



October 7, 2024

Sharon Reilly, Executive Director
California Law Revision Commission
925 L Street, Suite 275
Sacramento, CA 95814

Dear Executive Director Reilly and Members of the California Law Revision Commission:

I write today out of alarm by your recent *Expert Report: Artificial Intelligence*¹ and the A.I. working group's proposal that the Commission consider that California adopt rules based on Europe's Digital Markets Act (DMA).

While the working group argues that "the digital gatekeepers in Europe are already complying with" the DMA, it is vital for the Commission to understand just how harmful the DMA has been to European consumers.

The Digital Markets Act has created a second-class digital society in Europe, and would do the same for California residents. The DMA's approach should be firmly rejected, not mimicked.

The CLRC should prioritize consumer welfare, not competitor welfare

The *Expert Report* proposes a digital regulator to implement DMA-style policies, including:

- (1) rival app stores allowed access to mobile OS;
- (2) mobile OS must provide the same functionality for third-party apps as its own;
- (3) reader apps must be available for all developers;
- (4) developers may link out and distribute content on the web;
- (5) consumers may port their data out of a platform;
- (6) realtime continuous data feed of their own activities is available to end users and business users; and
- (7) ranking and ordering results must be fair and unbiased.

¹ See <http://www.clrc.ca.gov/pub/2024/MM24-47.pdf>

A closer look shows how unworkable and harmful these provisions are.

For example, following years of lobbying by gaming companies, the DMA now requires mobile operating systems to allow third-party app stores. Dutch government agencies have determined that such third-party applications pose an unacceptable cybersecurity risk². Policy should not force this choice on consumers - they should be able to determine for themselves to opt for open or closed systems.

In addition, requiring “the same functionality” to third-party apps has the perverse effect of fewer innovations coming to market and will deny California consumer access to the latest developments - ironically, many of them from leading California companies.

Lastly, requiring results to be “fair and unbiased” creates an impossibly vague standard. Search engines optimize for *relevance* not fairness or bias. A search engine determines relevance based on a variety of factors including search history and geographic location. A digital regulator forcing search engines to optimize for anything else necessarily means a less relevant, lower quality experience for consumers.

Under the DMA, a Google search is forbidden from returning clickable links to Google Maps. This is to prevent Google from “biasing” search results towards its Maps product, but the end result is a worse user experience. In fact, European internet users find this so frustrating that they have developed browser plugins to circumvent the DMA and re-enable clickable Maps links³.

Similarly, the DMA now limits large search engines from allowing direct booking of hotels. The goal is to benefit mid-sized hotel search platforms. The early evidence from Europe is that DMA-style mandates for “fair and unbiased” search has hurt hotels and consumers alike: “hotels in DMA regions have experienced a 30% drop in clicks and a 36% decrease in direct bookings compared to non-DMA markets⁴.”

Experience with the DMA demonstrates record consumer harm

European tech regulation, including the DMA, has slowed or prevented consumers from accessing innovative products there. Threads, a social network that is designed to be less vitriolic than X, did not launch initially in Europe “because of upcoming regulatory uncertainty.⁵” Instead of questioning whether denying Europeans a more hospitable

² See

<https://www.reuters.com/technology/number-agencies-have-concerns-about-sideloaded-apple-apps-2024-03-01/>

³ See <https://chromewebstore.google.com/detail/google-search-maps-button/>

⁴ See

https://ppc.land/the-dmas-impact-on-hotel-distribution-reduced-visibility-and-increased-reliance-on-intermediaries-pen_spark/

⁵ See <https://www.politico.eu/article/why-europeans-dont-have-threads-yet-twitter-meta/>

social network was a good idea, a European politician stated at the time “The fact that Threads is still not available for EU citizens shows that EU regulation works.⁶”

European tech regulation has also led Meta to announce it will not be releasing future versions of its powerful open source AI model Llama. This is particularly chilling for innovation because Llama is freely available. European developers may not build applications on it, and consumers cannot benefit from applications that never get developed.

For its part, Apple is not releasing its innovative and privacy-optimized suite of Apple Intelligence products to market thanks to uncertainty over the DMA's interoperability rules. There is no timeline for a European release of these advanced features. Californians, in contrast, will be able to access them this fall.

European style regulatory ambiguity would only harm California consumers. The Commission should reject it.

Europe is a tech failure, California should not follow its lead

Despite decades of effort, European policy has consistently failed to generate a thriving technology sector. Silicon Valley - a distinctly Californian phenomenon - arose through a light touch regulatory environment that allowed investment and innovation to flourish, and for California consumers to benefit from world-leading companies bringing world-changing products to market.

Importing failed European policies to California would set California's technology sector back, leaving consumers much worse off.

Sincerely,

Todd O'Boyle
Senior Director of Technology Policy

⁶ See <https://www.theverge.com/23789754/threads-meta-twitter-eu-dma-digital-markets>