



MEMORANDUM

Date: January 31, 2017
To: Antitrust File
From: Deena Said, Antitrust Compliance Officer
Subject: **Section V.H of Final Judgment**

Pursuant to Section V. H of the Final Judgment, Apple's Antitrust Compliance Officer shall furnish to the United States and the Representative Plaintiff States on a quarterly basis electronic copies of any non-privileged communications with any Person containing allegations of Apple's non-compliance with any provisions of this Final Judgment or violations of the antitrust laws.

For the period October 1 to December 31, 2016 (roughly Apple's First Quarter), Apple did not receive any new allegations of Apple's non-compliance with any provisions of the Final Judgment or violations of the antitrust laws.

In previous reports, I have provided letters from Spotify alleging anti-competitive behavior on the part of Apple as well as Apple's response. I am now providing a letter sent by Apple's General Counsel to Spotify's General Counsel, explaining that Apple had discovered, once again, that Spotify was not complying with the App Store rules. Spotify's General Counsel responded to this letter on November 21, 2016.



October 28, 2016

Horacio Gutierrez
General Counsel and Secretary
Spotify USA Inc.
45 W. 18th Street
7th Floor
New York, NY 10011

Dear Horacio,

It pains me to have to write this letter. I had hoped that we had resolved the issue of Spotify's compliance with our App Store rules when Apple approved Spotify's most recent app update. On the surface that app appeared to comply with Rule 3.1.1, a rule we have discussed with your team at length. Unfortunately, as we have lately discovered, the new app does not comply with Rule 3.1.1 – it merely disguises that non-compliance in a way that makes it difficult for our reviewers to detect. Apple has gone above and beyond to explain its rules to Spotify, spending inordinate time and resources with your team to insure that you are given every opportunity to conform your app – just as every other app developer has done. We have provided multiple opportunities for you to address those issues, including expedited review of Spotify's most recent submission. Despite all of this effort it appears that Spotify is attempting, once again, to receive specialized and privileged treatment.

As you must be aware, Spotify's current app directs users to link out of the App Store and go to Spotify's website for all commercial transactions. The app presents an ad to users acquired via Apple's App Store that encourages the user (at the conclusion of their free trial period) to click on the ad and be directed to Spotify's website to pay for Spotify's premium service. As you and the entire Spotify team know, because we have explained it to you repeatedly, this violates Rule 3.1.1.

Spotify is once again using the App Store as a means to attract potential subscribers while at the same time ignoring the rules of the App Store. As I have stated before in correspondence with you, if a developer is selling digital content from within its app then it must use in-app purchase. If a developer chooses not to use in-app purchase, it is free to do so. A developer is also free to sell traditional content such as music (including via subscription) outside of the app and then offer consumers a way to access that content from within app. What a developer cannot do is seek to use its iOS app as a marketing tool to redirect consumers outside of the app to avoid in-app purchase. This fundamentally undermines the App Store business model.

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It is unfortunate that Spotify has decided to willfully and deliberately violate our rules once again. Spotify must immediately bring its app into compliance by removing this latest feature and any other feature that violates our rules. As has been the case throughout this process, we remain available to answer any questions you may have about those rules. The required changes to your app are easy to implement and can easily be explained to your team.

Apple has treated Spotify in a fair and transparent matter throughout this process. However, we cannot allow Spotify to ignore rules that apply equally to all other developers. If our rules change I will let you know at once but for now, and in the future, if Spotify wishes to continue to utilize the App Store, it must follow the rules that apply to every other app developer. Your failure to do so will result in removal from the App Store. I remain hopeful that we can finally move past this issue.

Kind Regards,

A handwritten signature in black ink, appearing to read "Bruce Sewell", is written over the typed name.

Bruce Sewell
Vice President and General Counsel
Apple Inc.



November 21, 2016

Bruce Sewell, Esq.
SVP, General Counsel and Secretary
Apple Inc.
1 Infinite Loop
Cupertino, CA 95014

Dear Bruce:

I was surprised by your October 28 letter. Considering that Apple twice approved the latest versions of our app, we thought we had moved past these issues and the sorts of threats your letter makes against us and our users. Since it appears we have not and your team has now taken the remarkable step of revoking approval for Spotify's previously approved app and, once again, threatening us with removal of our app from the App Store, I would like to set the record straight.

First, you say that Spotify's current app *"directs users to link out of the App Store and go to Spotify's website for all commercial transactions."* That is not true. Our app does not include a link to Spotify's payment flow, and Spotify is in no way violating Apple's App Store rules. Instead, Apple seems intent on preventing Spotify from communicating with its customers, even via e-mail outside the app itself. Plainly, there is no legal or contractual basis for Apple to interfere with app developers' right to directly and freely communicate with their customers, especially in a case like this where the communication takes place outside the app itself.

Second, you suggest that Spotify somehow misled Apple into approving its app. But you know that when our app was approved back in September, it was submitted at your team's express invitation and with a specific request to update specific features; it was not conditioned upon any change in the operation of the app or any other commitment on the part of Spotify. It is clear from our correspondence on this topic over the last several months that Spotify's position has been clear and completely above board, and that it has not change during the app review and approval process.

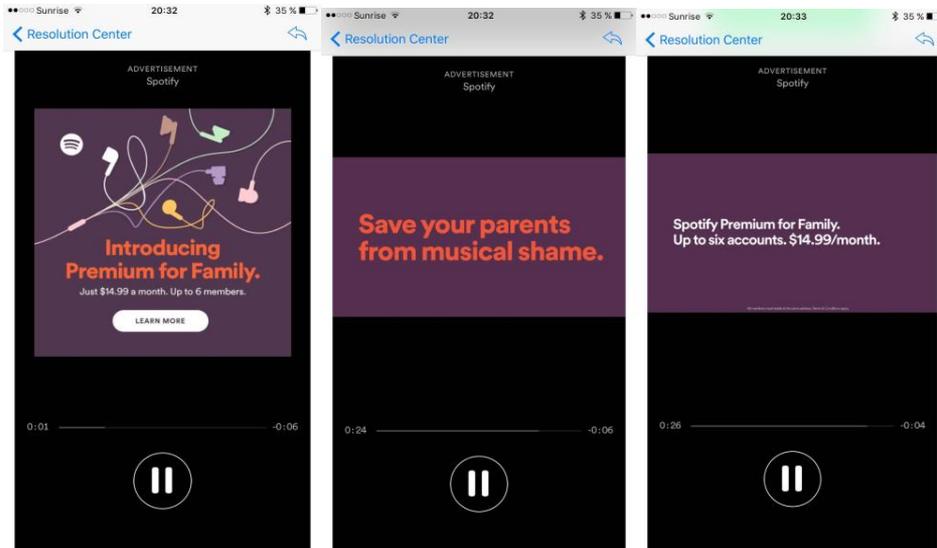
Apple's Unwarranted Complaints About Spotify's Current App

Your letter and Apple's App Review Team complain that our App violates the App Store rules in two ways: (1) because we serve an ad for Spotify's family plan that does not link to any external purchase mechanisms; and (2) because of an off-platform email to Spotify's users. Neither violates Apple's rules.



Spotify's Family Plan Ad

On November 2, your review team revoked approval of our app and informed us that an ad for Spotify's Premium for Family plan violates Rule 3.1.1. The ad shows three screens.



If a user selects the “Learn More” button, the user is directed to a “walled-off” web-page that provides *information* about Spotify’s discounted Family Plan. Spotify specially designed this walled-off web-page to comply with the App Store rules. As such, the ad does not link to Spotify’s web-based payment flow nor does it provide information about how to purchase the Family Plan. It is not possible for a user to navigate to Spotify’s web-based payment flow from the site. See <https://www.spotify.com/us/watch-now/family-learn-more/>. The ad neither “link[s] out to external mechanisms” for purchase (former Rule 11.13) nor “direct[s] customers to purchasing mechanisms other than IAP” (Rule 3.1.1). As such, we are confused as to why Apple is now claiming this ad violates the App Store Rules and would appreciate an explanation of why you believe this violates App Store Rule 3.1.1, and why you believe this rule applies to the Spotify app in the first place.¹

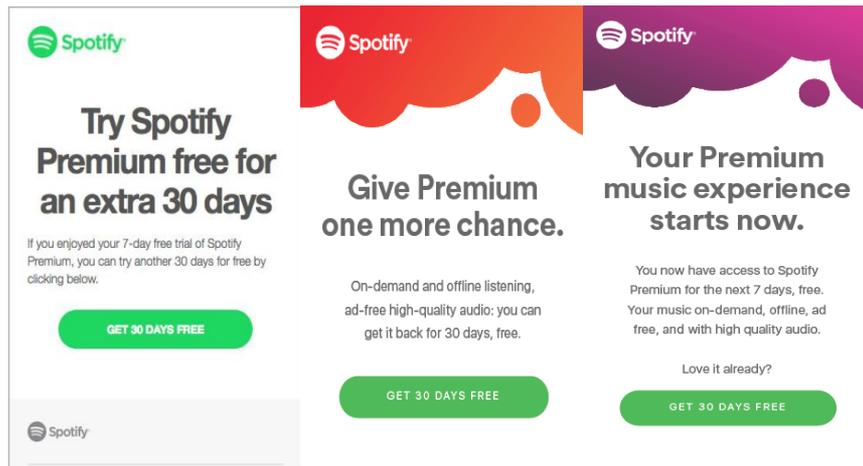
¹ Your letter and the App Review Team repeatedly refer to Rule 3.1.1, which was introduced in June 2016 after months of disagreement with Spotify about these very issues. Apple publicly stated that “the guidelines themselves haven’t changed” in that update. See <https://developer.apple.com/news/?id=06132016c>. To the extent that you interpret Rule 3.1.1 as having altered the scope of the previous rule 11.13, it does not apply to our situation because it is a unilateral change designed to prohibit behavior that was previously in compliance with Apple's old rules.



Free Trial and Off-Platform Communications with Customers

Second, your App Review Team has again taken issue with Spotify's free-trial and email communications with its customers, claiming that these communications violate Apple's App Store rules.

Examples of Spotify Emails Offering Users A Free Trial



To be clear, these communications with our customers about the 30-day trial of Premium service take place over email, entirely outside the iOS app environment. Apple and numerous third party app developers do just the same. I cannot understand how Apple would think it has the right to control or shut down those off-platform and out-of-app communications with Spotify's customers. There is no legal or legitimate business justification for such an intrusion into communications between an app developer and its customers that occur via email, completely outside the app. Indeed, in my July 18, 2016 letter to you, I wrote:

Given the absence of any in-app mechanism for subscription, it appears once again that Apple takes the position that even off-platform emails sent by Spotify to users of its free app violate Apple's App Store rules unless we agree to use Apple's IAP. Yet, there is no contractual or legal basis for such assertion, and a ban of all such off-platform communications represents an unreasonable (and crippling)



interference by Apple in the business of freemium app developers like Spotify, who depend upon such marketing efforts to build their business.

Neither you nor anyone else at Apple ever responded to these concerns. We had no reason to think this was an ongoing issue. But, most importantly, as a general matter Apple's attempt to interfere with Spotify's communication with its users is unlawful, and an unreasonable extension of the letter and spirit of Apple's own App Store Rules with serious anti-competitive effects.

Apple Has Constantly Changed Its Rules and Applied Them Inconsistently

You also claim that these *"rules ... apply equally to all other developers."* This, too, is wrong. Like prior correspondence, your letter ignores that Apple is favoring its own downstream music streaming service by imposing discriminatory and unfair terms and conditions on Spotify--instead of competing on the merits. In addition, Apple applies its IAP rules only to apps that charge for digital goods, which happen to be the apps that compete directly with Apple. But those rules are applied inconsistently. We have observed many inconsistencies in Apple's App Review Process which result in other apps being permitted to do the very things your team actively prohibits Spotify from doing.

To illustrate, Apple rejected Spotify's app for having links to its website in its Terms of Service. Deezer, however, is permitted to have links to its website through its terms and conditions where direct access to an upsell through their web-based payment flow is possible. Other apps that are either freemium or have free trials (*e.g.*, LinkedIn, Instapaper, HootSuite, etc.) are also permitted to have hyperlinks from within the terms and conditions pages to their websites. This all is well beyond what Spotify's app does, and one is hard-pressed to imagine what could drive such obviously discriminatory treatment besides an attempt to unlawfully gain competitive advantage.

Further, Apple has used ad hoc interpretations of its rules to reject Spotify's updates. For example:

- In May 2016, Apple claimed that Spotify could not communicate in-app with its users about discounts and alternative payment systems even though Spotify never presented the user with a "link" or "buy button."
- In June, Apple claimed that both the "email me offer" for a free trial button and Spotify's account registration feature violated the "spirit" of the app store rules and unwritten "business model rules," even though there is no actual rule against it. Spotify removed that button in response to Apple's complaints, though it was clear that the button did not violate Apple's rules at the time.



- Then, while Spotify’s app was still in the review process, in an obvious effort to conform its rules with its business goals, Apple unilaterally replaced Rule 11.13 with new App Store Review Guidelines Rule 3.1.1 prohibiting not just links to external mechanisms but also “calls to action that direct customers to purchasing mechanisms other than IAP.”
- Later that month, Apple claimed that Spotify could not communicate with its own customers, inside its own app, about the existence of its own Premium service—even if there was no link, button, or mention of any offer of any kind.
- Shortly after our meeting in early July, Apple objected to an *out-of-app* welcome email to free users, claiming that this email violated the App Store Rules because it mentioned the Premium service.
- Just a few days later, Apple claimed that the combination of the 7-day trial period and out-of-app emails about that trial period violated the rules—even though no financial information was exchanged, and there was no in-app mechanism by which the user could upgrade to the Premium service outside of the app.
- Now again, your App Review Team invokes the same logic for reversing its prior approval of our update.

Throughout this period, we have tried to accommodate your shifting IAP-related demands targeted at Spotify, but it is difficult for us to understand and predict how you are interpreting your rules given how your position continues to change over time.

Spotify does not seek “specialized and privileged treatment;” to the contrary, we are trying to avoid specialized discrimination. Apple has invoked its discretion over the App Store review process to creatively interpret the App Store’s Rules in a way that prevents Spotify from operating as other apps can. All developers have a clear and unambiguous legal right to directly and freely communicate with *their customers*, and the playing field must be level. Apple’s attempts to control this aspect of Spotify’s relationship with its customers is particularly troubling given that Apple and Spotify compete directly in the digital music market.

I remain hopeful that we can put these issues behind us. Apple has built an important platform, and we understand that Apple wants to manage and run it. But like so many other developers, we have invested enormous resources to deliver an innovative product and



great user experience to consumers, and we cannot allow Apple use its control over the App Store to harm Spotify's relationships with our customers. As always, we are open and willing to work with Apple on a reasonable solution. But we cannot operate under a cloud of constant threats of removal of our app from the App Store without justification.

Kind Regards,

A handwritten signature in black ink, appearing to be "HG", written over a faint, circular watermark or background.

Horacio Gutierrez
General Counsel

Spotify USA Inc. 45 W. 18th Street 7th Floor New York, NY 10011 USA