The 2020 spending figures show a 23.4% increase on the 2019 figures over the same period.³ This trend seems unlikely to change and the increasing dominance of these marketplaces seems assured.

Opacity of algorithms

The success or otherwise of any app is largely dependent on the visibility of the app in the Google and Apple marketplaces.

Algorithms determine which apps will be presented to the individual user. Google and Apple's market place dominance make them the gatekeepers to apps, capable of choosing and prioritising the apps that users are able to see.

App developers have little understanding of the way in which these algorithms operate.

Google and Apple's respective dominant market positions mean that they are able profoundly to affect the choice of apps available to users, through the way in which they search, select and rank various apps. This is likely to determine which apps will succeed and which will fail.

In the absence of a requirement that algorithms are non-discriminatory, Google and Apple are able to afford preferential treatment to Google and Apple Apps. There is only a narrow opportunity for third parties to optimise searches, making it very difficult for third parties to optimise the algorithms for their own benefit. This contrasts with Google and Apple's ability easily to manipulate their own algorithms and gain a competitive advantage.

In September 2019, the New York Times reported that⁴:

Apple's apps have ranked first recently for at least 700 search terms in the store, according to a New York Times analysis of six years of search results compiled by Sensor Tower, an app analytics firm. Some searches produced as many as 14 Apple apps before showing results from rivals, the analysis showed. (Though competitors could pay Apple to place ads above the Apple results.)

...

The Times's analysis of App Store data — which included rankings of more than 1,800 specific apps across 13 keywords since 2013 — illustrated the influence as well as the opacity of the algorithms that underpin tech companies' platforms.

Those algorithms can help decide which apps are installed, which articles are read and which products are bought. But Apple and other tech giants like Facebook and Google will not

³ Ibid.

⁴ <https://www.nytimes.com/interactive/2019/09/09/technology/apple-app-store-competition.html>

explain in detail how such algorithms work — even when they blame the algorithm for problems.

...

Several consultants who study the App Store algorithm to help companies rank higher said Apple's consistent success in the marketplace was suspicious. Algorithms are automated systems designed to largely run on their own. But it is humans who decide what algorithms measure. And those decisions can be subjective.

...

On March 25, the company unveiled an Apple-branded credit card that can be used via the Apple Wallet app. The next day, Apple Wallet was the No. 1 result in searches for "money," "credit" and "debit." The app had not ranked for those search terms before then.

The Wall Street Journal's research also found that Apple dominated searches for 'podcast', making it difficult for competitors to enter the market:

If you searched for "podcast" in May 2018, you would have had to scroll through as many as 14 Apple apps before finding one made by another publisher.

While the Apple Podcasts app has held the No. 1 spot for "podcast" searches since June 2016, other popular podcast apps have struggled in the rankings. A competitor named Stitcher, for instance, has been stuck in the hundreds of podcast search results since June 2018.⁵

There is currently little transparency regarding the use of algorithms by Google and Apple in ranking and making visible apps on their app marketplaces. Nor is notice provided of changes before they occur, meaning independent app developers are entirely at the mercy of the algorithm. This places independent app developers at a substantial disadvantage, when compared with apps developed by Google or Apple or their related entities.

Recommendation 1:

The ACCC should seek more transparency from Apple and Google regarding app algorithms, including no less than 30 days' prior notice to app developers of algorithmic changes, to ensure that a wide range of apps are available to Australian consumers on a transparent and non-discriminatory basis.

3. Third party app developers face significant barriers to entry into a competitive app market as a result of mandatory T&Cs and technical requirements

Third party app developers have no choice but to agree to the terms and conditions imposed by Apple and Google in order to participate in the app marketplaces.

⁵ <https://www.nytimes.com/interactive/2019/09/09/technology/apple-app-store-competition.html>

Apple devices will not permit users to download apps that are not in the Apple App Store. Google is not quite as restrictive, but, nevertheless, the only alternative to Google Play for Android users is the radio station webpage.

In circumstances where Apple and Google hold 95% of the app marketplace market – and when Apple will not permit apps on its devices that are not on App Store – it is simply not an option for radio stations to bypass the Apple App Store or Google Play.

As unavoidable trading partners, Apple and Google are able unilaterally to dictate the terms of business to app developers. This has a real commercial cost for commercial radio stations.

The technical requirements imposed by Apple and Google have a significant resource impact on CRA's members, both in terms of dollars and manpower.

For example:

- In September 2019, Apple announced changes to its rules, requiring app developers to offer sign in with Apple if they were offering sign in with social media platforms such as Facebook. It took CRA's members several weeks to rebuild their apps to comply with this requirement. This absorbed a significant amount of resources.
- Apple has a 'today' tab on which it features 'universal' apps, which are compatible with iPhone and iPad. Once this feature was announced, commercial radio stations had to divert resources to re-develop their apps to meet the criteria.

No notice of these changes was given to app developers. This means that radio stations are playing 'catch-up' with Apple and Google, who have already implemented the changes to their own apps and are ready to take advantage of the new framework. For example, the Apple 'today' tab was initially largely populated by Apple apps, which were prepared for the upcoming change.

Recommendation 2:

CRA urges the ACCC to:

- (i) ***limit mandatory terms imposed by Apple and Google to those that are reasonable. To be 'reasonable', the terms must not impose a substantial financial burden upon app developers nor must they discriminate against third party app developers; and***
- (ii) ***require Apple and Google to provide at least 30 days' notice to app developers of all changes to mandatory terms that have the potential to affect user consumption, search or ranking of apps.***

4. Lack of transparency in relation to rankings, Siri searches, app store charts and the iPhone 'today' tab which may diminish competition between app providers

Google and Apple develop and sell their own first party apps, which compete with those from third party app developers, such as radio stations.

CRA is concerned that Apple and Google use charts, rankings and Siri searches to promote their own first party apps over those of competitors.

Siri

Siri is a voice operated search product owned by Apple. It allows users to search using voice commands.

Siri operates as a filter of the results to which a user is exposed. It directs users to apps using an algorithm. This has the potential to result in a distortion of competition, particularly if users are directed first to Apple owned products. Siri gives Apple the ability to self-preference its own apps over those of third party app providers.

Many of CRA's radio stations have difficulties in getting Siri to recognise their own apps. The opacity regarding the algorithm makes it difficult for stations to instruct their listeners on how to access the app.

Due to the unpredictability of Siri, stations advise listeners to access the app through their own websites. However, the market dominance of Apple and Google means that this offers only a partial solution. While so many users access their Apps through App Store or Google Play, it is extremely difficult to compete by directing users to a website.

Further, even if Siri does open the station's own app, it does so within the Apple music platform. This means that users do not see the station website and are exposed to Apple's efforts to market their own radio stations and music platform.

Rankings and Charts

The Google and Apple app rankings and charts have a direct impact on app visibility to users and hence on the success of an app. There is little transparency regarding the factors that the app marketplaces consider when determining an app's ranking.

Apple and Google disclose that the rankings are based on reviews and the number of downloads. However, no further detail is provided, for example, regarding the time frame within which these factors are measured.

This leaves third party apps at a disadvantage when compared to Apple and Google apps. A low ranking or chart place has a direct impact on the take up of the app by users.

'Today' page

The Apple App Store home page has a tab called 'today'. Every app that is featured on 'today' is classified by Apple as a 'universal' app, which works on both the iPhone and iPad. It is extremely important for app developers that their apps are featured on *today*, as it gives an app greater prominence.

The *today* page enables Apple to self preference their own apps and, potentially, to discriminate between different apps on grounds that are not transparent or fairly applied.

Third party app developers are constantly at a disadvantage when such ranking systems are implemented, as Apple is able to ensure that its own apps are already compliant upon the announcement of the new system. Third party app developers are left to catch up, and

during the time it takes them to direct resources making technological changes, Apple is likely to have gained a competitive advantage.

Recommendation 3:

The ACCC should mandate that Apple and Google must operate their app marketplaces in a non-discriminatory manner. This must include:

- (iv) transparency regarding all ranking/chart/search criteria;***
- (v) consistent and non-discriminatory application of ranking/chart/search criteria to first and third party apps; and***
- (vi) no less than 30 days' notice to app developers of proposed changes to ranking/chart/search criteria.***

5. Inadequate processes and communication channels in response to app developers' requests to remove infringing apps

It is vital that Australian media businesses have an effective and efficient means of monitoring and removing unlicensed content from app marketplaces.

Apple and Google app marketplaces cannot legitimately be considered mere 'conduits' through which content passes. Instead, they heavily monetise the available content by:

- charging for 'in app' purchases;
- selling advertising;
- collecting data;
- developing their own competing products; and
- cross promoting products and services.

Apple and Google must take responsibility for the way in which they use third party apps by adhering to an efficient mechanism for ensuring that unlicensed content is removed promptly and effectively.

CRA urges the ACCC to look closely at the mechanisms available for right holders to insist that Google and Apple remove unauthorised apps from their app marketplaces.

Currently, it is extremely difficult for right holders to insist that Apple and Google remove infringing apps from their app marketplaces. This has proved to be the case even where CRA has provided clear evidence of direct trade mark infringement of commercial radio stations' logos and names.

Radio aggregation apps have proliferated over the past few years and commercial radio stations are increasingly directing their resources towards the removal of their intellectual property from third party apps. Typically, such apps provide 'listen live' links to the stations' broadcasts or enable consumers to access stations' podcasts. This diverts traffic – and ultimately advertising revenue – away from the stations' own websites and apps.

The purpose of copyright and trade mark protection is to allow the rights holder to exclusively exploit their works and access the ancillary benefits which come with this exploitation, including revenue obtained from advertising that is displayed alongside the content. This benefit is significantly eroded by the existence of digital aggregators of content, who absorb and divert advertising revenue without having contributed to the existence of the content itself.

The commercial radio industry urges the ACCC to address this issue, by requiring digital platforms to implement a clear and user friendly take down process, whereby infringing apps will immediately be removed upon the request of a right holder who provides proof of infringement. This is particularly straight forward where a rightholder provides proof of ownership of a registered trademark that is being used without authorisation by a third party.

An efficient communication and take down process is not onerous and should form part of the overall responsibility of Apple and Google, who provide the largest marketplace in the world for the distribution of apps.

CRA submits that any mandated take down process should include penalties for breach which are enforced by the ACCC. CRA's view is that such penalties should be escalated if the platform refuses or delays in removing infringing content. This would reflect the approach taken under the additional damages regime set out in section 115 of the *Copyright Act 1968*.

Mediation or negotiation should not be required where clear evidence of infringement of a trade mark or copyright is provided by the right holder.

Recommendation 4:

CRA urges the ACCC to require that Apple and Google provide a straightforward, user friendly take down process for right holders. In particular:

- ***a quick take down process where right holders provide evidence of infringement (i.e. proof of trade mark registration together with a screen shot of the infringing app's use of that trade mark);***
- ***clear communication points within Google and Apple to assist in expediting the take down process; and***
- ***no requirement for mediation or negotiation where clear evidence of infringement of a trade mark or copyright is provided by the right holder.***

Unauthorised aggregator apps and hyperlinks

In some cases, the unauthorised apps do not feature the station's intellectual property, but instead contain links to station broadcasts.

Typically, such apps provide 'listen live' links to the stations' broadcasts. This diverts traffic – and ultimately advertising revenue - away from the stations' own websites and apps.

The courts may support the removal of hyperlinks linking to infringing or unauthorised material, primarily on the basis of authorisation of an infringement (*GS Media BV v Sanoma*

Media Netherlands BV and Others (C-160/15⁶ and Universal Music Australia Pty Ltd v Cooper (14 July 2005) - [2005] FCA 972⁷).

However, there is a potential gap in the *Copyright Act 1968* (Cth) in that, as a result of technological advances, hyperlinking to a content creator's material may be undertaken without actually infringing the copyright in the underlying content. This enables the third party to share and monetise that content without having contributed to the creation of the content in any way and without the consent, and to the detriment, of the content owner.

Accordingly, it can be difficult to require the removal of apps that contain hyperlinks to legitimate websites unless those apps contain other infringing material. This is the case even where aggregators are generating revenue by placing advertisements or paid premium content within the apps.

Apps containing unauthorised aggregated hyperlinks have the potential to divert listeners from the legitimate station apps – in which stations invest a considerable amount of money – to illegitimate third party apps over which stations have no control and no entitlement to request payment.

Unauthorised aggregator apps derive revenue on multiple fronts:

- by serving advertising to listeners in the form of display or audio advertising that is delivered 'on top' of a radio station's audio stream;
- encouraging users to 'log in' and supply their personal details. This is in turn used to sell more targeted advertising to users;
- encouraging users to purchase a more premium version of the app that contain additional features.

All of this revenue appropriated by unauthorised app aggregators comes at the expense of Australian commercial radio broadcasters.

Recommendation 5:

Apple and Google should be required to remove hyperlinks to copyright protected content within apps upon the request of the right holder.

This issue is particularly important to the commercial radio industry and CRA would be pleased to provide the ACCC with further detail if required.

⁶ In this case, hyperlinks to unpublished photographs were made available without consent of the right holder.

⁷ In this case, linking to a site containing infringing material was considered to be an 'authorisation' of copyright infringement.

6. Apple and Google control app users' data

Apple and Google control app users' data almost entirely. App developers have little ability to obtain granular data that would help them to improve the product or understand their own app users' behaviour.

Apple and Google only provide the app developer with very basic information:

- the device being used (e.g. iPhone or iPad);
- the operating system; and
- the geographical region or city.

No information regarding location, age, gender or email address is given to the app developer.

Apple and Google thereby place themselves between the user and the product, preventing app developers from communicating with their own customers. This makes it difficult for app developers to communicate with users in order to improve and refine their own products.

Apple and Google have access to vast reserves of data left by their app users. This can be combined with data from their other platforms and devices to form a near complete picture of users' digital journeys.

Data is a valuable commodity, particularly to advertisers and product developers. It is the currency on which the app marketplaces have been built, enabling:

- the creation of algorithms that direct and control the content that is visible to users;
- the collection of metrics that are presented to advertisers to attract revenue; and
- insights into user behaviour that inform the development and refinement of apps to maximise revenue and beat competing apps.

Apple and Google have recently announced changes to their systems that enable them to monopolise further the collection of data. This has been presented by them as protecting users' privacy. For example:

- in June 2020 Apple announced its intention to give customers more ability to limit location tracking, by only giving apps approximate location; and
- Google has announced its intention to give users more ability to limit apps tracking their movements by giving one time permission for location access. Android will also now automatically evoke an app's permission to access information such as location after a few months if the app has not been opened.

While the stated rationale for this change is to address privacy concerns, the effect will be to entrench Google and Apple dominance. Google and Apple will still be able to access this data and will in effect become the gatekeeper of user data generated by apps. It is likely to

be extremely difficult for local Australian radio stations to negotiate with Google and Apple to obtain access to this data.

The data will simply be concentrated in the hands of Google and Apple, who will soon be uniquely capable of tracking a users' digital journey across a myriad of devices and platforms. Independent apps with location tracking that used smartphone data are likely to become obsolete.

The concentration of data in the hands of Apple and Google will have the effect of increasing the power of Google and Apple's own ecosystems.

Apple sign in process

Apple has recently changed its sign in process so that the user data is further concentrated in Apple's hands.

An app made for Apple's iOS gives users a sign in choice of either:

- (i) using an email address; or
- (ii) using Facebook or Google.

Apple now insists that app developers wishing to use its platform must make the user's Apple ID available as a log in method.

If users instead choose to sign in using social media, a window opens and gives users the opportunity to insert a fake email address rather than their actual email. This has the effect of preventing the app developer or any other platform from seeing the user's email address.

Apple already knows the identity of the user, through its Apple ID system, so is ensuring that no other platform or developer has access to the app user's data. The data becomes concentrated in Apple's hands.

This affects Android devices, as Android developers are starting to include the Apple ID to ensure that their apps will work across a user's Android and Apple devices.

CRA urges the ACCC to look closely at any attempts by Google and Apple to limit access to data by app developers, which will result in a concentration of data in the hands of the digital giants.

Recommendation 6:

CRA urges the ACCC to compel Apple and Google to:

- ***disclose the data that they receive from app users to app developers;***
- ***provide non discriminatory access to apps for users (i.e. users should be able to choose freely which sign in method they use); and***
- ***share such data (subject to user consent) or, alternatively, compensate app developers for the use of such data by Google and Apple.***

Please contact Joan Warner, on [REDACTED] for clarification on any aspect of this submission.

Commercial Radio Australia