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# The Epic question: how Google lost when Apple won

How is Google running an illegal monopoly with the Play store — while Apple's App Store is in the clear?

Sean Hollister Dec 16, 2023 at 10:55 AM PST

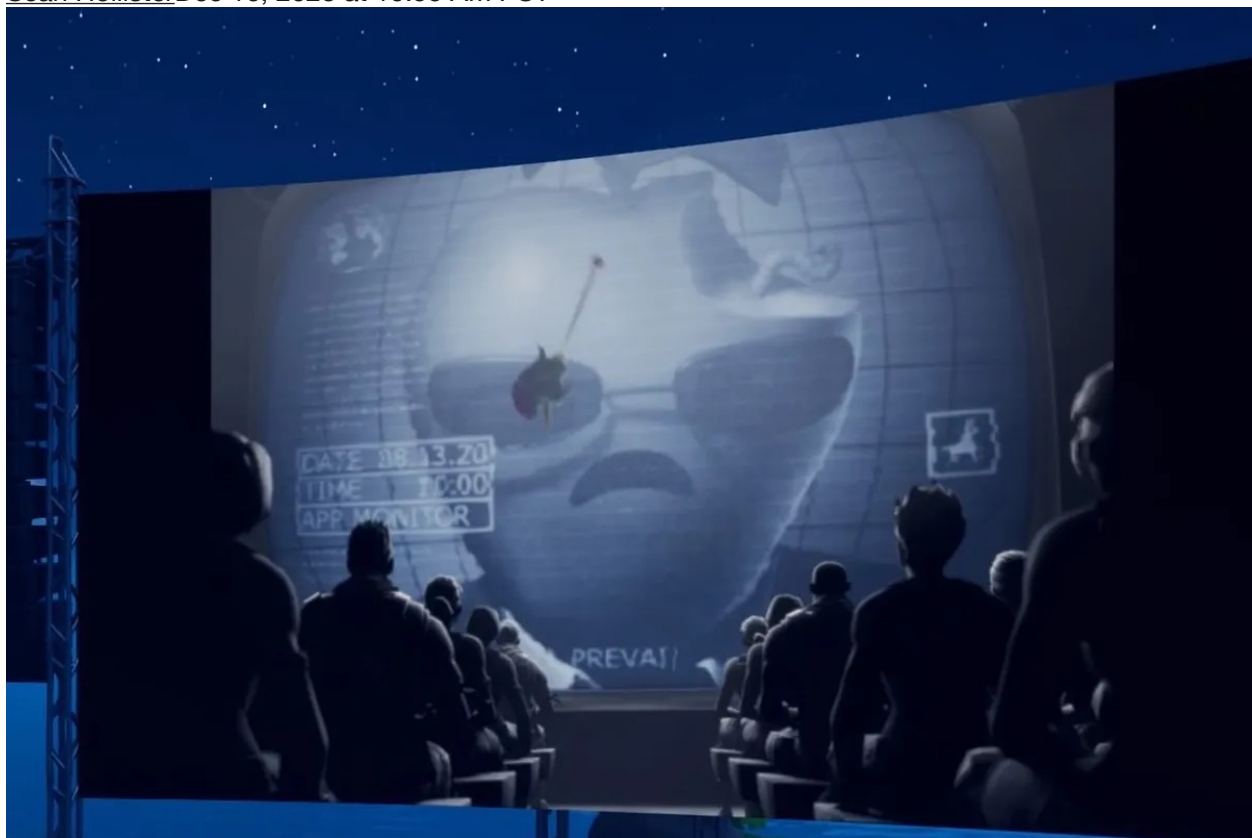


Image: Epic Games/none

Apple rules the iPhone's App Store with an iron fist — sideloading outside it is not allowed. Google lets anyone install any app on an Android phone. But guess which one of these two companies has an illegal monopoly, according to the courts?

As you probably already know, [Google is the one that lost its fight against Epic Games this week](#). It's a fight that Apple previously (mostly) won [in a similar trial in 2021](#), beating claims that it had violated antitrust laws by charging mandatory in-app transaction fees and kicking Epic's game *Fortnite* off the App Store. Google tried a similar move, but in its case, a jury found it had maintained an unlawful monopoly with the Play store; a judge is scheduled to consider remedies next month.

Listening to the verdict live in the courtroom, I couldn't believe my ears at first. Readers [in our comments](#) and around the internet felt the same. *How could Epic have possibly won* against the company that gives away its open-source operating system for free, especially after losing to that company's more locked-down competitor?

Here's my set of theories — which I spent half an hour discussing [on The Vergecast](#) this week.

## **1. Logistically, Epic v. Google is a fresh roll of the die.**

The court made it clear from day one: *Epic v. Google* is a different case from *Epic v. Apple*, with different evidence, in front of a different judge. Nothing in the Apple case is directly relevant to the Google case — in fact, the judge barred both sides from even bringing it up. Google's lawyers never got to argue to the jury that Apple won. Besides, Apple hasn't *quite* won yet: we're [waiting for the Supreme Court to decide](#) whether it'll hear a final appeal. (I won't be covering the Apple case more than the brief outline I'm giving you here, since I'm [ethically bound](#).) Google has also said it [plans to appeal](#) the decision in its case.

Precedent obviously plays a role in the legal system, with judges following the guidance of things like Supreme Court rulings. But as Nilay Patel points out on *The Vergecast*, we shouldn't think of it as a deterministic algorithm — a new case is a fresh roll of the die.

## 2. Google controls its ecosystem with third-party business deals, meaning unfair-looking documents are in more hands.

Apple sells the iPhone. It's Apple's way or the highway, and has [almost](#) always been.

Google doesn't sell the Samsung Galaxy phone lineup and didn't sell the Motorola Droid. It builds the Google ecosystem within Android by sharing a cut of its advertising and app store profits if phone makers agree to prominently carry its apps (like Chrome, Gmail, and Play), use its APIs, and issue timely security patches. Epic's lawyers could present details about these agreements and argue they showed Google using its power in one layer of the phone market to shut down competition in another.

As we learned in this trial, Google also tried to offer major app and game developers deals to keep them from bypassing the Google Play Store — [like Project Hug](#), which gave top game developers up to hundreds of millions of dollars worth of credits, co-marketing, and support. Paradoxically, the fact that Google allowed some competition created a paper trail of discussions about [how much of a potential threat that competition was](#), including forecasts of a “contagion effect” if game developers like Epic defected from Play.

Apple did face some awkward disclosures in its case too, [like an internal email](#) referring to iMessage as a “serious lock-in” factor for iOS. But the *Epic v. Apple* trial included long digressions about topics like [app store moderation](#), giving lots of airtime to Apple's non-monopolistic rationales for a walled garden. While Epic argued that these rationales were merely a pretext for running a monopoly, [the ruling ended up](#) treating them as valid concerns, albeit with some skepticism. In an antitrust trial, intentions matter — and over the course of its many negotiations, Google wrote a *lot* of intentions down.

Epic Games CEO Tim Sweeney [told me](#) it's unfortunate that the more open company is getting penalized for that openness:

*I think Apple is... it's a little bit unfortunate that in a lot of ways Apple's restrictions on competition are absolute. Thou shalt not have a competing store on iOS and thou shalt not use a competing payment method. And I think Apple should be receiving at least as harsh antitrust scrutiny as Google.*

### **3. Some of those deals looked seriously unfair!**

Putting aside Project Hug for a sec, Spotify *pays Google nothing* to get almost all the benefits of the Google Play store, we learned in court. I repeat: [Spotify pays 0 percent](#) when it uses its own in-app payment system — while a competing subscription service might pay 11 percent of its revenue if it's even allowed to use its own payments system at all. “If you're a smaller developer than Spotify, you get screwed,” Sweeney told me after the verdict.

Google [offered Netflix a sweetheart deal](#) to pay just 10 percent of its earnings via Google Play too, at a time when 15 percent was the norm. (Netflix refused and decided not to stop offering in-app purchase on Google's store entirely.) [This trial destroyed any notion that Google treats developers fairly and equally.](#)

And while Apple has [offered developers sweetheart deals](#) too...

### **4. This case was in front of a jury, not a bench trial.**

That meant Epic could spin a tale of good and evil, while Google was left explaining away complicated business deals.

Epic showed the jury document after unfair-looking document where Google allegedly “bribed” or “blocked” its partners from becoming competitors with special deals, ones which at least disincentivized them from building, joining, or carrying alternative app stores, I'd argue.

While a judge might have well decided those deals aren't out of the norm, the jury may have seen how the sausage is made for the very first time — and the jury was ultimately in charge.

## 5. That jury saw Google had something to hide.

Not only did Google have to explain that offering a game developer, [say, \\$90 million in incentives](#) wasn't necessarily a bribe, the Google executives behind those deals had to explain they weren't doing it to keep those companies from building rival app stores. Google employee after Google employee said they were doing it so Android phones could compete with the iPhone.

But Google's own internal emails and strategic plans [clearly showed that those execs wanted to block rival app stores](#), and the jury was here for it.

The jury was also in the room for two rounds of weirdness with the Spotify numbers in particular, which Google *tried hard* not to reveal in open court. At one point, a [Google VP admitted](#) that if deal terms "were to become known, other developers would come to us to do the same, and ... negotiate it down, and that would play out badly for us."

## 6. That jury saw that Google intentionally deleted evidence, too.

Judge James Donato literally said these exact words to the jury just hours before they reached a verdict:

You have seen evidence that Google Chat communications were deleted with the intent to prevent their use in litigation. You may infer that the deleted Chat messages contained evidence that would have been unfavorable to Google in this case.

Can you imagine being a juror in this case, getting told that Google probably deleted *even more* unfair deals and potentially damning evidence than what you've already seen? That's exactly what happened over and over during this trial, with Epic grilling practically every Google witness — right up [to Google CEO Sundar Pichai](#) — about why they didn't preserve all of their business communications as required by law.

It turned out that Google had set all one-on-one chats to automatically delete themselves after 24 hours by default, and employees all the way up to the CEO intentionally used that to make certain conversations disappear.

Not only did the jury see this, [at least one juror decided](#) that Sundar Pichai wasn't credible on the stand, and that the deleted chats were a factor in their decision to give Epic the win.

## **7. Maybe the biggest reason: market definition.**

It would be hard to argue Google has a monopoly on phones, or a monopoly on apps. It doesn't sell those directly, for one thing, and you can buy an iPhone instead.

Google wanted to argue the "relevant antitrust market" was phones and app stores in general — or [better yet, mobile transactions](#). That could have been a pathway to an easy win.

In fact, market definition was arguably the deciding factor in the Apple case, [when Judge Yvonne Gonzalez Rogers singlehandedly decided](#) the proper market definition was "digital mobile gaming transactions," a market where Apple's 30 percent cut looked relatively fair, since Sony, Microsoft, and Nintendo nominally charge the same rate.

But in this case, the jury got to choose the relevant market for themselves — it was a write-in option on the verdict form — and the judge was publicly skeptical of Google's market definitions, [casting serious doubt on the idea](#) that "digital transactions" made sense as an antitrust market at all.

In the end, the jury decided to go with Epic's chosen market definitions: *Android* app distribution and *Android* in-app billing services. From there, it was a lot easier to agree Google had monopoly power — and now, it's up to the judge to decide what penalties it should incur.