

## *Epic v. Apple Redux*

### An Update on the First Battle in the Antitrust Tech Wars

#### **Presented by:**

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# Speakers



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# Topics for Discussion

1

***Epic v. Apple:***  
**Summary of the  
District Court  
Judgment and  
the Appeal**

2

**What are the  
Major Antitrust  
Issues at Stake?**

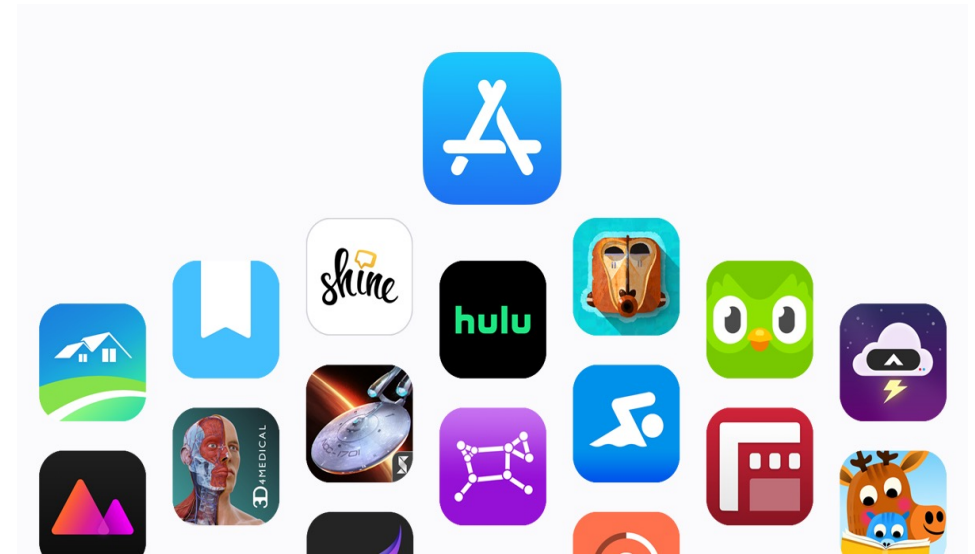
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**The Broader  
Context:  
Enforcement  
Actions, Int'l  
Actions and  
More**

# Previously...on Epic v. Apple:

## ■ Epic's Core Complaints about Apple

- 30% fee on digital transactions
- Requirement to use App Store
- Requirement to use IAP (Apple's in-app payment processing tool)
- Anti-steering provisions
  - Can't tell customers to make purchases on cheaper platform



# Apple's Response: You Love Your iPhone

- **Apple Competes; Not a Monopolist**
- **Apple as an Innovator**
  - Exponential growth of app economy
  - IP shouldn't be given away
- **Apple is About Security and Privacy**
  - Apple's security and privacy *create* the app economy
- **Epic's Remedies would Destroy the iOS Ecosystem**



# Epic v. Apple: First Season Finale

- **No Violation of Antitrust Law**

- Relevant market is “mobile gaming transactions”
- Apple does not have monopoly power in that market
- No Section 1 claim because no “concerted action”
- Security and privacy are legitimate interests

- **Violation of California Unfair Competition Law**

- **Remedy: Injunction against Apple’s “anti-steering policies”**

- Enjoined pending appeal

# Epic/Apple Season 2: The Appeals

- **Fact vs. Law: Standard of Review**
- **Limits of Section 2 (monopolization)**
  - Definition of single brand submarkets (Kodak)
  - Rule of reason balancing
  - What does Amex mean again?
- **Limits of Section 1**
  - Concerted action requirement for Section 1
  - When is payment processing a separate product for a tying claim?
- **Limits of UCL claims**
  - Standing and requirement of underlying antitrust violation

# Monopolization: Don't Pass Go

- **Epic: Court Erred on Market Definition/Monopoly Power**
  - Court misapplied *Kodak*; Apple has 100% market share in aftermarkets
  - Foremarket is operating systems; aftermarkets are app distribution and IAP for iOS mobile devices
- **Epic: App Distribution and IAP are Separate Products Subject to Tying**
- **Epic: Court Failed to Balance Anticompetitive Effects with Procompetitive Justifications**
- **Apple: Operating Systems Can't Be a Market**
- **Apple: Monopoly Power Requires Output/Price Evidence**
- **Apple: Ample Factual Findings of Procompetitive Effects (Privacy/Security)**



# Where's the Concert?

- **Epic: Section 1 Reaches “Contracts” that Restrain Trade**
  - Apple/Developers in “concerted action” that restrains trade when agreeing to DPLA
- **Epic: Court Imposed Requirement that Contracts be *Negotiated* to be “Concerted” Action**
- **DOJ: Negotiation Requirement Upends Current Law**
  - Most vertical agreements involve passive acceptance by buyer
- **Apple: Tech Licensing Contracts are Different; Protect Consumer**
  - Technical restraints are inherently unilateral, even if in a contract
  - Substance of Epic’s complaint is unilateral conduct by Apple
  - Not one of the “buckets” antitrust law should care about

# Is This Really All About Security?

- **Most Interesting Evidence; Factual or Legal or Both?**
- **Distinction between Sideloading and IAP; Same Arguments?**
- **Apples Allows Apps to Sell Physical Goods with Alternative Payment Processors**
- **When to Balance; Does Epic Have to Show Less Restrictive Alternatives?**
  - First, anticompetitive effects
  - Second, burden shifts to procompetitive justifications
  - Third, less restrictive alternatives proven (“LRA”)
  - Finally, rule of reason balancing (only if LRA proven??)



# Wait, I Thought the UCL Didn't Apply if there Was No Antitrust Violation?

- **Court: Anti-steering Provision Illegal under Unfair Prong**
  - Incipient violation of antitrust laws
  - Accepted all the security justifications for restrictions on iPhone
  - But still “unfair” to restrict telling consumers they could buy cheaper somewhere else
- **Apple: Courts Refuse to Find a UCL Violation w/out Violation of Antitrust Law**
- **Expansion of UCL?**
  - Creation of Section 5 like catchall for conduct that doesn't meet strict standards?

# We Don't Talk about Amex...or Do We?

- Amex Doesn't Feature Prominently
- Epic: If Amex Applies to App Acquisition, Doesn't Cover IAP
- Apple: Amex Requires that Epic Show Affect on Developers/Platform from *Any* Changes to App Store Policy



# Season 2 New Characters: Enemy of My Enemy, Strange Bedfellows, and Assorted Bone Picking

Friends of Fortnite		Apple's Associates	
Law, Econ, and Bus. Prof.		Am. For Prosperity	Law & Econ. Scholars
Comm. To Support AT Law		ACT/The App Association	IT & Innov. Foundation
Public Citizen		Nat'l Security Officials	Prof. Supporting Apple
Consumer Federation		Civil Justice Assoc. of CA	The Cntr. For Cybersecurity
Electronic Frontier Fed.		Washington Legal Found.	Roblox
Microsoft		Comp. & Comm. Ind. Assoc.	Law & Business Prof.
34 State AGs		Chamber of Progress	Fmr. Fed. AT Enforcers
United States of America		Int'l Center for Law & Econ	
Am. Antitrust Institute		State of California	

# New Enforcers v. Old Enforcers

- **DOJ and 35 state AG's think Court got it wrong**
  - Section 1 applies to unilateral contracts
  - Section 2 rule of reason balancing not done correctly
    - Should have weighed procompetitive benefits against anticompetitive harms
- **Former enforcers respond**
  - Antitrust laws should be careful to avoid harming innovation
  - Balancing test done correctly
    - Stop at “no less restrictive means”

# New Sheriffs in Town: Khan, Kanter, Vestager, State AGs

- **Publicly Stated Determination to Take on Big Tech; Existential Threat to Democracy**
  - But how? With rulings on Section 2 cases, is antitrust law the way? Criminal penalties for Section 2?
- **No Settlements Approach to Mergers and Acquisitions**

**The Washington Post**  
*Democracy Dies in Darkness*

## Apple CEO escalates fight over App Store regulation in rare D.C. speech

The remarks were Cook's most public efforts to date to fight legislation that would loosen the iPhone maker's grip on app downloads

By [Cat Zakrzewski](#)

Today at 10:42 a.m. EDT

# But They Didn't Start the Fight

- **Four Ongoing DOJ & AG Cases against Google**
- **FTC & AG Cases against Facebook**
- **Multiple Private Actions against Apple, Google, Facebook**
- **EU Enforcement Actions against Apple, Amazon, Facebook**



# Epic v. Apple International Spinoffs

- **EU Statement of Objections**

- Abuse of dominant position in distribution of music streaming apps
- Focused on anti-steering and forced use of IAP

- **Dutch Fines for Dating App IAP Requirement**

- **Legislation**

- Digital Markets Act – forces Apple to allow sideloading and other payment systems



# How Long Will the Series Last?

- Will the Supremes Weigh In?
- Will Apple Fight a Multi-Front Battle or Find a Global Compromise?
- Will New Technology (e.g., Cloud Gaming) Moot the Issues before the Battle is Done?



# What Does This Mean For You and Your Client?

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Has the world changed for advising on Section 2 risks?

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How could the proposed legislation and court orders affect your client?

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Are there any strategic advantages in getting involved in these lawsuits?  
(if you're not a defendant)

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# Questions?



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