

The curious case of Epic Games: how the developer beat Google but not Apple

Publication Date: 2023-12-16

Author: Unknown

Section: Technology

Tags: Google, Apple, Fortnite, Games, Alphabet, analysis

Article URL: <https://www.theguardian.com/technology/2023/dec/16/epic-games-antitrust-google-apple>



Late on Monday afternoon, nine jurors huddled together in a San Francisco federal court tasked with deciding the fate of Epic Games' antitrust lawsuit against Google. They emerged with a bomb likely to keep the tech world's ears ringing for years to come. After just three hours of deliberation, the jury shocked observers and legal experts by siding with the Fortnite maker, which had accused the tech giant of maintaining an illegal monopoly in the Android app market. Jurors found Google at fault for all 11 antitrust claims brought by Epic. The verdict surprised many observers because Epic had lost a very similar battle with Apple two years ago. The gaming company alleged the iPhone maker also operated an illegal monopoly via the App Store; a judge ruled against Epic in September 2021. Both cases highlighted app developers' longstanding resentment of Google and Apple's in-app purchasing fees, which can top out at 30%. Epic had tried to implement a payment system within Fortnite in 2020 that would have bypassed Google and Apple. Both companies briefly banned Fortnite from their app stores in response. Then Epic sued. Google has taken great pains to appear more open than Apple, licensing the Android operating system to third parties like Samsung and allowing users to install apps via other methods than the Play store. Apple does neither. When it comes to exclusivity, Apple has become synonymous with "walled garden" in the public imagination. So why did a jury find that Google held a monopoly but Apple didn't? Antitrust attorneys and other legal experts pointed to several key differences in the two trials. Apple's more closed-off app ecosystem actually made it less susceptible to antitrust enforcement, they argued. Differing trial circumstances also likely steered Epic v Google in a different direction than Apple's trial. Crucially, they said, a jury rather than a judge decided the Google case, meaning the gaming company's underdog narrative likely held more sway. Google was also repeatedly caught misbehaving. From damning internal documents to missing and deleted evidence, the company seemed to take every chance it could to present itself as the very archetype of a powerful monopolist sneakily trying to muddy the truth, experts said. John Bergmayer, the legal director of the non-profit consumer interest group Public Knowledge, said that an entirely sealed-off ecosystem means Apple really has no "duty to deal" with others. That's not the case with Google. "Antitrust laws are often about unfair business dealing and contracts," Bergmayer said. "So if you choose to do business with lots of different phone manufacturers, as Google does, then it could be that, even if you are in a sense more open, your dealings are more subject to antitrust laws." Wilson White, Google's vice-president of government affairs & public policy, said the trial "made clear that we [Google] compete fiercely with Apple and its App Store as well as app stores on Android devices". Google intends to appeal the ruling. Epic, meanwhile, wasted no time taking its victory lap. "Today's verdict is a win for all developers and consumers around the world," reads a company blog post that followed the ruling. "It proves that Google's app store practices are illegal and they abuse their monopoly

to extract exorbitant fees, stifle competition and reduce innovation.” Apple did not respond to a request for comment. Key differences: Google’s Play store v Apple’s App Store Google’s dealings with app developers played a prominent role during the trial. In particular, Epic repeatedly pointed to an initiative called “Project Hug” where the company paid major game developers like Activision and Nintendo millions of dollars in incentives to keep their wares in the Play store and persuade them not to create their own rival stores. The stakes were high. Activision alone was reportedly offered \$360m. Epic was offered \$147m to keep Fortnite on Google Play. Google documents reportedly referred to Epic in this case as a worrisome “contagion” that could cause other developers to defect. “None of those circumstances, as I understand it, exists in the Apple case,” said Katherine Van Dyck, senior legal council for the American Economic Liberties Project. “In the Apple case, it’s simply that Apple only has one App Store and won’t allow any others.” Epic’s underdog story found a receptive jury When Epic lost its fight against Apple two years ago, the case was decided by a judge. Google pushed for a bench trial this time around as well, but US district judge James Donato denied those requests. That matters because juries are, in general, more receptive to the types of evocative storytelling Epic presented, casting itself as David to Google’s Goliath. Van Dyck said the “nine ordinary people” of the jury likely wouldn’t view “blatant document destruction” positively. Bergmayer agreed. “With maybe some inflammatory emails and bad documents, it’s not unusual for juries to look at that evidence and say, ‘Well, I’m not quite sure how to read the legal instructions I’m getting but I think I should find in favor of the plaintiff,’” said Mark McCareins, a clinical professor of business law at Northwestern University’s Kellogg School of Management who has tried antitrust cases before judges and juries. Critics of the jury’s verdict, like Carl Szabo, NetChoice’s vice-president and general counsel, believe the jury pool was “bamboozled” into an incorrect outcome. “It’s clear that Epic was able to bamboozle the jury into setting aside facts and law and then somehow paint itself as a victim in order to achieve this outcome,” said Szabo, who has previously filed legal briefs in support of Google, though not in this case. “This is the type of decision no judge would have reached.” Google suffered self-inflicted wounds Google found itself in hot water, both in its case against Epic and in a separate Department of Justice antitrust trial, after testimony revealed that employees and executives used “history-off chats” for some corporate communications. That setting automatically deleted messages within 24 hrs. Google’s sloppy handling of documents struck a nerve with Judge Donato during the trial. Around a week before the verdict, the judge slammed Google’s handling of evidence as “a frontal assault on the fair administration of justice”. Prior to that, Donato had accused Kent Walker, Alphabet’s chief legal officer, of “tap dancing” around questions on how Google employees were instructed to retain communications. Donato said Google action’s amount to “the most serious and disturbing evidence I have ever seen in my decade on the bench with respect to a party intentionally suppressing relevant evidence”. Donato instructed members of the jury that they “may” infer that any missing evidence from Google related to the case may reflect poorly on Google. Van Dyke called the direction “rare and significant”; other experts agreed that the instruction may have swayed the jury in favor of Epic. Szabo criticized Donato’s instructions to the jury for leaving too much up to the imagination. The jury, he argued, was essentially allowed to conjure up damning evidence in their minds that may not have existed. “Here you have Epic Games, without the facts, without the evidence, and the judge basically allows the jury to imagine the evidence into existence,” he said. Epic’s CEO, Tim Sweeney, was less measured in his assessment during a recent interview with reporters. “The big difference between Apple and Google is Apple didn’t write anything down,” Sweeney said, according to CNBC. Epic Games did not immediately respond to the Guardian’s request for comment. What happens next to Google’s Play store will depend on future ruling from Donato. The judge, an antitrust veteran appointed by President Obama in 2014, dramatically announced he would “personally” investigate Google’s alleged destruction of evidence.