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PERSPECTIVE

‘Fortnite’ battle royale: Epic Games vs. Apple and Google

By Mark Riera

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A boy plays “Fortnite.”

Epic Games v. Apple and Google: Does success require an alleged monopolist to do business with a competitor that wants to sell mobile apps to IOS and Android users outside the iTunes and Google Play Stores? The Northern District of California provisionally said no, denying a temporary restraining order to require Apple to restore “Fortnite” to the iTunes store.

On Aug. 18, Epic Games sued Apple and Google in the Northern District alleging federal antitrust claims and related California state law claims because Apple and Google will not let Epic distribute games and charge users directly for in-app purchases. *Epic Games, Inc. v. Apple, Inc.*, 4:20-cv-05640- YGR, and *Epic Games, Inc. v. Google LLC, et al.*, 5:20-cv-05671-NC. Epic alleges that Apple and Google charge developers 30% of in-app sales and Epic proposes to reduce that amount by 20%.

The story goes that the vast majority of mobile devices use the Android operating system that Google owns and licenses to OEM device manufacturers. Although Apple’s mobile operating system (IOS) is limited to Apple iPhones and iPads, there are more than 1.5 billion active IOS devices worldwide. Epic Games publishes “Fortnite” that has more than 350 million players “and has become a global cultural phenomenon.” Tencent Holdings, the world’s largest video game company, reports that it owns more than 10% of Epic Games. Epic Games distributes “Fortnite” directly to PC and Apple computer gamers, and through Google to Android mobile users. Until recently, Epic distributed “Fortnite” through Apple to IOS mobile users. Apple’s Developer Agreement prohibits developers from distributing apps to IOS users or selling in-app enhancements outside Apple’s app store. On Aug. 13, Epic Games did just that, offering in-app purchases to “Fortnite” IOS app users directly. Apple responded by removing “Fortnite” from the iTunes store. IOS mobile “Fortnite” users can continue to play the game, but “Fortnite” is no longer available for purchase or update and, when Apple updates its mobile IOS, “Fortnite” may no longer work.

The Federal Antitrust Claims

Epic Games claims Apple and Google each has a monopoly in markets for app distribution and in-app payment processing systems within their mobile OS ecosystem. Based on this foundation, Epic Games alleges claims under Sherman Act Section 2 for unlawful maintenance of a monopoly in the distribution and payment processing markets and denial of access to an “essential facility” necessary to compete, and under Sherman Act Section 1 for unreasonable restraints imposed in Apple’s Developer Agreement and Google’s OEM Agreement, and tying the apps stores to IOS in-app payment and Google Play billing.

The Relevant Market

Epic Games will bear the burden of proving that Apple and Google have market power in a relevant product market. The narrower the market definition, the larger Apple’s and Google’s market shares will appear. Although every manufacturer is a monopolist in its own goods, the relevant product market will be defined by the cross-elasticity of demand, or consumers’ willingness to shift to substitutes as the monopolized good rises in price. Gamers are likely indifferent to the identity of the party charging for in-app purchases because gamers still choose their payment source, and in-app purchases are relatively small even if large in the aggregate. From the developer’s point of view, it likely wants to distribute its games in as many outlets as possible, including computers, gaming consoles, televisions, cell phones, and perhaps smart watches.

If the relevant market is games, the market may include a broad range of entertainment alternatives, and if the market is app hosting or payment processing, the market may be very different and Apple and Google may have market power… or not.

Monopolization and Essential Facilities

Big does not necessarily mean bad. A monopolization claim requires proof of power to exclude competitors and raise prices and anticompetitive conduct. Maintaining a closed ecosystem and controlling in-app billings may not prove to be anticompetitive in a relevant

market, depending on its definition. Similarly, the ability to sell apps and charge gamers directly may not be essential to competition in any field where Epic Games does business. Epic's success to date may be proof of this. Epic Games likely has no desire to host a site for apps or operate an online payment processing business. Rather, Epic likely prefers to continue its focus on developing games while capturing a greater percentage of the purchases "Fortnite" gamers make. While Epic proposes to reduce Apple's fee by 20% it would increase its net revenue 10%.

Unreasonable Restraints of Trade and Tying Arrangements

Epic Games complains that Apple's Developer Agreement and Google's OEM Agreement unfairly prevent it from selling directly to gamers and charging them for purchases. Apple and Google can refute this charge by showing procompetitive justifications for the restrictions, such as its protection against viruses, ransomware, privacy breaches, or more effective marketing.

Tying occurs where a seller with market power in one good forces purchasers to buy a second good that they might prefer to get elsewhere or on different terms. A threshold issue will be whether app distribution and payment processing are products buyers shop for separately, or whether they prefer to get both together, like left and right shoes. Although tying offenses are deemed per se unlawful, procompetitive justifications can still come into play. A frequent argument is if a seller has market power in a tying product, why not charge the highest price the tying good will bear, instead of increasing costs with an unwanted tied product?

The Road Ahead

Epic Games applied for a temporary restraining order against Apple on Aug. 17. After oral argument on Monday, the court denied a TRO as to removal of "Fortnite" because Epic Games inflicted its own harm by breaching its Developer Agreement, but granted relief to allow Epic Games continued access to Apple's developer tools for its Unreal Engine used to develop software for Apple platforms. A hearing on an order to show cause regarding preliminary injunction is set for Sept. 28. Because Epic Games seeks injunctive relief only, there will be no right to a jury trial and the court's ruling may provide a preview of the ultimate ruling.

An injunction against Apple would strip it of control and oversight of the apps distributed through iTunes Store, and force it to lodge a hostile competitor, like forcing a department store to accommodate a competitor's kiosk on its sales floor. Technology advances may be the great equalizer as the once dominant mobile phone manufacturers faded from the scene as smart phones advanced.

The claims Epic Games alleges here are similar to *United States v. Microsoft*, 87 F.Supp.2d 30 (D.D.C. 2000), aff'd 253 F.3d 34 (2001), where Microsoft was found to have maintained monopoly power in the market for PC operating systems by bundling its OS with Internet Explorer. The court there found Microsoft retaliated against Netscape when it refused to discontinue developing Netscape for 32-bit versions of Windows. ■

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