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# **Can David Really Beat Goliath? A Look into the Anti-Competitive Restrictions of Apple Inc. and Google, LLC**

Emily Feeley

## Introduction

Apple Inc. (“Apple”) and Google, LLC (“Google”) quickly become titans of e-commerce and have revolutionized the digital market.<sup>1</sup> They set the standards and other companies strive to compete, or even just to keep up. This article first looks at the digital marketplaces of the Apple App Store and Google Play Store.<sup>2</sup> Both the Apple App Store and the Google Play Store focus on selling applications (“app” or “apps”) that are downloadable onto smartphones. These apps are intangible but are often used to purchase both intangible and tangible goods. Presently, Apple is surrounded by controversy regarding whether the commission rates it receives from the developers who choose to place their apps on the Apple App Store are reasonable, or if the rates create a monopoly.<sup>34</sup> Google Play Store has escaped the public scandal and litigation for now, but its policies are roughly the same as those that affect the developers for Apple apps.<sup>5</sup> This article seeks to analyze the alleged monopolization of Apple and Google for their respective digital markets, the controversy surrounding their present policies, the public opinion, and the possible outcomes of government intervention within these volatile markets.

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<sup>1</sup> This article will focus exclusively on the alleged monopolization of the app market that is present on smartphones and other various digital devices created by these technology giants.

<sup>2</sup> The Google App Store on Android devices will be referred to as “Google Play Store.”

<sup>3</sup> The App developer is the entity that created the app, and is often the entity responsible for updating and maintaining the app. Often, the developer is the entity that owns the app, but as is common with goods, these ownership rights can be transferred to another entity. This article will focus on developers who own their apps, and will not delve into the issue of app ownership by a non-developer.

<sup>4</sup> Epic Games, *#freefortnite* (last accessed Oct. 27, 2020); <https://www.epicgames.com/fortnite/en-US/news/freefortnite>.

<sup>5</sup> *Id.*

## Apple App Store and Google Play Store

Americans are known for their love of smartphones, and such devices have become almost essential in everyday life. In the United States, approximately 96% of Americans own a cellphone of some kind, 81% of which are smartphones.<sup>6</sup> Factoring in that nearly 75% of Americans own a desktop computer or laptop device, most Americans have had some sort of interaction with the apps on smart devices.<sup>7</sup> In the United States alone, approximately 52.4% of smartphone users use Apple iOS devices and approximately 47% use Google Android devices.<sup>8</sup> This makes the Apple App Store and Google Play Store the predominant digital marketplaces in the United States.

### Commission Rates for the Apple App Store and Google Play Store

Apple's commission rates depend on how the company categorizes the app.<sup>9</sup> This categorization is based on whether there are internal advertisements in-app, whether the user must subscribe or pay upfront to purchase the app, and whether the app is a reader.<sup>10</sup> App Store Review Guidelines 3.1 concerns payments and goes into detail about the classification of apps, when Apple will take a commission, and the various exceptions for when Apple will not take a commission such as when the app is free or when the app is merely a reader app.<sup>11</sup> <sup>12</sup> Apple also

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<sup>6</sup> Pew Research Center, *Mobile Fact Sheet*, Pew Research Center: Internet & Technology (June 12, 2019); <https://www.pewresearch.org/internet/fact-sheet/mobile/>.

<sup>7</sup> *Id.*

<sup>8</sup> S. O'Dea, *U.S. smartphone subscriber share by operating platform 2012-2020, by month*, Statista: Telecommunications (Aug. 17, 2020);

<https://www.statista.com/statistics/266572/market-share-held-by-smartphone-platforms-in-the-united-states/>.

<sup>9</sup> Apple, *App Store Principles and Practices* <https://www.apple.com/ios/app-store/principles-practices/> (last visited Sept. 21, 2020).

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* A reader app is when "users exclusively purchase or subscribe to content outside the app, but enjoy access to that content inside the app on their Apple devices."

<sup>12</sup> Apple, *App Store Review Guidelines*, Apple Developer, <https://developer.apple.com/app-store/review/guidelines/#payments> (last updated Sept. 11, 2020).

supplies a list of dos and don'ts for more unique apps such as insurance apps, fundraising apps, and apps for stock trades.<sup>13</sup> Regardless of these different classifications, only in-app purchases (“IAP”) or upfront purchases of apps trigger a 30% commission charge.<sup>14</sup> As one individual aptly said on the Apple Developer Forums, “[i]f what you are selling is performed by code within the app then you must use IAP.”<sup>15</sup> For a better understanding of the commission rates based on the classification of the App, see the following chart.

<b>Apple's Commission Rates by Classification</b>		
	Apple's Commission Rates	Example Apps
Free	<b>0%</b>	Wikipedia, Geico
Free with Advertising	<b>0%</b> Developer earns revenue from in-app advertisements	Instagram, Twitter
Free with in-app Purchase	<b>30% of In-App Purchases</b> Developer earns based on in-app purchases	Candy Crush Saga, Skype
Free with physical goods and services	<b>0%</b> Developer earns based on the sale of physical goods or services	Amazon, Lyft, Target
Free with Subscription	<b>30% for First Year &amp; 15% for Every Year After</b> Developers earn money from in-app subscriptions	Pandora, Hulu
Paid	<b>30%</b> Developers earn money by charging up-front for the app	Facetune, Heads Up!
Reader	<b>0%</b> Purchases are made outside the app and enjoyed in-app	Spotify, Amazon Kindle, Netflix
Cross-Platform	<b>0% or 30%</b> Apple only earns a commission from purchases made in-app	Hulu, Microsoft Word, Dropbox

*The data for this chart is directly from Apple's website.*<sup>16</sup>

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> PBK, *Will Apple charge me 30% commission?*, Apple Developer Forums (last visited Sept. 21, 2020); <https://developer.apple.com/forums/thread/103195>.

<sup>16</sup> Apple, *App Store Principles and Practices* <https://www.apple.com/ios/app-store/principles-practices/> (last visited Sept. 21, 2020).

Developers with subscribing users, such as Netflix, Inc. (“Netflix”) or Hulu, have the choice between classification as a reader app or allowing for in-app purchases of the necessary subscription.<sup>17</sup> Netflix made news in 2018 when the company decided it would no longer allow subscriptions through the Apple App Store.<sup>18</sup> As a result, Apple may have lost up to \$256 million in profits according to a Sensor Tower study.<sup>19</sup> The study bases its calculations on data it compiled suggesting that Netflix grossed \$853 million from in-app subscriptions in 2018.<sup>20</sup> The \$256 million number is an estimation based on a 30% commission being collected by Apple for the first year of the subscription and a 15% commission on the in-app subscription for every year after.<sup>21</sup> While the accuracy of the Sensor Tower study may be up for debate, it is still important to note that Apple could have lost \$256 million in revenue in one year because it shows that the 30% commission is clearly significant. The choice of developers to allow users to make subscriptions in-app is certainly a costly one as the 30% commission rate has proven to be quite substantial. Consider the following two questions: (1) are users more inclined to purchase subscriptions in-app, and (2) would the removal of the in-app subscription result in fewer users? Companies that are thinking about either removing or adding in-app subscriptions must think about these questions carefully. It is doubtful that the removal of in-app subscriptions resulted in many users opting out of a Netflix subscription altogether. However, smaller, lesser-known apps may very well be better off retaining these in-app subscriptions to reach a larger market.

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<sup>17</sup> *Id.*

<sup>18</sup> The Verge, *Netflix stops offering in-app subscriptions for new and returning customers on iOS*, <https://www.theverge.com/2018/12/28/18159373/netflix-in-app-subscriptions-iphone-ipad-ios-apple> (last accessed Oct. 27, 2020).

<sup>19</sup> Sarah Perez, *Netflix stops paying the ‘Apple tax’ on its \$853M in annual iOS revenue*, Tech Crunch (Dec. 31, 2018); <https://techcrunch.com> (search “Netflix stops paying the ‘Apple tax’ on its \$853M in annual iOS revenue” and select top result).

<sup>20</sup> *Id.*

<sup>21</sup> Apple, *App Store Principles and Practices* (last visited Sept. 21, 2020).

Google Play Store has a similar commission structure to the Apple App Store, charging 30% commission for apps and in-app digital purchases.<sup>22</sup> Google Play Store also reduces in-app subscriptions to 15% commission after the first year and provides further guidance on what does and does not count towards the user's first paid year.<sup>23</sup> Google Play Store's guidelines of what is an in-app purchase are similar to Apple's and have included protections for consumers in an effort to not allow the developers to mislead consumers.<sup>24</sup>

Apple App Store and Google Play Store both charge an additional expense for a developer account before developers can place an app on their operating systems.<sup>25</sup> Apple charges a \$99 annual fee for the Apple Developer Program and a \$299 annual fee for the enterprise version.<sup>26</sup> Google Play Store charges a one-time \$25 registration fee for a developer account.<sup>27</sup> These developer accounts allow the developers to have access to resources that are not available to regular users and to receive support for the operating software.<sup>28</sup> Since the costs that the developers pay for the developer accounts are either annual or one-time rather than commission, they are outside the scope of this article.<sup>29</sup>

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<sup>22</sup> Google, *Service Fees*, Google: Play Console Help, <https://support.google.com/googleplay/android-developer/answer/112622> (last visited Sept. 21, 2020).

<sup>23</sup> *Id.*

<sup>24</sup> Google, *Payments*, Google: Play Console Help, <https://support.google.com/googleplay/android-developer/answer/9858738> (last visited Sept. 21, 2020).

<sup>25</sup> See Apple, *Purchase and Activation*, Apple Developer Support, <https://developer.apple.com/support/purchase-activation/> (last visited Sept. 21, 2020); Google, *How to use the Play Console*, Play Console Help, <https://support.google.com/googleplay/android-developer/answer/6112435?hl=en> (last visited Sept. 21, 2020).

<sup>26</sup> Apple, *Purchase and Activation*, Apple Developer Support, <https://developer.apple.com/support/purchase-activation/> (last visited Sept. 21, 2020).

<sup>27</sup> Google, *How to use the Play Console*, Play Console Help, <https://support.google.com/googleplay/android-developer/answer/6112435?hl=en> (last visited Sept. 21, 2020).

<sup>28</sup> *Id.*; Apple, *App Store Principles and Practices* (last visited Sept. 21, 2020).

<sup>29</sup> *Id.*

Do Apple Store and Google Play Charge More Than Other Market Places?

Apple has, seemingly, responded to criticism of its commission rates by arguing that its rates are comparable to those of other digital markets.<sup>30</sup> Apple has supported a July 2020 study that reiterates this point.<sup>31</sup> The study, “Apple’s App Store and Other Digital Marketplaces: A Comparison of Commission Rates,” focuses specifically on the purchase of non-physical goods through the Apple App Store and compares Apple’s commission rates to other major players such as Google Play Store, Microsoft Store, Amazon Appstore, and Samsung Galaxy Store.<sup>32</sup> The study does not find Apple App Store’s commission rates to be unusual for the market since numerous other app distribution marketplaces also use 30% commission rates.<sup>33</sup>

The study further looks into what the comparative rate is in other countries. The study found that in countries where there is no singular digital marketplace, the commission rates are often much higher.<sup>34</sup> China is a perfect example of this trend because the country does not have Google Play Store as a digital marketplace for Android phones.<sup>35</sup> As a result, numerous Android app stores were created to fill the void such as Huawei AppGallery, OPPO Software Store, Vivo App Store, MyApp, and China Mobile’s MM Store.<sup>36</sup> These app stores often charge a commission fee of 50% or more.<sup>37</sup>

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<sup>30</sup> See Analysis Group, *Apple’s App Store and Other Digital Marketplaces: A Comparison of Commission Rates*, Analysis Group (July 22, 2020), [https://www.analysisgroup.com/globalassets/insights/publishing/apples\\_app\\_store\\_and\\_other\\_digital\\_marketplaces\\_a\\_comparison\\_of\\_commission\\_rates.pdf](https://www.analysisgroup.com/globalassets/insights/publishing/apples_app_store_and_other_digital_marketplaces_a_comparison_of_commission_rates.pdf), at 5.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 5.

<sup>33</sup> *Id.* at 2.

<sup>34</sup> See *Id.* at A-5.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 6.

<sup>37</sup> *Id.*

The study, however, does not ask the right questions. The study should have asked, or at least addressed, whether the Apple App Store's 30% commission rate is too high or unusual and whether the prevention of alternative means to obtain apps on one's device is a monopoly.

### Do Digital Marketplaces Have a Monopoly?

Due to differences in the operating software, Google Play Store is not available on iOS devices, and Apple App Store is not downloadable on Android devices.<sup>38</sup> Apps that are compatible with one operating system cannot easily or cheaply transfer to another operating system. Different operating systems involve different codes, development tools, platforms, device fragmentation, and simulators.<sup>39</sup> The operating system a developer decides to place their app on first generally is based on the developer's knowledge of the operating system and which platform appeals more to their market.<sup>40</sup> Although, regardless of which platform a developer chooses, the developer will likely end up paying a 30% commission rate for in-app purchases.<sup>41</sup>

Whether the 30% commission rate is too high for the market is unclear and remains up for debate. Developers do not have alternative means to market their products on Apple devices or Android devices because there is not a traditional open market for apps. Developers do not have another digital marketplace that they can go to if they feel that the commission rates are too high or are unreasonable.

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<sup>38</sup> Business Insider, *How to get Google Play on your iPhone, and use it to download movies, music, and more*, <https://www.businessinsider.com/how-to-get-google-play-on-iphone> (last visited October 27, 2020).

<sup>39</sup> Various, *Is it easier to develop an app/game for iOS or for Android?*, Quora, <https://www.quora.com/Is-it-easier-to-develop-an-app-game-for-iOS-or-for-Android> (last visited Sept. 21, 2020).

<sup>40</sup> BuildFire, *iOS vs Android: Which Should You Build Your Mobile App on First*, BuildFire, <https://buildfire.com/ios-android-which-to-develop-on-first/> (last visited Sept. 21, 2020). The referenced article is a biased, but interesting, comparison for which operating system a game should be built on first.

<sup>41</sup> Analysis Group, *Apple's App Store and Other Digital Marketplaces: A Comparison of Commission Rates*, Analysis Group (July 22, 2020).



Phone manufacturers could simply make a basic phone that performs phone calls and text messages over a cellular network. The makers of these devices have no obligation to allow other developers on their apps. Technological advancements have allowed for the creation of a new marketplace with endless possibilities and, similar to the early days in the wild west, some questions must be answered to set order. The question that must now be answered is whether or not a singular digital marketplace is a monopoly.

### **Litigation Regarding Anti-Competition**

In the past ten years, there have been numerous legal actions against Apple concerning its alleged monopolization of the app market.<sup>42</sup> These allegations involve Apple's involvement in iBookstore, iTunes, and the Apple App Store.<sup>43</sup> Although iBookstore and iTunes are not within the Apple App Store, such litigation illustrates Apple's history of monopolizing the market and Apple's consequences for these actions.

The first sort of anti-trust litigation that Apple was involved in revolved around the iTunes store.<sup>44</sup> iTunes was Apple's original digital marketplace for music on its devices and still exists as a digital marketplace for purchases of music singles and albums.<sup>45</sup> Recently, iTunes has fallen out of popularity with the younger generations in favor of Apple Music, a subscription service that allows users to listen and download unlimited music to which Apple has license

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<sup>42</sup> See generally *United States v. Apple, Inc.*, 791 F.3d 290, 296 (2d Cir. 2015); *Apple iPod iTunes Antitrust Litig.*, 75 F. Supp. 3d 1271, 1273 (N.D. Cal. 2014).

<sup>43</sup> *Id.*

<sup>44</sup> *In re Apple iPod iTunes Antitrust Litigation*, 796 F.Supp.2d 1137, 1139 (N.D.Cal.2011).

<sup>45</sup> Apple, *What happened to iTunes?*, <https://support.apple.com/en-us/HT210200> (last accessed Oct. 27, 2020).

agreements.<sup>46</sup> However, prior to the popularization of Apple Music, Spotify, and other music apps, iTunes was the primary destination to purchase digital music.

In 2006, *Charoensak v. Apple Computer, Inc.*, No. C 05–00037 JW, and *Tucker v. Apple Computer, Inc.* were consolidated to form *In re Apple iPod iTunes Antitrust Litig.*, a putative class action against Apple alleging that Apple violated § 2 of the Sherman Antitrust Act, among other acts and state laws.<sup>47</sup> *In re Apple iPod iTunes Antitrust Litig.* was brought after Apple created an update to iTunes that redesigned FairPlay to prevent other third-party applications from placing music onto the iPod.<sup>48</sup> FairPlay is an encryption system that Apple created, and it protects the copyrighted songs available on iTunes.<sup>49</sup> The plaintiffs alleged that “Apple made technological modifications to its products for the express purpose of maintaining monopoly power.”<sup>50</sup> Apple argued that it implemented the update to prevent third-party applications from corrupting the iPod because such applications could modify the internal database and prevent the addition of foreign files to the operating system.<sup>51</sup> Apple further contended that the update worked only by allowing iTunes to write on the iPods’ internal database.<sup>52</sup>

Apple’s refusal to license FairPlay to RealNetworks, one of their direct competitors, is not anticompetitive conduct.<sup>53</sup> The court held that there is not a duty to aid one’s competitors unless there has been a prior course of dealing.<sup>54</sup> As the plaintiffs could not prove that there had

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<sup>46</sup> *Id.*; See Apple, *Listen to music and more in the Apple Music app*, <https://support.apple.com/en-us/HT204951> (last accessed Oct. 27, 2020).

<sup>47</sup> The two combined cases that form this case are *Charoensak v. Apple Computer, Inc.*, No. C 05–00037 JW, and *Tucker v. Apple Computer, Inc.*, No. C 06–04457 JW. *In re Apple iPod iTunes Antitrust Litig.*, 796 F. Supp. 2d 1137, 1140 (N.D. Cal. 2011).

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 1141.

<sup>51</sup> *Id.* at 1146.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 1144-1145.

<sup>54</sup> *Id.* at 1145.

been a prior course of dealing between Apple and RealNetworks due to Apple's adamant refusal to license its intellectual property, there is no violation of § 2 of the Sherman Antitrust Act.<sup>55</sup> Following the court's ruling that Apple did not have to license FairPlay to others such as RealNetworks, other companies have shifted the focus of litigation to other apps of Apple that were also deemed by their competitors to have been monopolistic such as the iBookstore.<sup>56</sup> Both *United States v. Apple, Inc.* and *In re Apple iPod iTunes Antitrust Litig.* concerns apps that directly compete with apps developed by Apple.<sup>57</sup> These cases are likely why Apple lists competing apps available on the App Store if a user does not wish to use an Apple App, such as Spotify instead of Apple Music, or Amazon Kindle instead of Books<sup>58</sup>

In 2012, the United States Department of Justice, in collaboration with thirty-three states and territories, brought legal action against Apple and several book publishers concerning whether there was a conspiracy to raise, fix, and stabilize retail prices for digital books on the iBookstore app.<sup>59</sup> Specifically, they alleged a violation of § 1 of the Sherman Antitrust Act and state antitrust laws.<sup>60</sup> This action followed the release and successes of the iPad.<sup>61</sup> Due to the success of the Amazon Kindle, Apple sought to create a marketplace on its operating system for digital books and at the time of this litigation it was known as iBookstore.<sup>62</sup> The iPad, an innovative and compact device with the power of a computer, was the perfect device for the

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<sup>55</sup> *Id.*

<sup>56</sup> See *United States v. Apple, Inc.*, 791 F.3d 290, 296 (2d Cir. 2015).

<sup>57</sup> *Id.*; *In re Apple iPod iTunes Antitrust Litig.*, 796 F. Supp. 2d 1137 (N.D. Cal. 2011).

<sup>58</sup> Apple, *App Store Principles and Practices*, <https://www.apple.com/ios/app-store/principles-practices/> (last visited Sept. 21, 2020).

<sup>59</sup> *United States v. Apple, Inc.*, 791 F.3d 290, 296 (2d Cir. 2015).

<sup>60</sup> *Id.*

<sup>61</sup> The first-generation Apple iPad's were initially released on April 3, 2010, while the second generation was released in 2011. See AppleInsider, *A brief history of the iPad, Apple's once and future tablet*, <https://appleinsider.com/articles/18/04/03/a-brief-history-of-the-ipad-apples-once-and-future-tablet> (last visited Oct. 27, 2020).

<sup>62</sup> iBookstore is now commonly known as "Books."

iBookstore. Furthermore, the iPad was similar to the Amazon Kindle in size and weight, making it a strong competitor.<sup>63</sup> Apple executives seized the release of the iPad and began negotiations with the “Big Six” of the publishing world.<sup>64</sup> Of the “Big Six” only five made arrangements with Apple that were the source of this controversy (“Publisher Defendants”).<sup>65</sup> The Publisher Defendants had the authority to set the prices of their publications, with the prices of new releases and *New York Times* Bestsellers not costing more than \$19.99 and \$14.99, respectively.<sup>66</sup> Despite the publishers’ ability to set the prices, the Publisher Defendants received less from Apple than they did from Amazon for the purchase of eBooks.<sup>67</sup> The Publisher Defendants then sought to gain control over their pricing from Amazon and then raised the prices of their eBooks within a few months.<sup>68</sup>

Apple and the Publisher Defendants committed a per se violation of § 1 of the Sherman Act.<sup>69</sup> The United States District Court for the Southern District of New York held that Apple’s agreements with the Publisher Defendants were a conspiracy to raise the price of eBooks, and thus issued an injunction to prevent further price manipulation.<sup>70</sup> Apple appealed the injunction, but the Second Circuit affirmed the lower courts decision.<sup>71</sup> The Second Circuit held the injunction to be reasonable because the injunction only pertained to the Publisher Defendants’ agreements with Apple and used an interval-based system in which Apple was prevented from

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<sup>63</sup> *Id.* at 299.

<sup>64</sup> The “Big Six” are more specifically: Hachette, HarperCollins, Macmillan, Penguin, Random House, and Simon & Schuster. They are commonly known to be the largest publishers in the United States. *United States v. Apple, Inc.*, 791 F.3d 290, 298 (2d Cir. 2015).

<sup>65</sup> The five that participated are Hachette, HarperCollins, Macmillan, Penguin, and Simon & Schuster. *Id.* at 296.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at 297.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

agreeing to limit its pricing authority for “between 24 and 48 months depending on the Publisher Defendant.”<sup>72</sup> The court was deferential in this matter stating that “context is particularly important,” and it disregarded the Department of Justice’s recommendation that there be a restriction on all discounting between Apple and the Publisher Defendants for five years.<sup>73</sup>

*United States v. Apple, Inc.* was only resolved in 2015 and the consequence that Apple and the Publisher Defendants received was relatively mild and focused.<sup>74</sup> The injunction did not restrict Apple’s agreements with other publishers or other developers, it only affected the Publisher Defendants that participated in the price conspiracy. More importantly, the case set a precedent for Apple’s involvement with anti-trust and anti-competition laws. Apple received a slap on the wrist for its conspiracy to manipulate the price of eBooks, but this punishment is not enough of a deterrence to prevent Apple from engaging in similar behavior in its other digital marketplaces.

#### Epic Games and Spotify Challenge Apple Inc.

As of 2020, Epic Games, Inc. (“Epic Games”) and Spotify AB (“Spotify”) have decided to continue the battle against Apple’s App Store policies. *Epic Games, Inc. v. Apple Inc.* is the principal case against Apple in the United States, since Spotify filed its complaint against Apple with the European Commission.<sup>75</sup> What makes both of these cases interesting is that all three of the companies are technologically sophisticated and have an avid fan base that they are utilizing

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<sup>72</sup> *Id.* at 337-338.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Epic Games, Inc. v. Apple Inc.*, No. 4:20-CV-05640-YGR, 2020 WL 5073937 (N.D. Cal. Aug. 24, 2020); *Frequently Asked Questions, Time to Play Fair*, <https://www.timetoplayfair.com/frequently-asked-questions/> (last visited Oct. 12, 2020).

to gain popular support. This section will discuss the allegations in both cases, where the cases currently stand, public opinion, and the potential outcomes of these cases.

While many may not be familiar with Epic Games, it has cemented itself in the video game market with its game Fortnite. Fortnite has surged to popularity with the younger generations as it is free to download and can be played on most modern gaming devices.<sup>76</sup> Epic Games makes a profit from Fortnite solely from players purchasing additional features within the game and thus does not rely on advertisements to boost revenues.<sup>77</sup> It is no surprise that a game that profits almost exclusively from IAP has come to the forefront of the battle against Apple concerning Apple's IAP commission rate. Not one to be satisfied with taking on just one giant of the technological industry, Epic Games has extended its fight to the Google Play Store as well.<sup>78</sup>

To understand the litigation between Epic Games and Apple it is important to first understand how Fortnite operates and how its related company, Epic Games International, S.a.r.l ("Epic International") operates. As previously mentioned, Fortnite is free to download and play. The game is free to play for as long as the user desires, however, to get additional benefits within the game, such as different skins for your playable character, the player will have to complete various missions and challenges to unlock them. For players that don't want to go through all the effort of continually staying on top of the challenges and missions, there is the option of purchasing "V-Bucks."<sup>79</sup> V-Bucks allow the player to get different benefits such as the Battle

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<sup>76</sup> Epic Games, *FAQ*, <https://www.epicgames.com/fortnite/en-US/faq> (last accessed on Oct. 27, 2020).

<sup>77</sup> The Fortnite game also has merchandise that it sells and profits from in both online and physical stores, but this will not be discussed at length here as it does not pertain to the issue of Apple's App Store policies.

<sup>78</sup> The complaint has been made available by Epic Games. See Epic Games, *#freefortnite*, <https://www.epicgames.com/fortnite/en-US/news/freefortnite> (last accessed Oct. 27, 2020).

<sup>79</sup> Iain Wilson and Ford James, *Fortnite Missions: What are they, how do they work, and how do you complete them?*, GamesRadar+ Guides (Feb. 6, 2020), <https://www.gamesradar.com/fortnite-missions/>.

Pass and other cosmetics for their playable character.<sup>80</sup> Despite the game being free, a survey of 1,000 Fortnite players revealed that 68.8% of users spend money on in-game purchases and found that the average user spends \$84.37 on these purchases.<sup>81</sup> While the survey is not a particularly large survey, the results are quite telling about how willing the Fortnite players are to spend money to get the additional benefits in the game. Even more telling, the survey found that Fortnite was the first in-game purchase for 36.78% of those surveyed.<sup>82</sup> Once a player has purchased something on Fortnite, they can use it on any platform that their Fortnite account is signed into.<sup>83</sup> A platform is any device such as an Xbox or PlayStation that can play the game, and often due to the operating system of these platforms play between them is incompatible. Even if a user is playing the same game on the Xbox, they will not be able to play with their friend on another platform such as PlayStation or use the same profile on multiple platforms. If the game is designed to allow for cross-platform play, then users may play with others on different platforms or use the same profile on other platforms they own. Another draw to Fortnite is that users can play cross-platform; whereas most games presently on the market will not allow users to play with users on other platforms or to retain the same profile on different platforms.<sup>84</sup> However, for a player to be able to do cross-platform play, they must be on the same version of the game.<sup>85</sup> In addition to general updates being necessary for the game, Epic Games also

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<sup>80</sup> *Fortnite V-Bucks: what they are, how much do they cost, and can you get free V-Bucks?* PC Games, <https://www.pcgamesn.com/fortnite/fortnite-free-v-bucks-win-prices-buy> (last visited Oct. 12, 2020).

<sup>81</sup> Mike Brown, *The Finances of Fortnite: How Much Are People Spending on This Game?*, Lendedu (June 26, 2018), <https://lendedu.com/blog/finances-of-fortnite/>.

<sup>82</sup> *Id.*

<sup>83</sup> To do this the player must merge their Fortnite accounts. Most games will not allow users to do this. For those interested in how to do this, see <https://www.theverge.com/2019/2/7/18215594/fortnite-epic-games-account-merge-feature-switch-ps4-xbox-one-v-bucks>.

<sup>84</sup> An example of this if you but the game for Xbox you will not be able to play the game with your friends who bought the game for PlayStation. Despite it being the same game and there being an online feature in both, the users are prevented from interacting with one another.

<sup>85</sup> *Epic Games, Inc. v. Apple Inc.*, No. 4:20-CV-05640-YGR, 2020 WL 5073937, at \*1 (N.D. Cal. Aug. 24, 2020). Order Granting In Part And Denying In Part Motion For Temporary Restraining Order Re: Dkt. No. 17.

updates whenever there is a new “season” of the game, which is only available for a limited time.<sup>86</sup> The seasons change the gameplay and allow players to participate in new storylines, themes, events, and customizations for their playable character.<sup>87</sup>

Epic International, a related company to Epic Games, hosts the Unreal Engine (among other things).<sup>88</sup> The Unreal Engine is a graphics engine that developers can use to create video games, content for film and television, or architectural and automotive visualization.<sup>89</sup> The Unreal Engine has two basic licensing terms that its users can choose from. If the user wishes to create something that will not produce a profit, then the software is free. If, however, the user wishes to monetize what they create with the software, then there is a 5% royalty that is incurred when the lifetime gross revenue from the product exceeds \$1,000,000 USD.<sup>90</sup> The Unreal Engine is used by many developers of games for both apps and console games.<sup>91</sup> Users of the Unreal Engine vary from small developers to giants in the technology industry like Microsoft.<sup>92</sup>

On August 13, 2020, Epic Games allowed Fortnite players to make IAP for the Apple App version of its product through methods other than the Apple Store, effectively preventing Apple from receiving its usual 30% commission rate.<sup>93</sup> Unsurprisingly, Apple responded immediately and removed Fortnite from the App Store.<sup>94</sup> Removing Fortnite from the Apple App Store prevented any new download of the game and also prohibited any updates of the game to iOS

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<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> Its uses are only limited by your creativity with the software.

<sup>90</sup> *Frequently Asked Questions (faq)*, Unreal Engine (last visited Oct. 12, 2020), <https://www.unrealengine.com/en-US/faq>.

<sup>91</sup> *Id.*

<sup>92</sup> *Epic Games, Inc.* at \*1.

<sup>93</sup> *Id.* at \*2.

<sup>94</sup> *Id.*



devices that had installed Fortnite prior to its removal. Reacting just as quickly as Apple, Epic Games filed a complaint in the United States District Court for the Northern District of California against Apple alleging violations of the Sherman Act, California's Cartwright Act, and California's Unfair Competition Law relating to Apple's App Store policies.<sup>95</sup> The Complaint alleges a total of ten different counts against Apple.<sup>96</sup> All of these allegations are related to the 30% commission rate that Apple's App Store charges for IAP. More specifically, Apple does not allow users of Apple Apps to purchase anything related to use within the app through another purchasing method, consequently forcing developers of Apple Apps to pay a 30% commission to Apple. On the same day that Epic Games filed suit against Apple, Epic Games filed an almost identical suit against Google concerning its 30% commission rate on IAP.<sup>97</sup> As the counts in these two complaints are identical and concern the same aspects of law, this section addresses them together.

### Sherman Act

The Sherman Act was created with the intention of “preserving free and unfettered competition as the rule of trade.”<sup>98</sup> <sup>99</sup> First passed in 1890, and most recently amended in 2004, the Sherman Act is the first federal antitrust law.<sup>100</sup> While the Act governs the operation of businesses, it is intended to protect consumers by ensuring that the market remains competitive and that businesses do not work together to manipulate the market to their advantage at the

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<sup>95</sup> *Id.* at \*1.

<sup>96</sup> *Epic Games, Inc. v. Apple Inc.*, No. 4:20-cv-05640-YGR, 2020 WL 5073937 (N.D.Cal. Aug. 13, 2020) (Complaint).

<sup>97</sup> Complaint against Apple and Google available through Epic Games. See Epic Games, #freefortnite, <https://www.epicgames.com/fortnite/en-US/news/freefortnite> (last accessed Oct. 27, 2020).

<sup>98</sup> *The Antitrust Laws*, Federal Trade Commission, <https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws> (last visited Oct. 12, 2020).

<sup>99</sup> This article will not explore the intricacies of the Sherman Act, except for aspects directly relating to the case at hand.

<sup>100</sup> *Id.*

disadvantage of the consumers.<sup>101</sup> More precisely, the Sherman Act prohibits “[e]very contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce,” or any monopolization or attempt at monopolization of trade or commerce.<sup>102</sup> Six of the counts in the Complaint against Apple related to the Sherman Act: (1) unlawful monopoly maintenance in the iOS app distribution market; (2) denial of an 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; and (6) tying the App Store in the iOS app distribution market to IAP in the iOS in-app payment processing market.<sup>103</sup> Upon closer analysis of these counts, there are essentially two issues at play: first, that Apple does not allow any sort of IAP to occur that is not processed through Apple’s processing system, and second, that the developer agreement with Apple unlawfully requires the developers to adhere to its requirements for IAP, in-app payments, and any use of the Apple App Store.<sup>104</sup> Whether the court views these allegations as a violation of the Sherman Act is still up for debate. However, the argument for both sides remains strong.

#### California's Cartwright Act and California's Unfair Competition Law

California's Cartwright Act<sup>105</sup> and California's Unfair Competition Law<sup>106</sup> are further protections that the state of California has implemented to keep consumers safe. Some distinctions can be made between these two state laws and the federal Sherman Act that will be

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<sup>101</sup> *Id.*

<sup>102</sup> 15 U.S.C.A. §§ 1-2.

<sup>103</sup> See *Epic Games, Inc. v. Apple Inc.*, No. 4:20-cv-05640-YGR, 2020 WL 5073937 (N.D.Cal. Aug. 13, 2020) (Complaint); *Epic Games, Inc. v. Google, et al.* (August 13, 2020) (Complaint).

<sup>104</sup> *Id.*

<sup>105</sup> Cal. Bus. & Prof. Code § 16700 et seq.

<sup>106</sup> Cal. Bus. & Prof. Code § 17200 et seq.

addressed in the following paragraphs. Furthermore, it is important to note that while federal law usually preempts most state law, in these instances there is a presumption against preemption.<sup>107</sup> The presumption against preemption is in place to help protect the “established state role,” as states are free to enact stricter and more rigorous laws than the minimum protections granted by the federal government.<sup>108</sup>

The Cartwright Act has many similarities with the Sherman Act, such that federal precedent is often used in the analysis of the Cartwright Act claims.<sup>109</sup> Federal precedent is important in the analysis of these issues because the Cartwright Act is similar to §1 of the Sherman Act as both prohibit unreasonable restraints on trade.<sup>110</sup> However, federal precedent related to §2 of the Sherman Act does not apply to any Cartwright Act analysis.<sup>111</sup> This is because the Cartwright Act does not prohibit monopolization.<sup>112</sup> In California, state law claims concerning monopolization must be brought under California's Unfair Competition Law, which will be addressed later in this section. The Cartwright Act differs from federal precedent in four ways: (1) the factors necessary to show standing; (2) the standing of indirect purchasers; (3) the legality of minimum resale price maintenance; and (4) the elements of certain tying claims.<sup>113</sup> Since the Cartwright Act can differ from the federal Sherman Act, plaintiffs should bring claims under both laws.<sup>114</sup>

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<sup>107</sup> *In re Cipro Cases I & II*, 61 Cal. 4th 116, 161, 348 P.3d 845, 872 (2015) citing *California v. ARC Am. Corp.*, 490 U.S. 101, 109 S. Ct. 1661 104 L. Ed. 2d 86 (1989).

<sup>108</sup> *Id.*

<sup>109</sup> The Cartwright Act: Overview, Practical Law Practice Note Overview w-020-0487.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

While the Sherman Act generally prohibits unreasonable restraints of trade and monopolization, the Cartwright Act differs by listing specific actions that are prohibited.<sup>115</sup> These prohibitions are as follows: (1) restrain trade or commerce; (2) limit production or increase prices; (3) prevent competition in the manufacturing, making, transportation, sale, or purchase of merchandise, produce, or any commodity; (4) fix or control prices; and (5) enter into any agreements regarding the transport or sale of any article or commodity to set price, amount, united effort or any interest that may affect the price.<sup>116</sup> To prove a Cartwright Act claim, three elements must be satisfied: (1) formation and operation of a conspiracy, (2) illegal activity conducted under the conspiracy, and (3) damages.<sup>117</sup>

California's Unfair Competition Law prohibits any business act or practice that is “unlawful, unfair or fraudulent” or that is an “unfair, deceptive, untrue or misleading” advertisement.<sup>118</sup> California’s Unfair Competition Law also incorporates any act that is prohibited by California’s false advertising law as stated in Cal. Bus. & Prof. Code §17500.<sup>119</sup> California courts have extended the unfair competition law to protect against both anti-competitive business practices and injuries to consumers.<sup>120</sup> This is important because violating other laws can provide the necessary groundwork to bring a claim under California's Unfair Competition Law. Even if the claim fails under the unfair competition law, it may still establish unfair or fraudulent acts or practices.<sup>121</sup>

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<sup>115</sup> *Id.*

<sup>116</sup> Cal. Bus. & Prof. Code § 16720.

<sup>117</sup> *Quelimane Co. v. Stewart Title Guar. Co.*, 19 Cal. 4th 26, 47, 960 P.2d 513, 525 (1998), as modified (Sept. 23, 1998).

<sup>118</sup> Cal. Bus. & Prof. Code § 17200.

<sup>119</sup> *Id.*

<sup>120</sup> California's Unfair Competition Law: Overview, Practical Law Practice Note Overview w-017-1521.

<sup>121</sup> *Id.*

The most famous California case concerning California's Unfair Competition Law is *Cel-Tech Commc'ns, Inc.*<sup>122</sup> In this case, the California Supreme Court established the test for an unfair business act or practice is conduct that either violates antitrust law or policy or otherwise has a significant adverse impact on competition.<sup>123</sup> *Cel-Tech* has been held to apply in commercial cases, but courts are still deliberating as to whether it can apply to cases concerning consumers.<sup>124</sup> Despite the prevalence of *Cel-Tech*, courts have established two other tests, the balancing test and the Federal Trade Commission ("FTC") Acts Test, for deciding whether there is an unfair business act or practice in regards to consumers.<sup>125</sup> Under the balancing test, courts look to the conduct's impact on the consumer and the alleged wrongdoer's reasons, justifications, and motives.<sup>126</sup> The balancing test can be further simplified into whether the practice or act circumvents an established public policy and is "immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers."<sup>127</sup> The balancing test has seemingly fallen out of favor, even in the consumer context, and appears to have been replaced by the FTC Act Test. Under the FTC Act Test, a court looks to whether the act or practice causes or is likely to cause substantial injury to consumers, and the injury is both not reasonably avoidable by the consumers and not outweighed by the benefits to consumers or competition.<sup>128</sup> Overall, *Cel-Tech* is the appropriate analysis for cases in the commercial context while the FTC Act Test is better suited to consumer-based cases. However, regardless of which method is used, acts or practices

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<sup>122</sup> *Cel-Tech Commc'ns, Inc. v. Los Angeles Cellular Tel. Co.*, 20 Cal. 4th 163, 187, 973 P.2d 527, 544 (1999).

<sup>123</sup> *Id.*

<sup>124</sup> California's Unfair Competition Law: Overview, Practical Law Practice Note Overview w-017-1521.

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *Podolsky v. First Healthcare Corp.*, 50 Cal. App. 4th 632, 647, 58 Cal. Rptr. 2d 89, 98 (1996), as modified (Nov. 5, 1996), as modified (Nov. 20, 1996).

<sup>128</sup> 15 U.S.C.A. § 45.

that are expressly permitted by statute cannot be considered to be an unfair business practice or act and cannot be considered to be a violation of the California Unfair Competition law.<sup>129</sup>

The Cartwright Act is “broader in range and deeper in reach than the Sherman Act” in many regards, and with California's Unfair Competition Law, it provides more protection than the Sherman Act.<sup>130</sup> In Epic Games’ Complaint, three counts pertain to the California Cartwright Act and one count relates to California’s Unfair Competition Law.<sup>131</sup> The specific allegations revolving around the Cartwright Act allege that there is anti-competitive conduct because the “conduct of a single firm coerces other market participants to involuntarily adhere to the anti-competitive scheme” and that the digital market is a valid antitrust market because app developers are forced “to submit to conditions that unreasonably restrain competition.”<sup>132</sup>

### The Argument for Both Sides

It should come as no surprise to anyone familiar with either an iPhone or an Android that these devices do not allow their users options of where they download and purchase apps.<sup>133</sup> The operating systems of these devices are confidential and proprietary information that is the result of years of effort and millions of dollars.<sup>134</sup> The technological giants behind smartphones have continued to upgrade their devices to generate profit.<sup>135</sup> It is rational and makes good business

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<sup>129</sup> *Id.*

<sup>130</sup> *In re Cipro Cases I & II*, 61 Cal. 4th 116, 160, 348 P.3d 845, 872 (2015) citing *Cianci v. Superior Court*, 40 Cal. 3d 903, 920, 710 P.2d 375, 384 (1985).

<sup>131</sup> In the Complaint against Google, there are 11 total counts, and the eleventh count is against Google and all of their named subsidiaries. This is different from the Complaint against Apple Inc. as there are no name subsidiaries. See *Epic Games, Inc. v. Apple Inc.*, No. 4:20-cv-05640-YGR, 2020 WL 5073937 (N.D. Cal. Aug. 13, 2020) (Complaint); *Epic Games, Inc. v. Google, et al.* (August 13, 2020) (Complaint).

<sup>132</sup> This language is used in Count 7-9 of the Google Complaint and Count 7-9 of the Apple Complaint. *Id.*

<sup>133</sup> See Tim Worstall, *The Problem with Apple’s Closed Apps Universe* (last accessed Nov. 6, 2020); See Tom Foremski, *Apple becomes more closed with each new device . . .* (last accessed Nov. 6, 2020).

<sup>134</sup> *Id.*

<sup>135</sup> See Todd Haselton, *Why you don’t really need a new smartphone*, <https://www.cnbc.com/2017/04/07/you-dont-need-to-upgrade-your-smartphone.html> (last accessed Nov. 6, 2020).

sense that they do not want to allow a secondary market to gain access to their proprietary information.<sup>136</sup> However, it is this very refusal to allow for a secondary market or to permit a workaround that has caused these present legal actions. What is most interesting about the Epic Games' actions is that both sides in these cases have compelling arguments. Apple and Google, as the manufacturers of the smartphones and the creators of the operating systems, have a compelling argument as to why they should be allowed to retain control of their digital marketplaces. On the other hand, Epic Games and the others who have objections to how Apple and Google run their digital marketplaces do have legitimate concerns that need to be addressed.

Epic Games is the most recent, and perhaps the most well-known, of the companies that have sought to challenge the commission rates of digital marketplaces. Fortnite is well on the path to becoming one of the most profitable and well-loved games of this generation.<sup>137</sup> Not only is the game free to download, which makes it more accessible, but it allows for cross-platform play. This cross-platform play allows the game to be more universal and can even be considered as an encouragement for the players to spend money as purchases made in the game on one platform can now be used in the same game on other devices. Players previously hesitant to spend money to get the same customization or benefits can now spend freely knowing that the purchases will benefit their game play on all devices with that game. Gamers, despite their reputation of being introverts, are quite sociable and love to be able to show off in game.<sup>138</sup> The

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<sup>136</sup> See Al Bento, *Android and iOS*, <https://home.ubalt.edu/abento/315/android-ios/index.html#:~:text=iOS%20is%20a%20proprietary%20mobile,of%20iOS%20is%20found%20here> (last accessed Nov. 6, 2020).

<sup>137</sup> How big is 'Fortnite'? With nearly 250 million players, it's over two-thirds the size of the US population. See Ben Gilbert, *How big is 'Fortnite'? With nearly 250 million players, it's over two-thirds the size of the US population*, Business Insider (Mar. 20, 2019), <https://www.businessinsider.com/how-many-people-play-fortnite-2018-11>.

<sup>138</sup> Rebecca Jennings, *Why We Spend Real Money on Fake Clothes in Free Games*, <https://www.vox.com/2018/4/5/17193156/fortnite-skins-pubg-league-of-legends-dota-2> (last accessed Nov. 6, 2020).

ability to purchase and customize the playable character is a huge attraction and incentive for players to spend additional money on in-game purchases.<sup>139</sup> Furthermore, the in-game purchases make up the majority of Epic Game's revenue for its' smash hit Fortnite.<sup>140</sup> Epic Games made a conscious choice to allow its users to purchase V-Bucks for use on Apple and Android devices directly through Fortnite. After all, this allows Epic Games to retain 100% of the profit and maneuver around paying any commission on the IAP.

Why would Epic Games bother to file complaints against both Apple and Google - is all this effort worth the payoff if they win? Since Fortnite's release in 2017, the game quickly rose to popularity and has been installed 133.2 million times in the Apple App Store and 11 million times in the Google Play Store. Even more impressive is that Fortnite only joined the Google Play Store in April 2020.<sup>141</sup> That Fortnite has had over 11 million downloads on Android from April 2020 to August 2020 is indicative of just how popular Fortnite is and continues to be. A study by Sensor Tower estimated that Fortnite has generated around \$1.2 billion in revenue from the Apple IAP.<sup>142</sup> According the developers' commission, it is estimated that \$360 million of Fortnite's revenue went to Apple.<sup>143</sup> The commission rates for Android users on the Google Play Store have resulted in \$10 million in commission for Google, and this is no small number considering that Fortnite has only been available on Google Play Store since April 2020.<sup>144</sup>

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<sup>139</sup> *Id.*

<sup>140</sup> Ben Gilbert, *'Fortnite' made \$1.8 billion in 2019, analysts say — that's down 28% from 2018, but it's still the biggest game in the world*, <https://www.businessinsider.com/how-much-did-fortnite-make-in-2019-2020-1> (last accessed Nov. 6, 2020).

<sup>141</sup> Aaron Holmes, *Apple made \$360 million from 'Fortnite,' the online game that it's now battling over App Store commissions*, *Business Insider* (Aug. 14, 2020), <https://www.businessinsider.com/apple-made-360-million-from-fortnite-in-app-purchases-2020-8#:~:text=Apple%20has%20taken%20a%2030,2020%2C%20according%20to%20Sensor%20Tower.>

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*



You may be asking yourself, what exactly does Apple do that is deserving of a 30% commission rate on all IAP? This is undoubtedly the question that Epic Games asked itself before it launched its lawsuit. However, Apple does provide many useful services to its developers including, but not limited to, assistance with the development of the apps and assistance with billing. Apple does not design the game and operates more as a facilitator for the app as it creates the devices on which the app will exist, the operating system on which the app runs, and provides the necessary service of updating apps that have already been downloaded.<sup>145</sup> These are essential services that allow the app to operate as intended.<sup>146</sup> Furthermore, these services are not free to operate as there is substantial work that must go into providing such services.<sup>147</sup> For example, Apple provides customer service assistance when there is a bug in a program that causes a user to be charged wrongly for something that they did not purchase. Without Apple providing customer service, informing the app developer of any issue within the app would be time consuming and frustrating for the App user's. Apple must pay for and provide the customer service for the consumer to chat or call into, and Apple must implement the update that resolves the issue onto all devices that contain the app.<sup>148</sup> Granted, large companies like Epic Games, who make their living off of developing and producing games, are capable of directly providing these sorts of services to their consumers. But does this mean that they should be exempt from the 30% commission rate just because they feel that they can better provide the services Apple does for their consumers?

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<sup>145</sup> Apple Developer Program, *Developer Support*, <https://developer.apple.com/support/> (last accessed Nov. 6, 2020).

<sup>146</sup> *Id.*

<sup>147</sup> Apple Developer Program, *How the Program Works*, <https://developer.apple.com/programs/how-it-works/> (last accessed Nov. 6, 2020).

<sup>148</sup> Apple Developer Program, *Choosing a Membership*, <https://developer.apple.com/support/compare-memberships/> (last accessed Nov. 6, 2020).

### Hot Off the Press! - What's the Public Opinion?

Public opinion on the 30% commission rate and Apple's treatment of those that oppose it appears to be oscillating back and forth. The public seems to never take Apple's side but never quite takes Epic Games' side either. Both sides are actively using their public platforms to sway the popular opinion to their side. What has yet to be seen is whether these efforts will be effective on the court and sway the judge or the federal authorities to step in further.

Epic Games has launched a page on its website dedicated to what they call #FreeFortnite.<sup>149</sup> Fortnite is advocating that players and fans use the hashtag on social media in order to get people to join the fight "to end anti-competitive restrictions on mobile device marketplaces by Apple and Google."<sup>150</sup> A search for #FreeFortnite on Twitter does show that it is frequently used, but whether Apple or the courts will consider this social media advocacy to be persuading cannot be known until the case is decided.<sup>151</sup> Most importantly, the web page features Epic Games' public statements regarding the litigation, the original complaints against both Apple and Google, and Epic Game's motion for a preliminary injunction to prevent Apple from removing Fortnite from the Apple App Store.<sup>152</sup> Epic Games is being very open and forward with aspects of this litigation, likely in an effort to gain public sympathy and support.

Epic Games has even offered a frequently asked questions section specifically about the litigation against Apple.<sup>153</sup> The FAQ includes questions such as: "Why can't I access Fortnite on

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<sup>149</sup> Epic Games, #freefortnite, <https://www.epicgames.com/fortnite/en-US/news/freefortnite> (last accessed Oct. 27, 2020).

<sup>150</sup> *Id.*

<sup>151</sup> FREEFORTNITE Live on Twitter, Twitter, <https://twitter.com/hashtag/freefortnite?f=live> (last visited Oct. 12, 2020).

<sup>152</sup> *Id.*

<sup>153</sup> Epic Games, #freefortnite, <https://www.epicgames.com/fortnite/en-US/news/freefortnite> (last accessed Oct. 27, 2020).

iOS and Google Play?,” “I only play Fortnite on mobile devices. How can I regain access to Fortnite if I only play on iOS devices or on Android via Google Play?,” and “ Why doesn’t Epic capitulate to Apple and Google’s demand to remove Epic direct payment.”<sup>154</sup> In its answers to these questions, Apple’s 30% commission rate for all IAP is referred to by Epic Games as a “30% tax.”<sup>155</sup> Calling Apple’s 30% commission charge for IAP a “tax” will likely be persuasive to those that are not familiar with the law or with how Apple’s commission charge actually works. However, calling the 30% commission rate a tax is a clear misrepresentation of what the charge is and how it is implemented. The 30% commission rate is not redirected to the consumers and it cannot properly be considered a tax that the consumers pay as it only really affects the bottom line of Epic Games. If Epic Games were to pass this commission rate onto the consumers and raise the cost of its V-Bucks, then perhaps this would be considered a “tax” of sorts for the consumers. However, if Epic Games were to try to implement this and raise the price of V-Bucks it is likely that it’s sales would decrease. Interestingly, Epic Games has also asserted that Apple and Google want to “punish game developers like [Epic Games] who offer direct payment options.”<sup>156</sup> Epic Games contends that it should be able to offer an alternative option to its players where they can make these purchases and that it should be able to offer an option to its consumers for them to purchase directly from Epic Games.<sup>157</sup> To encourage players

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<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

to directly purchase from Fortnite, Epic Games has instituted a discount of 20% for all purchases made directly from Epic Games.<sup>158</sup>

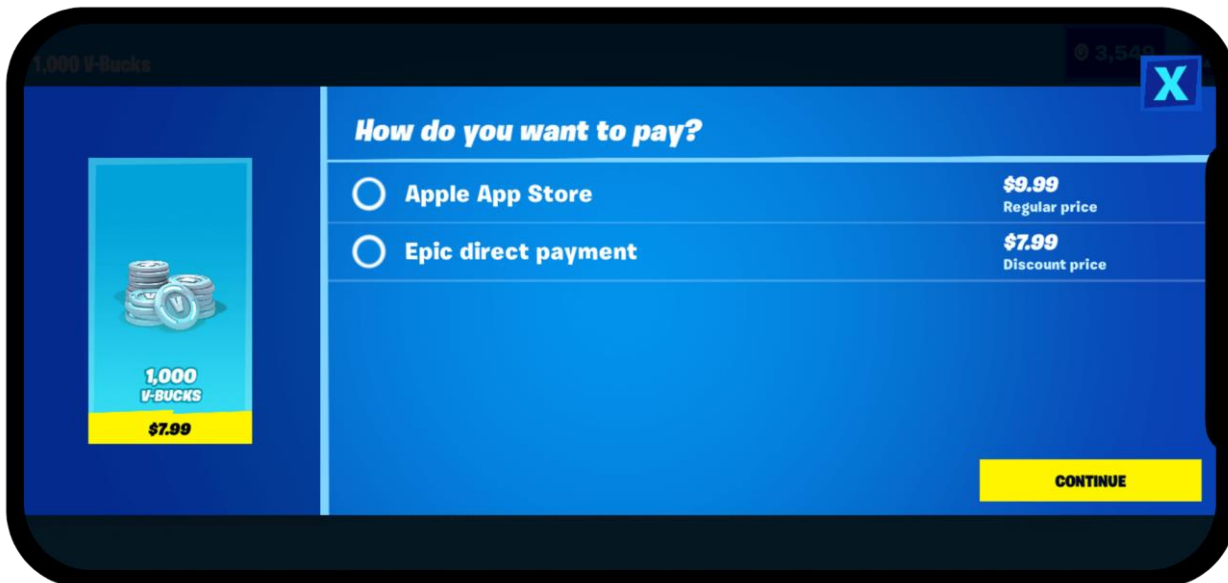


Image from Epic Games website announcing the pricing discount on iOS devices.<sup>159</sup>

This 20% price discount that Epic Games attempted to offer to players on iOS and Android devices is what resulted in Fortnite being removed from the digital marketplaces. Interestingly enough, the 20% discount has become permanent on other platforms.<sup>160</sup> The devices that are eligible for this discount are PlayStation 4, Xbox One, Nintendo Switch, PC, Mac, and GeForce NOW.<sup>161</sup> Despite Google's efforts to remove Fortnite from the Google Play Store, it appears that there is still a viable way to download and play the game from Google Play Store. For users who still wish to play Fortnite on their Android devices, there are two ways players may install the

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> The Fortnite Team, *THE FORTNITE MEGA DROP - PERMANENT DISCOUNTS UP TO 20%*, EpicGames (Sept. 10, 2020), <https://www.epicgames.com/fortnite/en-US/news/the-fortnite-mega-drop-permanent-discounts-up-to-20-percent>.

<sup>161</sup> *Id.*

latest version of the Epic Games App for Android.<sup>162</sup> The two options include downloading the game from Fortnite.com/Android or from the Samsung Galaxy Store.<sup>163</sup>

As of October 2020, Apple has yet to make any public comment on the lawsuit filed by Epic Games. It is only the documents that Apple has filed with the court that can shed some light on Apple's opinion on the litigation as Apple has been fairly quiet on the matter outside of the courtroom. Apple has not held back in its court documents filed against Epic Games about how it feels about the current situation, making comments such as "Epic started a fire, and poured gasoline on it, and now asks this Court for emergency assistance in putting it out,"<sup>164</sup> and "Epic's asserted harm is the self-inflicted and self-fixable result of its own cheating and breach."<sup>165</sup> Most interestingly, Apple repeatedly refers to what it calls the "iPhone Ecosystem."<sup>166</sup> Apple's "iPhone ecosystem" is essentially the culmination of its operating system, the iPhone hardware, and the resulting community that began to use Apple's products and develop their own applications for it.<sup>167</sup> Apple seems almost incredulous that Epic Games has brought this suit alleging that Apple participates in anti-competition acts and practices. Apple contends that Epic Games "wants to keep enjoying these extensive, and expensive, benefits of Apple's ecosystem, including continued access to Apple's iPhone customers—*for free*."<sup>168</sup> To not pay the 30% commission to Apple for IAP, Epic Games activated hidden code within Fortnite that allowed it to circumvent Apple's in-app payment system.<sup>169</sup> Apple is within its right

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<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> *Epic Games, Inc. v. Apple Inc.*, No. 4:20-cv-05640-YGR, 2020 WL 5073937 (N.D. Cal.) (Apple Inc.'s Opposition To Epic Games, Inc.'s Motion For A Preliminary Injunction) at 2.

<sup>165</sup> *Id.* at 3.

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> *Id.* at 1.

<sup>169</sup> *Id.*

to remove Fortnite from the App Store because Epic Games broke the developer agreement that it made with Apple.<sup>170</sup>

### Where Does This Case Currently Stand? Is Anyone Right?

As of October 9, 2020, the judge in the *Epic Games v. Apple Inc.* case ruled on the motion for preliminary injunction and held that Apple does not have to put Fortnite back into the Apple App Store.<sup>171</sup> While this may seem like an initial victory for Apple, the judge ruled that Apple may not ban the Unreal Engine from the App Store.<sup>172</sup> This is likely due to a large number of users of Unreal Engine whose apps and businesses do not relate to the pending litigation.<sup>173</sup>

Appearing to take advantage of the present movement, those who have had objections to Apple's developer policies and mandatory commission rates have created the Coalition for App Fairness.<sup>174</sup> Among the group's founders are familiar names such as Epic Games, Spotify, Match Group, and Tile.<sup>175</sup> This coalition has labeled itself as an "independent nonprofit organization founded by industry-leading companies to advocate for freedom of choice and fair competition across the app ecosystem."<sup>176</sup> The coalition has targeted Apple as the principal offender of anti-competitive policies, and contends that Apple is displaying "monopolist behavior" by "controlling the products and features that are available to consumers."<sup>177</sup> The site provides two

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<sup>170</sup> *Id.*

<sup>171</sup> Rachel Sandler, *Apple Doesn't Have To Reinstate Fortnite To The App Store, Judge Rules*, Forbes (Oct. 9, 2020), <https://www.forbes.com/sites/rachelsandler/2020/10/09/apple-doesnt-have-to-reinstate-fortnite-to-the-app-store-judge-rules/#32e3dcdcf398f>; James Vincent, *Epic's decision to bypass Apple's App Store policies were dishonest, says US judge*, The Verge (Sept. 29, 2020), <https://www.theverge.com/2020/9/29/21493096/epic-apple-antitrust-lawsuit-fortnite-app-store-court-hearing>.

<sup>172</sup> *Id.*

<sup>173</sup> *Epic Games, Inc. v. Apple Inc.*, No. 4:20-CV-05640-YGR, 2020 WL 5073937, at \*1 (N.D. Cal. Aug. 24, 2020).

<sup>174</sup> Coalition for APP Fairness, *Every Day, Apple Taxes Consumers & Crushes Innovation*, [appfairness.org](http://appfairness.org/) <https://appfairness.org/> (last visited Oct. 12, 2020).

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> Coalition for APP Fairness, *The App Store is Ruled by Anti-Competitive Policies*, [ppfairness.org](http://ppfairness.org)

examples of Apple’s behavior concerning Tile and Kindle.<sup>178</sup> The second issue the coalition picks with Apple is the 30% commission rate on IAP.<sup>179</sup> The coalition references that when the 30% commission rate was implemented in 2011 many businesses were no longer able to make a profit and went out of business and that Steve Jobs, in an internal email, told other Apple executives that “Bottom line — we didn’t have a policy and now we do, and there will be some roadkill because of it. I don’t feel guilty.”<sup>180</sup>

### Spotify Investigation

On March 11, 2019, Spotify filed a complaint with the European Commission who have announced that it will be conducting a formal investigation into the matter.<sup>181</sup> The complaints Spotify raises are closely related to those of Epic Games as both object to the 30% commission rate and Apple’s other anti-competitive policies.<sup>182</sup> The European Commission will be investigating Apple’s App Store practices and how such “practices may ultimately harm consumers by preventing them from benefiting from greater choice and lower prices.”<sup>183</sup> Not much is formally known about this investigation. Spotify has created a website called “Time to Play Fair” where it advocates for its case against Apple and has answered common questions about the investigation.<sup>184</sup> Most offensive to Spotify appears to be Apple’s favoring of Apple

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, <https://appfairness.org/issues/anti-competition/> (last visited Oct. 12, 2020).

<sup>178</sup> This article will not explore these examples; if interested, see: <https://appfairness.org/issues/anti-competition/>

<sup>179</sup> Coalition for APP Fairness, *30% “App Tax” on Creators and Consumers*, [appfairness.org](https://appfairness.org/issues/30-app-tax/), <https://appfairness.org/issues/30-app-tax/> (last visited Oct. 12, 2020).

<sup>180</sup> *Id.*

<sup>181</sup> *Frequently Asked Questions*, Time to Play Fair, <https://www.timetoplayfair.com/frequently-asked-questions/> (last visited Oct. 12, 2020).

<sup>182</sup> *Id.*

<sup>183</sup> *Antitrust: Commission opens investigations into Apple’s App Store rules*, European Commission (June 16, 2020), [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_20\\_1073](https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1073).

<sup>184</sup> *Frequently Asked Questions*, Time to Play Fair, <https://www.timetoplayfair.com/frequently-asked-questions/> (last visited Oct. 12, 2020).

Music App over competitors' apps, as Spotify argues that this creates an unfair playing field and does not allow the companies to compete on merit alone.<sup>185</sup> Spotify has allowed the European Commission to champion them and take over their fight to make the digital marketplaces fair and equal to the developers who use them.

### Conclusion

The litigation between Apple and the app developers is likely only to have begun. The Epic Games litigation has brought the debate over anti-competitive restrictions in the digital marketplaces to the forefront of our news and our minds. The digital marketplace on these devices has no federal regulations, and soon the federal government, most likely the Department of Justice, will have to address the issues concerning whether Apple and other smartphone manufacturers are participating in anti-competitive behavior. Even if the litigation filed by Epic Games is resolved in Apple's favor, it is likely to be only the first case of the sort in the United States. The approach that the European Union is taking with investigating Apple's practices in Europe will likely soon be mirrored here in the United States as valid concerns about Apple and Google's treatment of their respective digital markets have been raised and can no longer be ignored.

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<sup>185</sup> *Id.*