ICLE Brief for 9th Circuit in Epic Games v Apple
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United States Court of Appeals
For the
Ninth Circuit

EPIC GAMES, INC.,
Plaintiff/Counter-Defendant, Appellant/Cross-Appellee,
v.
APPLE, INC.,
Defendant/Counter-Claimant, Appellee/Cross-Appellant

Appeal from a Decision of the United States District Court
for the Northern District of California,
No. 4:20-cv-05640-YGR • Honorable Yvonne Gonzalez Rogers

BRIEF OF *AMICI CURIAE* INTERNATIONAL CENTER FOR LAW & ECONOMICS AND SCHOLARS OF LAW AND ECONOMICS IN SUPPORT OF APPELLEE/CROSS-APPELLANT

INTEREST OF AMICI CURIAE

The International Center for Law & Economics ("ICLE") is a nonprofit, non- partisan global research and policy center aimed at building the intellectual foundations for sensible, economically grounded policy. ICLE promotes the use of law & economics methodologies to inform public policy debates and has longstanding expertise in the evaluation of antitrust law and policy.

Amici also include 26 scholars of antitrust, law, and economics at leading universities and research institutions around the world. Their names, titles, and academic affiliations are listed in Addendum A. All have longstanding expertise in, and copious research on, antitrust

law and economics.

Amici have an interest in ensuring that antitrust promotes the public interest by remaining grounded in sensible legal rules informed by sound economic analysis. *Amici* believe that Epic's arguments deviate from that standard and promote the private interests of slighted competitors at the expense of the public welfare.

INTRODUCTION

Epic challenges Apple's prohibition of third-party app stores and in-app payments ("IAP") systems from operating on its proprietary, iOS platform as a violation of the antitrust laws. But, as the district court concluded, Epic's real concern is its own business interests in the face of Apple's business model—in particular, the commission charged for the use of Apple's IAP system. *See* Order at 1-ER22, *Epic Games, Inc. v. Apple Inc.*, No. 4:20-CV-05640 (N.D. Cal. Sept. 10, 2021), ECF No. 812 (1-ER3–183). In essence, Epic is trying to recast its objection to Apple's 30% commission for use of Apple's optional IAP system as a harm to consumers and competition more broadly.

Epic takes issue with the district court's proper consideration of Apple's procompetitive justifications and its finding that those justifications outweigh any anticompetitive effects of Apple's business model. But Epic's case fails at step one of the rule of reason analysis. Indeed, Epic did not demonstrate that Apple's app distribution and IAP practices caused the significant *market-wide* effects that the Supreme Court in *Ohio v. Am. Express Co. ("Amex")* deemed necessary to show anticompetitive harm in cases involving two-sided transaction markets. 138 S. Ct. 2274, 2285–86 (2018). While the district court found that Epic demonstrated some anticompetitive effects, Epic's arguments below focused only on the effects that Apple's conduct had on certain *app developers* and failed to appropriately examine whether consumers were harmed overall. This is fatal. Without further evidence of the effect of Apple's app distribution and IAP practices on consumers, no conclusions can be reached about the competitive effects of Apple's conduct.

Nor can an appropriate examination of anticompetitive effects ignore output. It is critical to consider whether the challenged app distribution and IAP practices reduce output of market-wide app transactions. Yet Epic did not seriously challenge that output increased by every measure, and Epic's *Amici* ignore output altogether.

Moreover, the district court examined the one-sided anticompetitive harms presented by Epic, but rightly found that Apple's procompetitive justifications outweigh any purported anticompetitive effects in the market for mobile gaming transactions. The court recognized that the development and maintenance of a closed iOS system and Apple's control over IAP confers enormous benefits on users and app developers.

Finally, Epic's reliance on the theoretical existence of less restrictive alternatives ("LRA") to Apple's business model is misplaced. Forcing Apple to adopt the "open" platform that Epic champions would reduce interbrand competition, and improperly permit antitrust plaintiffs

to commandeer the judiciary to modify routine business conduct any time a plaintiff's attorney or district court can imagine a less restrictive version of a challenged practice, irrespective of whether the practice promotes consumer welfare. See NCAA v. Alston, 141 S. Ct. 2141, 2161 (2021) ("[C]ourts should not second-guess 'degrees of reasonable necessity' so that 'the lawfulness of conduct turn[s] upon judgments of degrees of efficiency.'"). Particularly in the context of two-sided platform businesses, such an approach would sacrifice interbrand, systems-level competition for the sake of a superficial increase in competition among a small subset of platform users.

Read the full brief here.

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