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The Battle of the Experts Begins

by **Parker Miller and Valarie Williams**

This week will start the "battle of the experts" portion of the *Epic v. Apple* federal antitrust trial in San Francisco, where leading economists will attempt to help Judge Yvonne Gonzalez Rogers determine the core issues in the case around relevant markets and market power. Last week, the interconnected world of digital media and, more specifically, digital gaming was on full display. The parties battled to show similarities and dissimilarities between Apple and other parties' conduct. From the beginning, Apple has positioned itself as just one among many tech companies with similar policies and practices. Epic has emphasized how competition in the App Store is critical for developers. Like an especially cruel and difficult law school exam, the court must sort through evidence from both parties seeking to demonstrate how other companies' conduct justified their own conduct (or not). Often, the parties used the same evidence to prove radically different points.

Much of the evidence so far has centered on the conduct of other participants in digital media. For instance, witnesses from Sony and Microsoft were questioned about the policies of their app stores, as well as their interaction with Epic. The parties sparred over key facts:

- Apple adduced evidence that Sony and Microsoft also charge a 30% commission on in-app purchases in their app stores, but Epic adduced testimony that demonstrated that both Sony and Microsoft sell consoles at a loss and use the app store revenue to generate profits in their gaming businesses.
- Apple was able to introduce evidence about how companies had worked hard to allow cross-platform play, including access to a cross-platform wallet, for *Fortnite* and other games, but Epic countered with testimony that the need for cross-platform play actually supports the notion that iOS, and the App Store, are distinct markets.
- Apple introduced evidence that Microsoft considers a console gaming market when developing the strategy for its gaming business, but Epic developed testimony that Microsoft's foray into mobile hardwire may have been related to the need to compete in the separate market of mobile media.
- Apple touted its App Store review policy as an important security benefit for consumers, but Epic pointed to Apple's approval of a school-shooting game and apps that carry out malicious ad-fraud tasks.

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- The parties disagreed on even the basic necessity of an app. Apple adduced evidence that Microsoft had just expanded a beta test of its Xbox cloud gaming service delivered through the Safari browser. Epic seemed to hint that the very fact that Microsoft would go through the research and development costs to create access to the Xbox cloud gaming service for iOS users demonstrates the power of Apple and the importance of reaching iOS users, even with a more challenging browser work-around.

The same evidence often serves multiple purposes in an antitrust trial. As an example, the fact that a third-party company has developed a work-around that allows consumers to access their products outside the defendant's conduct could be used to prove that the defendant does not have the market power alleged. This same evidence could also be used to show that the defendant is attempting to block competition by requiring rivals to spend money trying to get around those policies and leading to a less efficient marketplace and a lower quality user experience.

The contentions in this case also highlight the way the facts and allegations work together. Apple is asking the court to see its conduct as similar to other app stores because the commission fees and policies are similar. Epic alleges that the 30% commission is a monopolistic rate when charged by Apple *because* of its unique position as the gatekeeper for more than 1 billion iPhone users. Epic seems to be saying to the court that Sony's and Microsoft's commissions are irrelevant because they are positioned differently and operate in related but different markets. Same facts, but different context.

The brief takeaway is that in this trial, and antitrust law more generally, the finder of fact, whether judge or jury, has to really understand and put in context the factual rationale for business and consumer decisions in the marketplace. Businesses, markets, and industries operate in unique ways that require careful and detailed analysis. Rarely does the public have the opportunity to see that analysis play out in a courtroom in industries where consumers are so intimately involved – mobile gaming and smartphones. The upcoming expert testimony should help place all this competing evidence in context for Judge Gonzalez Rogers, antitrust practitioners, and the public following along.

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