Article Title: A Jury Will Decide If Google's App Store Is an Unjust Monopoly

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Article Content:

When *Fortnite* video game creator [Epic Games sued Google in 2020](https://12ft.io/proxy?q=https%3A%2F%2Fwww.wired.com%2Fstory%2Fepic-games-sues-apple-fortnite-app-store%2F) over the monopoly held by its official Google Play Android app store, its allegations that the company was unfairly restricting competition immediately resonated with developer Hans-Christoph Steiner. Like [Microsoft](https://12ft.io/proxy?q=https%3A%2F%2Flearn.microsoft.com%2Fen-us%2Fwindows%2Fandroid%2Fwsa%2F), [Amazon](https://12ft.io/proxy?q=https%3A%2F%2Fwww.amazon.com%2Fgp%2Fmas%2Fget%2Famazonapp), [Samsung](https://12ft.io/proxy?q=https%3A%2F%2Fwww.samsung.com%2Fus%2Fapps%2Fgalaxy-store%2F), and a few other tech companies, he oversees a rival app marketplace that has struggled to win users. If Epic beats Google at the trial scheduled to begin tomorrow in San Francisco, Google may be forced to make it easier for people to source apps from Steiner’s store and other alternatives.

Google Play accounts for well over 90 percent of all downloads onto Android phones in the US, according [to state prosecutors](https://12ft.io/proxy?q=https%3A%2F%2Fstorage.courtlistener.com%2Frecap%2Fgov.uscourts.cand.381462%2Fgov.uscourts.cand.381462.188.0.pdf). Epic’s accusations already have encouraged a few competition regulators, like in South Korea, to order Google to loosen some of its control over app distribution in their countries. Steiner, who is technical lead for [F-Droid](https://12ft.io/proxy?q=https%3A%2F%2Ff-droid.org%2F), which offers thousands of open source apps, including ad blockers banned under the Google Play store’s [strict content rules](https://12ft.io/proxy?q=https%3A%2F%2Fsupport.google.com%2Fgoogleplay%2Fandroid-developer%2Fanswer%2F9888379%3Fhl%3Den%23zippy%3D%252Cexamples-of-common-violations), has been urging authorities contacting him from South Africa, the [UK](https://12ft.io/proxy?q=https%3A%2F%2Fassets.publishing.service.gov.uk%2Fgovernment%2Fuploads%2Fsystem%2Fuploads%2Fattachment_data%2Ffile%2F1138104%2FMobile_Ecosystems_Final_Report_amended_2.pdf), [EU](https://12ft.io/proxy?q=https%3A%2F%2Fwww.reuters.com%2Ftechnology%2Fgoogle-appeal-android-fine-europes-top-court-2022-10-27%2F), US, and just a month ago, [Japan](https://12ft.io/proxy?q=https%3A%2F%2Fasia.nikkei.com%2FBusiness%2FTechnology%2FApple-and-Google-warned-on-app-stores-by-Japan-antitrust-watchdog), to follow suit. But Google’s tight grip on what apps users can download and how much they pay for them has persisted in much of the world.

The 10 jurors to be selected in San Francisco on Thursday could force substantial changes in how Google controls apps. Their verdict is expected around mid-December. US district judge James Donato, who is overseeing the trial, would later determine any remedies. “It seems to be a pretty broad phenomenon these days,” Steiner says of the pressure on Google Play. “That’s quite exciting.” The trial starting this week is Google’s second courtroom battle against charges that it blocks competition, joining [one underway in Washington, DC](https://12ft.io/proxy?q=https%3A%2F%2Fwww.wired.com%2Fstory%2Fis-googles-search-engine-smart-or-sneaky-a-trial-court-judge-will-decide%2F), that will decide whether Google has unlawfully maintained its monopoly over web search.

Judge Donato—following a last-minute settlement in a related Play store lawsuit—has given Epic and Google a final chance today to decide whether to face a jury or let him alone decide the California case.

Either way, Steiner and experts in antitrust law have reasons to doubt the trial will end in Google being forced to better support rivals. Epic in 2021 [mostly lost](https://12ft.io/proxy?q=https%3A%2F%2Fwww.wired.com%2Fstory%2Fepic-leaves-big-crack-in-apple-walled-garden%2F) a nearly identical case against Apple over its own app store monopoly for iOS devices, and it is waiting to find out whether the US Supreme Court will hear an appeal. In countries such as [South Korea](https://12ft.io/proxy?q=https%3A%2F%2Fwww.kcc.go.kr%2Fuser.do%3Fmode%3Dview%26page%3DE04010000%26dc%3DE04010000%26boardId%3D1058%26cp%3D1%26boardSeq%3D57618) and [India](https://12ft.io/proxy?q=https%3A%2F%2Fwww.reuters.com%2Fworld%2Findia%2Findia-antitrust-body-wants-inquiry-into-google-in-app-payments-fees-2023-05-12%2F) where antitrust regulators ordered Google to open the door to more competition, the company has through appeals and new terms found ways to make it no easier for users to download apps outside Play and pay any less for them.

Even if the San Francisco jurors find Google’s behavior to be unlawful, the possibility that Google could find a workaround rather than earnestly comply troubles Steiner. “We know they can make it such a second-class experience to use anything beside Google Play that it’s really not worth it to use alternatives,” he says.

Google in court filings argues that the restrictions Epic’s lawsuit seeks to undo help make Android devices appealing when compared to iPhones, in terms of [prices, features, and cybersecurity](https://12ft.io/proxy?q=https%3A%2F%2Fblog.google%2Foutreach-initiatives%2Fpublic-policy%2Flawsuit-ignores-choice-android-and-google-play%2F). Microsoft and Amazon decline to comment. Samsung did not respond to a request for comment.

Grudge Match

Epic’s lawsuit dates back to *Fortnite*[getting booted from the Play store](https://12ft.io/proxy?q=https%3A%2F%2Fwww.wired.com%2Fstory%2Fepic-games-sues-apple-fortnite-app-store%2F) after a stunt in which the company tried to use its own billing tool instead of Google’s to sell in-app purchases. *Fortnite,* which is now available for download through Samsung’s Galaxy Store and [Epic’s website](https://12ft.io/proxy?q=https%3A%2F%2Fwww.fortnite.com%2Fmobile%2Fandroid)**,** has historically been a powerful revenue generator, but using Google’s payment tool required Epic to hand over up to 30 percent of sales to the search company. Epic views the mandate as unfair and unlawful under statutes that bar unreasonable restraints on trade.

Google allegedly restricts device makers and wireless carriers that want to sell phones and tablets with the official version of its Android operating system from promoting app stores beside Play. It bars developers from offering competing app stores through Play, and has paid over $1 billion to at least 24 top developers, [such as Activision Blizzard and Riot Games](https://12ft.io/proxy?q=https%3A%2F%2Fwww.reuters.com%2Ftechnology%2Fgoogle-agreed-pay-360-mln-activision-stop-competition-epic-games-alleges-2022-11-17%2F), to keep them loyal to Play through a program it codenamed Project Hug, Epic alleges.

“These agreements serve no legitimate or pro-competitive purpose that could justify their anti-competitive effects,” Epic writes in court papers, claiming that they shield Google from meaningful competition. They say the company’s practices have raised app prices, reduced innovation, and led to worse customer service, by helping Google Play suck in apps and consumers without having to compete. Epic will get to inform jurors that Google deleted evidence such as internal chats about the restrictive agreements with device makers.

When Android users try to circumvent Play by installing apps through other means, their devices sometimes warn that the “file might be harmful” and require settings to be changed to allow “unknown” apps. Epic calls these “arbitrary technical restraints,” designed to deter users from bypassing Play. In Google’s view, the warnings strike a balance between openness and protecting users.

Google says Epic’s accusations overall will fail a key test under antitrust law. “Plaintiffs may wish that Google’s business model cost them less, but they cannot prove that a different business model would have generated the same enormous benefits for users and developers as a whole,” the search giant’s attorneys say in court pleadings.

It is countersuing Epic for not using the billing system required for Google Play. Epic contends the contract obligating that was unlawful, making it unenforceable.

Google has added new features that help consumers sidestep the Play store, but the experience remains subpar, according to the lawsuit and F-Droid’s Steiner. Two years ago, Google enabled automatic updates to apps downloaded from outside Play, but Steiner says the mechanism is still buggy. “Strategically, it’s in their interest for it to exist but not work well,” he says.

Google has also added new restrictions on apps downloaded from outside of Play. For example, mechanisms that limit what apps can do, such as barring a device from automatically joining certain Wi-Fi networks, were moved from inside Play to be a general feature of the Android operating system, allowing them to control non-Play apps too, Steiner says. Recently, when Google’s malware scanner [automatically uninstalled a texting app](https://12ft.io/proxy?q=https%3A%2F%2Fwww.reddit.com%2Fr%2Fkde%2Fcomments%2F175upzi%2Fhas_play_protect_removed_kde_connect_from_your%2F) distributed by F-Droid, Steiner and users received scant details about the supposed issue. He says users should have the choice to decide who protects users best, noting that F-Droid conducts manual and automated review of every app’s code. “Let us compete on trustworthiness,” Steiner says.

Jurors will ultimately hear up to 90 hours of testimony, including from Google CEO Sundar Pichai and Epic CEO Tim Sweeney, before ruling on whether Google broke federal and California antitrust laws. Judge Donato is expected to separately decide on allegations under California’s unfair competition law.

In choosing to let a jury largely decide its fate, Google may be betting on customer affinity for its brand, says Herbert Hovenkamp, a University of Pennsylvania antitrust scholar who has [supported](https://12ft.io/proxy?q=http%3A%2F%2Fwww.fosspatents.com%2F2022%2F01%2Fthe-dean-of-american-antitrust-law.html) Epic’s case against Apple. “If there are soft questions about intent, you are more likely to want to go to a jury,” he says. Google did not respond to a request for comment on its choice.

Epic Dispute

The tech giant has made concessions in response to US lawsuits similar to Epic's. Last year, [Google agreed to settle](https://12ft.io/proxy?q=https%3A%2F%2Fblog.google%2Foutreach-initiatives%2Fpublic-policy%2Fgoogle-and-us-developers-find-agreement-over-google-play-store%2F) for a total of $90 million to as many as 48,000 app developers without any new easing of rules. In September, it agreed to unspecified payment and policy changes [to settle](https://12ft.io/proxy?q=https%3A%2F%2Fag.ny.gov%2Fpress-release%2F2023%2Fattorney-general-james-releases-statement-settlement-principle-google) with a group of consumers as well as attorneys general for all 50 US states, the District of Columbia, and Puerto Rico. Further details are expected later this month.

[Match Group](https://12ft.io/proxy?q=https%3A%2F%2Fwww.wired.com%2Fstory%2Fwhen-the-boss-of-all-dating-apps-met-the-pandemic%2F), whose portfolio of dating apps includes Tinder, Match.com, OkCupid, Hinge, and Plenty of Fish, settled its own suit against Google’s app policies yesterday. Google agreed to forgo commissions it alleged were owed from sales made inside Android apps, and Match will join [a Play store trial program](https://12ft.io/proxy?q=https%3A%2F%2Fsupport.google.com%2Fgoogleplay%2Fandroid-developer%2Fanswer%2F13821247) called user-choice billing that allows alternative billing systems while still funneling commissions to Google. But an unspecified “value exchange” between the companies will offset the increased costs Match faces over the next three years from having to offer Google’s billing tool, it [told shareholders](https://12ft.io/proxy?q=https%3A%2F%2Fs22.q4cdn.com%2F279430125%2Ffiles%2Fdoc_financials%2F2023%2Fq3%2FEarnings-Letter-Q3-2023-vF.pdf).

All those settlements are pending Judge Donato’s approval. Epic’s Sweeney [has said](https://12ft.io/proxy?q=https%3A%2F%2Ftwitter.com%2FTimSweeneyEpic%2Fstatus%2F1699291375160656010) he won’t accept a payoff and what he views as half-fixes. “We reject Google's so-called ‘user choice billing,’ in which Google controls, surveils, and taxes transactions between users and developers,” Sweeney posted yesterday on X, formerly known as Twitter.

In the *Epic v. Apple* case two years ago, US district judge Yvonne Gonzalez Rogers found that the iPhone maker was justified in forcing developers to use its billing system and share a portion of sales because it needed to recoup its investment in developing its App Store. Epic’s lone victory came from the judge ordering Apple to start allowing apps to direct users nationwide to pay for purchases outside the app itself, like on their websites. The Ninth Circuit Court of Appeals upheld the decision, but Apple has not made that change as it awaits the Supreme Court’s decision early next year about whether to review the case. Hovenkamp says the court’s conservative majority could find reason to restrict the policy change to California users.

Epic’s Google case could fare better because the company’s control over the Android operating system is more limited than Apple’s over iOS, Hovenkamp says. Because Google doesn’t fully ban alternative app stores or downloads of apps from outside of Play, making the argument that the restrictions that it does have in place are necessary to preserve the integrity of Android phones may be a more difficult sell than it was for Apple with its completely closed-off ecosystem. Google closed that loophole when it released its newer operating system, ChromeOS, for laptops, which bars installation of apps from outside of Play.

Android app store competitors are excited about the Epic trial because so many regulatory efforts have yet to deliver noticeable improvements. In some countries where it has faced regulatory pressure about Play’s rules, such as [the UK](https://12ft.io/proxy?q=https%3A%2F%2Fwww.gov.uk%2Fcma-cases%2Finvestigation-into-suspected-anti-competitive-conduct-by-google) and [South Korea](https://12ft.io/proxy?q=https%3A%2F%2Fdevelopers-kr.googleblog.com%2F2021%2F11%2Fenabling-alternative-billing-in-korea-en.html), Google is allowing usage of alternative billing systems and cutting its commission fees by 3 or 4 percentage points when users pay through alternatives. But for developers, fees owed to alternative billing providers offset the lowered payments to Google.

Luis Hernández, CEO of the Android app store [Uptodown](https://12ft.io/proxy?q=https%3A%2F%2Fen.uptodown.com%2F), says the Epic lawsuit could restore a consumer’s right to choose where to download software. “This is a right that has existed since the birth of computing, protecting innovation on the part of developers, as well as users' own ability to decide,” Hernández says.

In the EU, provisions of the [Digital Markets Act](https://12ft.io/proxy?q=https%3A%2F%2Fwww.wired.com%2Fstory%2Feurope-dma-prepares-to-rewrite-the-rules-of-the-internet%2F) becoming enforceable next year prohibit Google and also Apple from forcing their own billing systems on apps or preventing users from taking advantage of alternative app stores. But the companies can leave certain restrictions in place to protect user security. Steiner worries that could give Google enough wiggle room to find ways to keep consumer freedoms locked down.

Rupprecht Podszun, a University of Düsseldorf competition law professor, is unequivocal in saying that regulators won’t let that happen. “This is a crystal-clear obligation,” he says. With legislative changes in the US [stalled](https://12ft.io/proxy?q=https%3A%2F%2Fwww.wired.com%2Fstory%2Famerican-innovation-choice-online-act-democrats-argument%2F), it’s up to the San Francisco jury whether people in the US will gain the same right to download as they please without sacrifice.