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The App Store Wars: An “Epic” Loss for Google Takes Shape

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Although Google fought tooth and nail against it, a win for an underdog video game developer means the Google Play Store could likely soon look a lot different for Android users. Google met its match in December when Epic Games, the creator of the hit video game Fortnite, won on all counts in its antitrust suit against the tech titan. However, the fight is far from over: the court is currently determining what exactly the Google Play Store will look like in the future and heard arguments last week over Epic’s proposed injunction. As Judge Donato of the Northern District of California put it during the hearing, despite Google’s argument that “there’s a terrifying world of chaos and energy that’s just around the corner if there’s competition in the app store market,” the judge “just [doesn’t] buy it.” On the other hand, he said Epic’s proposed injunction – which would bar Google from enforcing “contractual provisions, guidelines or policies, or otherwise imposing technical restrictions, usage frictions, financial terms or in-kind benefits that … restrict, prohibit, impede, disincentivize or deter the distribution of Android apps through an Android app distribution channel other than the Google Play Store” – was “too open-ended.” Proceedings continue in August, and the parties will have opportunity for closing arguments. In the meantime, we revisit the implications and the stakes of the case, beyond just Google and its Play Store.

The Epic v. Google Lawsuit

Following an announcement in 2020 from Epic Games that it was going to offer Fortnite for download on its own platform, Google promptly removed Fortnite from its Play Store. Epic Games responded with an antitrust lawsuit, challenging Google’s “walled garden” application distribution platform – the Google Play Store. Epic claimed that the Play Store constituted an illegal monopoly, and that the removal of Fortnite from Google’s virtual shelves amounted to unfair competition.

In December of last year, the jury agreed with Epic, finding Google's requirement that all third-party apps use Google's in-app billing system, a massive money-maker for Google, violated antitrust laws. Mandating the use of Google's in-app billing system allowed Google to keep a percentage of every purchase, depriving third-party app developers of substantial revenue.

Epic sought injunctive relief, but not monetary damages, requesting a ruling that would force Google to tear down the walls around its garden. Epic has since listed, in a 16-page proposed injunction, a hefty list of demands for Google, to which Google responded, "Epic's demands would harm the privacy, security, and overall experience of consumers, developers, and device manufacturers."

Now, Google faces the domino effects of the loss to Epic. The attorneys general of all 50 states, in the midst of the *Epic v. Google* litigation, also filed suit against Google for its allegedly anticompetitive Play Store practices, and Google ultimately settled with the states for $700 million in December following the *Epic* verdict.

Apple's Escape

Interestingly, Epic filed a separate antitrust suit against Apple on the same day it filed its lawsuit against Google. While Epic's suit against Apple was in the same court, a different judge presided over the trial.

Apple removed Fortnite from its App Store at the same time Google did so. As with Google, Epic accused Apple of the anticompetitive and monopolistic practices. However, in *Apple*, after a bench trial, Judge Yvonne Gonzalez Rogers dismissed all of Epic's federal antitrust claims, finding for Epic on only its California state competition claim and issuing an injunction that forced Apple to allow third-party app developers to link to their own storefronts within their apps on Apple devices. The decision was affirmed on appeal.

But why the differing results? A few factors might help explain:

1. Inter-developer payments. Epic presented evidence that Google paid app developers to distribute their apps on the Play Store rather than through developers' independent platforms (where they could avoid Google's hefty in-app billing system fees), to persuade app developers away from independent distribution. No evidence of comparable payments was offered in *Apple*.

2. Spoliation. Google faced spoliation issues, while Apple did not. Epic developed evidence that Google was deleting internal communications and messages between its employees, which Epic seized on at trial, and the judge called both “egregious” and “disturbing.”
3. Market Definition. In *Apple*, the court settled on a market definition that was much broader than in Google, covering not just the Apple App Store but also other comparable mobile application stores that provided games. The relevant market in Google was narrowly defined as the Android app distribution market and Android in-app billing services for digital goods and services transactions.

With closing arguments coming up in *Google* and the appeal pending in *Apple*, at least one thing is clear: the App Store Wars are far from over.

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