

The Epic Battle for the Soul of Antitrust

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Antitrust is back in the United States, and Big Tech might soon feel it. After decades of decay and deterioration, concerns about monopolization initially picked up steam in academia. Congress followed and initiated a comprehensive investigation into the abuse of market power in the digital economy. In July, the House Subcommittee Antitrust, Commercial, and Administrative Law under the leadership of David Cicilline summoned the CEOs of Amazon, Apple, Alphabet, and Facebook to a hearing. While the hearing was virtual, the reputational damage of cringeworthy responses to well-researched questions was real. With Epic Games, Inc.'s (Epic) complaint against the app store operators Apple and Google, the core of the present antitrust debate has squarely reached the federal courts in the U.S.: what are the legal limits of Big Tech's monopoly power?

Most technology platform markets are highly concentrated. And [app stores](#) are no exception. In the U.S. and Europe, Google and Apple control the supply of operating systems and, with it, the app stores. Neither app developers, nor consumers have a practical and feasible alternative to Google and Apple. The market concentration does not come as a surprise. Indirect network effects explain the condition: like networks, the app stores become more valuable with increasing reach and participation. To be precise, the value of the platform for app developers increases with its consumer reach and the value of the platform to consumers increases with the number and diversity of apps available for download. While this phenomenon creates significant welfare for society, it also translates into enormous market entry barriers for potential competitors. To compete effectively, the nascent competitors would need to provide a similar ecosystem to that of the incumbents from the get-go – with app developers to attract consumers and consumers to attract app developers. More than 20 years ago, Hal Varian (now Google's Chief Economist) and Carl Shapiro already identified such an endeavor as "[virtually impossible](#)."

As to be expected, Google and Apple leverage their market power to extract monopoly rents and expand their monopolies into the app markets. This abuse of market power provides the basis for Epic's recent complaints against [Google](#) and [Apple](#), both filed in the Northern District of California. Epic is the developer behind the popular online game [Fortnite](#). The company distributes its gaming app via Google's Play Store and Apple's App Store.

Like [96% of the apps in the Google Play Store and 92% in Apples App Store](#), Fortnite is offered free of monetary charges. Instead, users can exchange real money into V-Bucks and use the virtual currency within the game to [buy perks for their characters](#), ranging from weapons to special skills. These in-app purchases bring in billions per year. Though, Google and Apple take a hefty cut: they charge developers like Epic 30 % on all payments that are processed through their platforms. There are some exceptions to that 30 % commission fee. For example,

after one year of a subscription, the platform providers [reduce their cut to 15 %](#), incentivizing app developers to cultivate loyal customers.

Another exemption: so-called “[reader apps](#),” which includes magazines, newspapers, and some streaming services. Developers of certain apps “may allow a user [to access previously purchased content or content subscriptions](#).” In effect, this exemption enables app developers to market their services directly to customers without taking a cut in revenue.

Yet, there are limits to building around the fee. Take [Apple’s multiplatform policy](#):

“Apps that operate across multiple platforms may allow users to access content, subscriptions, or features they have acquired in your app on other platforms or your web site, including consumable items in multiplatform games, provided those items are also available as in-app purchases within the app. You must not directly or indirectly target iOS users to use a purchasing method other than in-app purchase, and your general communications about other purchasing methods must not discourage use of in-app purchase.”

In “[a calculated decision to breach its allegedly illegal agreements with Apple](#),” Epic enabled customers with its latest update [in many countries to choose](#) whether they wanted to pay for V-Bucks through the Apple App Store or via “Epic direct payment.” The difference for users: 20 % in price. The difference for Epic: 30 % in revenue. Epic’s move fundamentally questioned a main pillar of the app stores’ business model, taking a cut from in-app purchases. And the empires struck back immediately. [Apple](#) and [Google](#) both banned the Fortnite app from their platforms. While Android users can still update to the latest episode of the game via the [Samsung Galaxy Store and Fortnite’s own app store](#), Apple users are entirely cut off. Also, Apple’s response was not limited to removing Fortnite from its app store. It targeted Epic’s game development tool [Unreal Engine](#) and [threatened to shut it down as well](#).

Epic seemed prepared for all the fallout and, immediately after the removal of its apps, filed lawsuits against [Google](#) and [Apple](#), accompanied by a [large scale PR campaign](#). The complaints for injunctive relief largely rest on alleged violations of the [Sherman Act](#). In the [complaint against Apple](#), which has already moved further along in court and will likely prove more seminal in the larger context, Epic alleges six federal antitrust violations: (1) “Unlawful Monopoly Maintenance in the iOS App Distribution Market;” (2) “Denial of Essential Facility in the iOS App Distribution Market;” (3) “Unreasonable Restraints of Trade in the iOS App Distribution Market;” (4) “Unlawful Monopoly Maintenance in the iOS In-App Payment Processing Market;” (5) “Unreasonable Restraints of Trade in the iOS In-App Payment Processing Market;” (6) “Tying the App Store in the iOS App Distribution Market to In-App Purchase in the iOS In-App Payment Processing Market.” The essential facility doctrine (second count) refers to a remedy which requires owners of critical infrastructure (or other preconditions to compete in the marketplace) to grant competitor access to its facilities. Aside from federal antitrust

law, Epic also invokes California antitrust law and California unfair competition law. Seeking to avoid further damage, Epic filed a temporary restraining order.

In its [response](#), Apple, unsurprisingly denied all allegations of wrongdoing. Moreover, it vehemently rejects Epic's assertions of monopoly power: "Apple Manifestly Lacks Monopoly Power." Relying on earlier court decisions and secondary sources that are heavily influenced by the anti-enforcement Chicago School of antitrust, Apple rebuffs the existence of access rights based on the essential facilities doctrine. According to Apple's argumentation, the doctrine has rightly been all but abandoned by the courts and the conditions for its remainder are clearly not fulfilled. Directed at the temporary restraining order specifically, Apple denies any irreparable harm that could warrant such an order.

The District Court partially followed Epic's arguments in its [decision on the motion for a temporary restraining order](#). It saw merit in Epic's fear of irreparable damages to Unreal Engine following its potential removal from the App Store. As it relates to Epic's core concern, the terms and conditions of the app store, the court refrained from forcing Apple to re-list Fortnite despite its independent payment option. While the court did see "serious questions" raised by Apple's conduct, it saw neither any urgency nor any reason why Epic should get free access to the App Store:

"Epic Games moves this Court to allow it to access Apple's platform for free while it makes money on each purchase made on the same platform. While the Court anticipates experts will opine that Apple's 30 percent take is anti-competitive, the Court doubts that an expert would suggest a zero percent alternative. Not even Epic Games gives away its products for free."

After decades of corporatist assaults on antitrust enforcement, all of this is remarkable. A court sees "serious questions" about the legality of unilateral conduct, among others based on the price charged by Apple and its measures to enable the extraction of monopoly rents. And, the essential facilities doctrine made a comeback – not in the court's decision, but in the implicit reasoning necessary to reach the court's conclusions.

Yet, overshadowing the dispute over the terms and conditions of app stores looms something much larger: the epic battle over the soul of antitrust in the United States. Does dynamic innovation indeed miraculously overcome monopolies entrenched by network effects? Should tech monopolists be allowed to "[levy what are in fact taxes](#)" on large parts of the economy, to quote Thurman Arnold, the legendary antitrust enforcer under FDR? Is it ideal to concentrate all incentives for dynamic innovation within a short period of competition for the market? In today's digital economy, fierce antitrust enforcement is needed more than ever. Don't take it from me, take it from [17 leading antitrust authorities](#) that have compiled 21 reports over the last few years with exactly that conclusion. Adding the historic concentration of power, [rising inequality](#), and [increasing mark-ups](#) into the equation further strengthens the case. Epic v. Apple & Google gives reason to hope that the tide is slowly turning – even in the courts.

