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Epic Games, Inc. v. Apple, Inc.: An Epic Opinion for Software Developers

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Aside from Google Play, Apple's App Store is where the majority of apps are downloaded from across the world. Recently, Apple has faced scrutiny for its management of the App Store and the control Apple has over the market due to the lack of competition. Additionally, developers have criticized the 30% fee Apple charges them for in-app purchases. The recent ruling by the Northern District of California in Epic Games, Inc. v. Apple, Inc., 559 F. Supp. 3d 898 (N.D. Cal. 2021) addressed this issue and issued an injunction allowing the possibility for developers to direct consumers to external links to subscribe or make purchases which could allow the developers to circumvent Apple's high commission rates.

In Epic Games, Inc. v. Apple, Inc., the court held Apple was not an antitrust monopolist in the market of mobile gaming transactions under the Sherman Act; however, Apple's anti-steering restrictions were held to be anticompetitive and unlawful under the unfair prong of California's Unfair Competition Law. This Comment analyzes how the Northern District of California correctly applied prior law in its holding that Epic Games failed to satisfy the rule of reason test to prove Apple's app distribution restrictions were anticompetitive effects that were harmful to consumers and unlawful under § 1 of the Sherman Act. While Apple's app distribution restrictions did have anticompetitive effects, Apple was able to validate the anticompetitive effects with security, interbrand competition, and intellectual property as

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valid procompetitive justifications since the justifications enhance consumer appeal and make Apple more competitive to brands like Google. Additionally, this Comment focuses on how the court correctly ruled Apple's anti-steering provisions threaten an incipient violation of an antitrust law under California's Unfair Competition Law since the anti-steering provisions lack a valid procompetitive rationale and block communications about lower prices on other platforms to consumers. Going forward, this case provides implications on how future developers should structure their arguments when pursuing litigation against companies with significant market power, namely Apple and Google. The fact Apple was granted an injunction for its anti-steering provisions under the California Unfair Competition Law but was not considered to be in violation of § 1 of the Sherman Act may reveal that developers are better off framing their arguments as "incipient violations of antitrust law" rather than more broadly through the Sherman Act § 1 unfair restraint of trade.

INTRODUCTION

Is it fair that one company has almost total control over the mobile network and what apps people can use?[1]

Epic, Inc. v. Apple, Inc., the antitrust lawsuit that involved video game company Epic Games, unveiled the extent of Apple's power over its App Store, the only store from which iOS users can obtain apps. Nowadays, if a consumer wants to use an app on their mobile device, the app developer has to abide by Apple's rules and levies.[2] This is the genius of Apple, as it exercises its control of the iOS operating system to its own advantage by controlling the products and features consumers have access to and forcing developers to sell through the App Store.[3] As part of its exercise of power and probably to most consumers' surprise, Apple takes a 30% cut for all apps purchased from its App Store.[4] This 30% commission has been the same since the App Store's inception.[5] It has not changed, despite Apple's

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1 *About the Coalition*, COALITION FOR APP FAIRNESS, https://appfairness.org (last visited Jan. 26, 2022).

2 *Id.*

3 *The App Store is Ruled by Anti-Competitive Policies*, COALITION FOR APP FAIRNESS, https://appfairness.org/issues/anti-competition/ (last visited Jan. 26, 2022).

4 Mark MacCarthy, *The Epic-Apple app case reveals monopoly power and the need for new regulatory oversight*, BROOKINGS (June 2, 2021), https://www.brookings.edu/blog/techtank/2021/06/02/the-epic-apple-app-case-reveals-monopoly-power-and-the-need-for-new-regulatory-oversight/.

5 Epic Games, Inc. v. Apple, Inc., 559 F. Supp. 3d 898, 923 (N.D. Cal. 2021)

now near-total control over the mobile device market.[6] Apple's exercise of its growing market power is a big deal to developers and consumers.[7] Its 30% commission negatively impacts developers by limiting the revenue they can generate and places developers at a clear competitive disadvantage compared with apps sold directly by Apple.[8] Given the 30% commission fee, developers have no choice but to raise their prices which trickles down to negatively impact consumers by cutting into their purchasing power.[9] Because of Apple App Store policies, consumers have no choice but to pay Apple's 30% commission if they want to use one of Apple's widely popular and modern mobile devices.[10] Currently, antitrust law contains few resources to curb the kind of monopoly power Apple possesses, and it is difficult to find remedies that exist under antitrust law for software developers who challenge Apple's unyielding market power.[11]

To demonstrate the impact of Apple's 30% commission, consider Epic Games who produces Fortnite, one of the most popular video games on the market today.[12] If a customer of Fortnite were to buy an upgrade, they might have to pay $9.99 in the App Store, whereas they could only have to pay as much as $7.99 for that same upgrade if they purchased the upgrade directly through Epic.[13] The reason for this increased price in the app store is because of Apple's 30% commission on apps in its App Store.[14] When consumers pay for upgrades through Epic, Epic can directly pass savings back to customers.[15] Alas, Apple specifically instructs developers not to direct customers to less expensive options. Developers who do so risk being banned from the App store entirely.[16] Apple's control over software distribution to iOS devices harms competition, limits innovation among app developers, raises prices, and limits choices for

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6 *About the Coalition, supra* note 1.

7 *30% "App Tax" on Creators & Consumers*, COALITION FOR APP FAIRNESS, https://appfairness.org (last visited Jan. 26, 2022).

8 *Id.*

9 *Id.*

10 *No Consumer Freedom*, COALITION FOR APP FAIRNESS, https://appfairness.org (last visited Jan. 26, 2022).

11 *See* Mark MacCarthy, *The Epic-Apple app case reveals monopoly power and the need for new regulatory oversight*, BROOKINGS (June 2, 2021), https://www.brookings.edu/blog/techtank/2021/06/02/the-epic-apple-app-case-reveals-monopoly-power-and-the-need-for-new-regulatory-oversight/.

12 *The App Store Limits Consumer Freedom*, COALITION FOR APP FAIRNESS, https://appfairness.org/issues/no-consumer-freedom/ (last visited Jan. 26, 2022).

13 *Id.*

14 *Id.*

15 *Id.*

16 *Id.*

consumers.[17] Epic attempted to give Fortnite players on iOS a choice between Apple's App Store payment and the payment directly through Epic that passed savings directly to customers.[18] Apple retaliated by banning Fortnite updates on iOS devices and threatening to stop Epic from creating software for all of its games on Apple devices.[19] When Apple demanded Epic revert to exclusively using Apple payments, Epic refused and filed suit.[20]

I. BACKGROUND

Congress passed the Sherman Act in 1890 to prohibit monopolies and to promote competitiveness and economic fairness.[21] Section one describes and prohibits specific types of anticompetitive conduct.[22] Section two regards end results that are anticompetitive, such as monopolies.[23] However, "[a]ntitrust law does not end with the Sherman Act."[24] California's Unfair Competition Law bars business practices that comprise "unfair competition," which includes "any unlawful, unfair or fraudulent business act or practice."[25] Unfair practices can include conduct that threatens an incipient violation of antitrust law.[26] In *Epic Games, Inc. v. Apple, Inc.*, Epic Games, Inc. sued Apple, Inc. claiming Apple is an antitrust monopoly over its own systems relative to the App Store.[27] The court found in favor of Apple on nine of the ten counts and found Apple was not an antitrust monopolist in the market for mobile gaming transactions.[28] The court ruled against Apple on the anti-steering charge and issued a permanent injunction that blocked Apple from preventing developers from including external links within apps to direct customers to purchasing mechanisms and blocking Apple from prohibiting developers from using information collected from an app to notify customers of these other storefronts.[29] While the court acknowledged

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17 *Id.*

18 *Free Fortnite*, EPIC GAMES, https://www.epicgames.com/site/en-US/free-fortnite-faq (last visited Jan. 26, 2022).

19 *Id.*

20 *Id.*

21 *The Antitrust Laws*, FEDERAL TRADE COMM'N, https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws (last visited Jan. 9, 2022).

22 15 U.S.C. § 1 (1890).

23 15 U.S.C. § 2 (1890).

24 Epic Games, Inc. v. Apple, Inc., 559 F. Supp. 3d 898, 1051 (N.D. Cal. 2021).

25 CAL. BUS. & PROF. CODE § 17200 (1993).

26 Cel-Tech Commc'ns, Inc. v. L.A. Cellular Tel. Co., 20 Cal. 4th 163, 187 (1999).

27 *Epic Games*, 559 F. Supp. 3d at 921.

28 *Id.* at 1068.

29 *Id.* at 1057, 1068.

Apple's app distribution restrictions do have some anticompetitive effects, it could not take immediate action since it determined Apple was not a monopolist for antitrust purposes since Epic Games, Inc. could not meet its burden of demonstrating Apple's procompetitive justifications could be achieved through less restrictive alternatives.[30] Although the court analyzed both § 1 and § 2 of the Sherman Act, among other antitrust issues, this Comment will focus on the courts' application of the rule of reason test in evaluating Sherman Act § 1 claims, as well as the court's analysis under California's Unfair Competition Law.

This Comment hopes to show that the Northern District of California was correct in its application of the rule of reason test in determining that Apple's app distribution restrictions do not violate § 1 of the Sherman Act and in stating Apple's anti-steering provisions threaten an incipient violation of an antitrust law under California's Unfair Competition Law. This implies that developers may be better at effecting change by attacking platforms themselves through the incipient violation of an antitrust law provision of California's Unfair Competition Law rather than making broad claims about monopolistic power.

Part I of this Comment lays out basic background information about the Sherman Act § 1 rule of reason test and California's Unfair Competition Law, including significant federal and California cases that form the basis of the holding in *Epic v. Apple*. Part II lays out the relevant background facts and procedural history of *Epic v. Apple*, as well as the reasoning behind the holding. Part III analyzes the majority's decision, discussing its choice in applying the rule of reason test when analyzing the facts under the Sherman Act and its choice in applying the balancing and tethering tests when analyzing the facts under the unfair prong of California's Unfair Competition Law, as well as its decision to issue an injunction on Apple's anti-steering provisions. Part III concludes by discussing the decision's future implications on developers and consumers and how developers can frame legal arguments going forward to better achieve their goals.

A. Prior Law and Perspective

The Sherman Act and California's Unfair Competition Law provide federal and state approaches to antitrust law.[31] The Sherman Act is a federal statute that promotes interstate commerce and bars unreasonable

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30 *Id.* at 1040-41.

31 *The Antitrust Laws*, FEDERAL TRADE COMM'N, https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws (last visited Feb. 11, 2022); CAL. BUS. & PROF. CODE § 17200 (1993).

restraints on trade and competition in the marketplace.[32] It contains two main provisions.[33] Section 1 of the Sherman Act bans all agreements "in restraint of trade," while Section 2 bans monopolization.[34] As discussed further below, California's Unfair Competition Law bans business practices that create unfair competition.[35]

B. The Sherman Act and the Rule of Reason Test

To establish liability under § 1 of the Sherman Act, a plaintiff needs to prove two elements: (1) the existence of an agreement, and (2) the agreement was an unreasonable restraint of trade.[36] Regarding the second element of determining if an agreement was an unreasonable restraint of trade, the courts have determined some restraints to be *per se* unreasonable, while judging all other restraints under a "rule of reason" test.[37] The rule of reason test involves the courts performing a fact-specific assessment of "market power and market structure to assess the restraint's actual effect on competition."[38] The test weighs all the relevant facts of a case, including specific information about the relevant business as well as the history, nature, and effect of the restraint and the businesses' market power.[39] Courts consider those relevant factors to decide whether a restrictive practice places an unreasonable restraint on competition that should be prohibited.[40] The test is designed to help distinguish between restraints of trade that are unreasonable because their anticompetitive effects are harmful to the consumer and restraints of trade that are in consumers' best interests because they stimulate competition.[41]

The rule of reason test involves a three-step burden shifting test.[42] In *Amex*, the Supreme Court explained the following rules for the test.

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32 Legal Info. Institute, *Sherman Antitrust Act*, CORNELL LAW SCHOOL, https://www.law.cornell.edu/wex/sherman_antitrust_act (last visited Feb. 11, 2022).

33 *Id.*

34 15 U.S.C. § 1 (1890); 15 U.S.C. § 2 (1890).

35 BUS. & PROF. § 17200.

36 Aerotec Int'l, Inc. v. Honeywell Int'l, Inc., 836 F.3d 1171, 1178 (9th Cir. 2016).

37 Ohio v. Am. Express Co., 138 S. Ct. 2274, 2284 (2018); *See* Michael A. Carrier, *The Rule of Reason: An Empirical Update for the 21st Century*, 16 GEO. MASON L. REV. 827, 827 (2009) (for more explanation on the "rule of reason" test).

38 *Id.*

39 Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 885-86 (2007).

40 *Id.*

41 *Id.*

42 Ohio v. Am. Express Co., 138 S. Ct. 2274, 2284 (2018).

> To determine whether a restraint violates the rule of reason, . . . a three-step, burden shifting framework applies.
>
> Under this framework, the plaintiff has the initial burden to prove that the challenged restraint has a substantial anticompetitive effect that harms consumers in the relevant market. If the plaintiff carries its burden, then the burden shifts to the defendant to show a procompetitive rationale for the restraint.
>
> If the defendant makes this showing, then the burden shifts back to the plaintiff to demonstrate that the procompetitive efficiencies could be reasonably achieved through less anticompetitive means.[43]

The court recognized that the rule of reason test is not a "rote checklist" and applied the facts of *Epic Games v. Apple* to analyze Apple's app distribution restrictions and their anticompetitive effects, procompetitive rationales, and less restrictive alternatives.[44] To prove anticompetitive effects, Epic would need to prove that Apple's app distribution provisions raised the price of mobile gaming transactions "above a competitive level, reduced the number of [mobile gaming] transactions, or otherwise stifled competition in the [mobile gaming] market."[45] If Epic successfully proved anticompetitive effects, Apple would need to offer a procompetitive justification for its anticompetitive effects.[46] A procompetitive rationale is defined by the courts as a "nonpretextual claim that [the defendant's] conduct is indeed a form of competition on the merits because it involves, for example, greater efficiency or enhanced consumer appeal."[47] "Pretextual" refers to something that is done as a "pretext" which is "a pretended reason for doing something that is used to hide the real reason."[48] Then, if Apple proves procompetitive justifications to the court for the anticompetitive effects of Apple's app distribution restrictions, the burden shifts back to Epic to demonstrate that Apple could achieve these procompetitive

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43 *Id.*

44 Epic Games, Inc. v. Apple, Inc., 559 F. Supp. 3d 898, 1034 (N.D. Cal. 2021) (citing Ohio v. Am. Express Co., 138 S. Ct. 2274, 2284 (2018)).

45 *Id.* at 1036 (quoting Am. Express Co., 138 S. Ct. at 2284).

46 *Id.* at 1038.

47 FTC v. Qualcomm Inc., 969 F.3d 974, 991 (9th Cir. 2020).

48 *Pretextual*, CAMBRIDGE DICTIONARY (2022), https://dictionary.cambridge.org/us/dictionary/english/pretextual (last visited Oct. 7, 2022).

justifications through less restrictive means.[49] Under this third step, the court does not expect Apple to utilize the least restrictive means of achieving its procompetitive effects.[50] Rather, the "less restrictive means" must only be significantly less restrictive while achieving the same procompetitive effects without significantly increasing costs.[51]

C. California's Unfair Competition Law

In addition to federal laws, many states have their own unfair competition laws with antitrust remedies.[52] California's Unfair Competition Law bars business practices that comprise "unfair competition," which includes "any unlawful, unfair or fraudulent business act or practice."[53] A practice can be declared an unfair competition under the Unfair Competition Law even if it does not violate an antitrust statute.[54] Plaintiffs challenging conduct under the Unfair Competition Law can bring claims as either competitors or consumers.[55] The "unfair" prong of the Unfair Competition Law differs for claims depending on whether such claims are brought by consumers as opposed to competitors.[56] The court in *Epic Games v. Apple* found Epic qualified as a quasi-consumer since Epic and developers similar to Epic jointly consume Apple's game transactions and distribution services just like iOS users do.[57]

In analyzing claims brought by quasi-consumers under the Unfair Competition Law, the courts consider both a "tethering" test and a "balancing" test.[58] Under these tests, Epic needed to prove that Apple's conduct satisfied the following three elements: (1) Apple's conduct "threatens an incipient violation of antitrust law," (2) the conduct "violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law," or (3) the conduct "otherwise significantly threatens or harms competition."[59] Then, for the tethering test, these findings must be found to be tethered to a legislatively declared

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49 *Epic Games*, 559 F. Supp. 3d at 1040.

50 *See* NCAA v. Alston, 141 S. Ct. 2141, 2164 (2021).

51 Alston, 141 S. Ct. at 2164; In re NCAA Athletic Grant-in-Aid Cap Antitrust Litig., 958 F.3d 1239, 1260 (9th Cir. 2020), *aff'd* 141 S. Ct. at 2161.

52 CAL. BUS. & PROF. CODE § 17200 (1993).

53 *Id.*

54 *See* Cel-Tech Commc'ns, Inc. v. L.A. Cellular Tel. Co., 20 Cal. 4th 163, 180 (1999).

55 Kwikset Corp. v. Superior Court, 246 P.3d 877, 885 (Cal. 2011).

56 *See Cel-Tech Commc'ns, Inc.,* 20 Cal. 4th at 187.

57 Epic Games, Inc. v. Apple, Inc., 559 F. Supp. 3d 898, 1052 (N.D. Cal. 2021); *Quasi-*, CAMBRIDGE DICTIONARY (2022), https://dictionary.cambridge.org/us/dictionary/english/quasi ("Quasi-" is a prefix used to define "that something is almost, but not completely").

58 *Id.* at 1053.

59 *Id.* at 1052 (quoting Cel-Tech Commc'ns, Inc. 20 Cal. 4th at 187 (1999)).

policy or proof of an actual or threatened effect on competition.[60] On the other hand, the balancing test weighs the usefulness of the defendant's conduct against the gravity of the harm to the plaintiff and must lead to a finding that the challenged business practice is "immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers."[61]

Under the "tethering test," California courts have "broad discretion" to create "equitable remedies to serve the needs of justice."[62] The California Business & Professional Code § 17203 reinforces the "broad discretion" by allowing courts to make necessary judgments to prohibit a use by any person or practice that creates unfair competition. Unfair practices can include conduct that threatens an incipient violation of antitrust law.[63] Therefore, this could enable the court to find Apple's anti-steering provisions violate the "unfair" prong of California's Unfair Competition Law if the court finds the anti-steering provisions "threaten an incipient violation of antitrust law."[64]

D. Court Precedent Relevant to Epic v. Apple

1. *Ohio v. Amex* and Anticompetitive Effects

The opinion in *Epic v. Apple* frequently references *Ohio v. Am. Express Co.*[65] in its analysis of whether Apple violated both the Sherman Act and California's Unfair Competition Law. In *Ohio v. Am. Express Co.*, in order to fund its cardholder reward program, American Express charged merchants higher fees than competitors.[66] This business model promoted competitive innovations in the credit-card market but frustrated merchants who tried to "steer" cardholders from using American Express cards at the point of sale.[67] American Express responded by placing anti-steering provisions in its contracts with merchants; the government sued, claiming the provisions violated § 1 of the Sherman Act.[68] The court applied the rule of reason test and held that American Express's anti-steering provisions did not violate § 1 of the Sherman Act because the government failed to show that the anti-steering provisions had anticompetitive effects.[69] Increased merchant fees reflected increases in the value of its

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60 *Id.*
61 Drum v. San Fernando Valley Bar Ass'n, 182 Cal. App. 4th 247, 257 (2010).
62 Zhang v. Superior Court, 57 Cal. 4th 364, 371 (2013).
63 CAL. BUS. & PROF. CODE § 17203 (2004).
64 *See* Cel-Tech Commc'ns, Inc. v. L.A. Cellular Tel. Co., 20 Cal. 4th 163, 187 (1999).
65 138 S. Ct. 2274 (2018).
66 *Id.* at 2282.
67 *Id.* at 2282-83.
68 *Id.*
69 *Id.* at 2284, 2287.

services and transactions, not an ability to charge above a competitive price.[70] Anti-steering provisions also did not restrict Interbrand competition.[71]

2. *Leegin* and Interbrand Competition

Another significant case to the *Epic v. Apple* decision was *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*[72] In *Leegin*, Leegin Creative Leather Products ("Leegin") refused to sell to retailers that discounted their goods below suggested prices and stopped selling to PSKS, Inc.'s store for that reason.[73] PSKS sued Leegin, alleging Leegin violated antitrust laws by entering into vertical agreements with its retailers to set minimum resale prices.[74] The court ruled that the rule of reason test was the appropriate standard to judge vertical price restraints and minimum resale price maintenance agreements because procompetitive justifications existed for a manufacturer's use of resale price maintenance by the promotion of interbrand competition.[75] "Interbrand" competition refers to competition between brands. An example of Interbrand competition is the competition between Apple and Google in the smartphone market.[76] This contrasts with "intrabrand" competition, which occurs when there is competition within a brand, such as when brick-and-mortar Apple stores compete with other Apple stores or other stores that sell Apple products.[77] *Leegin* demonstrated that courts consider interbrand competition a valid procompetitive justification.[78]

3. *NCAA v. Alston* and Findings of Pretext

The court in *Epic v. Apple* referred to *NCAA v. Alston* to demonstrate the need for a connection between a procompetitive rationale and anticompetitive effects when applying the rule of reason analysis.[79] In *NCAA v. Alston*, current and former student-athletes sued the NCAA, alleging that it and certain of its member institutions violated the Sherman Act by agreeing to restrict the compensation universities can offer student-

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70 *Id.* at 2289.
71 *See id.* at 2290.
72 *See* Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877 (2007).
73 *See id.* at 883-84.
74 *Id.* at 884.
75 *Id.* at 890, 907.
76 Kyle Colonna, *Recognizing The Importance Of Intrabrand Competition In High Technology Markets: The Problem With Large Retailors & Vertical Territorial Restraints*, 4 J. OF LAW & TECH. & THE INTERNET 483, 483 (2013).
77 *Id.*
78 551 U.S. at 889.
79 Epic Games, Inc. v. Apple, Inc., 559 F. Supp. 3d 898, 1034 (N.D. Cal. 2021).

athletes.[80] The court affirmed the district court's ruling that the NCAA violated the Sherman Act § 1 by limiting the education-related benefits schools could offer student-athletes.[81] The rule of reason analysis did not require the NCAA to show that its compensation rules were the least restrictive means of preserving consumer demand.[82] However, the court declared a violation of the Sherman Act upon finding the restraints were stricter than necessary to achieve demonstrated procompetitive benefits.[83] The court rejected the NCAA's procompetitive justifications because it found that the justifications had no direct connection to the NCAA's restrictions on student-athlete compensation.[84]

Similarly, Eastman Kodak Co. was sued under the Sherman Act § 1 and § 2 for adopting policies that limited the availability of parts to independent service organizations (ISOs) and made it difficult for ISOs to compete with Kodak in servicing Kodak equipment.[85] The court denied summary judgment to Kodak based on its argument that companies providing repair services for its machines were exploiting the investment Kodak had made in product development.[86] On remand, the Ninth Circuit affirmed a jury finding of pretext in that no evidence demonstrated Kodak considered intellectual property when it began its policies.[87]

4. *Tech. Res.* and Protection of Intellectual Property

Technical Resource Services, Inc. ("TRS") sued Dornier, arguing Dornier violated the Sherman Act by engaging in unlawful, anticompetitive conduct to manipulate the servicing market for lithotripters and to prevent competition from TRS and other independent service organizations.[88] The court held that because Dornier provided multiple business justifications aside from its alleged response to competition, the jury could decide to rule on some or all of those other business justifications as procompetitive effects.[89] The jury could have credited Dornier's need to protect its trade secrets and proprietary information.[90] This case demonstrated that a defendant could escape

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80 NCAA v. Alston, 141 S. Ct. 2141, 2147 (2021).
81 *Id.* at 2166.
82 *See id.* at 2161.
83 *See id.* at 2162.
84 *See id.* at 2162-63.
85 *Eastman Kodak Co. v. Image Tech. Servs.*, 504 U.S. 451, 458-59 (1992)
86 *See* Image Tech. Servs. v. Eastman Kodak Co., 125 F.3d 1195, 1219 (9th Cir. 1997).
87 *See id.* at 1213-18.
88 Tech. Res. Servs., Inc. v. Dornier Med. Sys., Inc., 134 F.3d 1458, 1460-61 (11th Cir. 1998).
89 *Id.* at 1467.
90 *Id.*

liability under the Sherman Act if it can explain its actions by legitimate business justifications, which include the need to protect intellectual property.[91]

5. *Cel-Tech* and the Tethering Test

Leading up to *Epic v. Apple*, one of the main approaches to analyzing violations of California's Unfair Competition Law stemmed from *Cel-Tech Commc'ns, Inc. v. L.A. Cellular Tel. Co.* and its application of the "tethering test."[92] In *Cel-Tech*, Cel-Tech sued L.A. Cellular under California's Unfair Practices Act and unfair competition law, arguing that L.A. Cellular's below-cost sale of telephones harmed them.[93] The court concluded the case should be remanded because the defendant might have violated the unfair competition law and because the applicable test for an unfair competition law was stated for the first time by the court, the plaintiff should be allowed to present additional evidence to meet that test.[94]

In *Cel-Tech*, the court adopted the tethering test for the unfair prong of California's Unfair Competition Law.[95] Under the test, a plaintiff who claims to have suffered injury must show the defendant (1) threatens an incipient violation of an antitrust law, (2) violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or (3) otherwise significantly threatens or harms competition.[96] These findings must be tethered to some legislatively declared policy or proof of some actual or threatened impact on competition.[97]

II. EPIC GAMES, INC. V. APPLE, INC.:

A. Background Facts and Procedural Posture

In *Epic Games, Inc. v. Apple, Inc.*, Epic Games, Inc. ("Epic") sued Apple, Inc. ("Apple"), claiming Apple is an antitrust monopoly over its own systems relative to the App Store.[98] Epic is a multi-billion-dollar video game company that was founded by Tim Sweeney, who serves as

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91 *Id.*

92 *See* Cel-Tech Commc'ns, Inc. v. L.A. Cellular Tel. Co., 20 Cal. 4th 163, 186-87 (1999).

93 *Id.* at 169.

94 *Id.* at 190.

95 *Id.* at 186-87.

96 *Id.* at 187.

97 *Id.* at 186-87.

98 *See* Epic Games, Inc. v. Apple, Inc., 559 F. Supp. 3d 898, 921 (N.D. Cal. 2021).

the controlling shareholder and chairman of the Board of Directors.[99] In addition to developing games, Epic provides software development tools and distributes apps.[100] Epic's most popular game and app is *Fortnite*.[101] *Fortnite* uses the "freemium" game model.[102] Under this model, a game is basically free to download and play but incorporates in-game features that can be purchased.[103] Among *Fortnite's* distinct features are that the game releases new content and updates on a regular basis to enhance the user experience.[104] *Fortnite* also contains cross-play, which allows players to play with one another from different platforms, such as Sony's PlayStation, Microsoft's Xbox, Mac computers, and certain iOS mobile devices (until recently).[105]

iOS is Apple's operating system for mobile devices.[106] This is a closed platform where Apple has control and provides supervision to any software which accesses iOS devices, such as iPhones and iPads.[107] Apple's iOS system has been described as a "walled garden" since Apple effectively controls and monitors admission to any software that accesses iOS devices.[108] Apple also requires that developers use Apple's in-app purchases or in-app payment ("IAP") systems.[109] Under this IAP system and other agreements with app developers, Apple retains a 30% commission from any payments made to developers through the apps.[110] This 30% rate has existed since Apple's formation, and while initially acceptable, the commission rate has now been more frequently questioned by developers and consumers alike as being onerous and a violation of competition laws.[111] The trial for this case also contained evidence of the use of Apple's anti-steering provisions in its contracts with developers to restrict the information available to consumers, keeping consumers from knowing about the payment structure of in-app purchases.[112]

When Mr. Sweeney signed a Developer Product Licensing Agreement ("DPLA") with Apple in 2010, he agreed to contractual terms including, "that Epic Games (i) was required to pay a commission on in-app

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99 *See id.* at 923-24.
100 *See id.* at 924.
101 *See id.* at 925.
102 *Id.* at 928.
103 *See id.*
104 *See id.* at 927.
105 *See id.*
106 *Id.* at 922.
107 *Id.*
108 *Id.*
109 *Id.* at 923.
110 *Id.*
111 *See id.*
112 *See id.* at 923.

purchases; (ii) was prohibited from putting a store within the App Store; (iii) was prohibited from sideloading apps on to iOS devices; and (iv) was required to use Apple's commerce technology for any payments."[113] Up until the lawsuit, gamers were able to play *Fortnite* on iOS devices which proved extremely profitable for Epic.[114] However, as part of Epic's contract with Apple, Epic had to pay a 30% commission on every Epic purchase made through the App Store, including both initial downloads and in-app purchases.[115] Therefore, *Fortnite* generated profitable revenues for Apple as well.[116] Epic and Mr. Sweeney began expressing dissatisfaction with the App Store's contract terms in the mid-2010s.[117] Mr. Sweeney attempted to discuss with Tim Cook, Apple's chief executive officer, whether Apple would consider making the App Store an open platform in the future.[118] Epic attempted to use its success with *Fortnite* on the iOS platform as leverage to convince Apple to lower its commission fee and open its closed platform.[119] However, in response to Apple's refusal, Epic subsequently breached its contract with Apple, leading to the current lawsuit.[120]

Towards the end of 2019, Mr. Sweeney developed a plan called "Project Liberty," which was essentially an attack on Apple and focused on disrupting Apple's software distribution and payment apparatuses.[121] According to Mr. Sweeney, the plan was "an attempt to provide developer choices for payment solutions and bring that benefit to the customers in a platform where [that] choice is not available."[122] As part of Project Liberty's deployment, Epic Games created a "hotfix" that Epic Games planned to use to introduce code that would allow additional payment methods for iOS and Android versions of *Fortnite*.[123] A hotfix works by coding an app to introduce new instructions on how to configure settings in the app.[124] Developers can use hotfixes to activate content features in an app that are not primarily available to users, despite being in the code.[125] The content feature only becomes available after the app is "notified" by

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113 *Id.* at 934.
114 *See id.* at 923.
115 *See id.*
116 *See id.*
117 *See id.* at 934.
118 *See id.* at 934-35.
119 *See id.* at 923.
120 *See id.*
121 *Id.* at 935.
122 *Id.* at 936.
123 *Id.*
124 *See id.*
125 *See id.*

the server to display the new feature.[126] Epic Games has constantly used hotfixes in the App Store to enable new features in *Fortnite* and resolve configuration issues.[127] However, the Project Liberty hotfix was different in that it enabled substantive features in *Fortnite* that willfully violated the contractual obligations and guidelines to which Epic and Apple had agreed.[128]

On August 3, 2020, Epic introduced its hotfix into the *Fortnite* version 13.40 update.[129] Once activated by Epic, a direct pay option to Epic allowed *Fortnite* players on iOS to opt for a direct pay option that would circumvent Apple's system.[130] Apple approved *Fortnite* version 13.40 to the App Store based on representations that purposefully omitted the full details of this hotfix.[131] Epic activated the direct pay option on August 13, 2020, which led to Apple removing *Fortnite* from the App Store.[132] *Fortnite* remains unavailable on the App Store to this day.[133]

Apple allotted Epic two weeks to cure its breaches of the App Store guidelines and DPLA.[134] Epic responded by requesting a temporary restraining order, the reinstatement of *Fortnite* with its hotfix activated, and the enjoinment of Apple from revoking any developer tools owned by Epic and its affiliates.[135] On August 28, 2020, after the two weeks had passed, Apple terminated Epic's developer program account but continuously offered Epic the opportunity to return *Fortnite* to the App Store if Epic would agree to comply with its contractual obligations.[136] Epic refused.[137] Then, on October 9, 2020, the court issued an Order Granting in Part and Denying in Part Epic's motion for a preliminary injunction.[138] The court also permitted Epic's request to conduct a bench trial on an expedited basis to which Apple objected, requesting at least three additional months.[139] Ultimately, Epic sued Apple, followed by Apple's prompt countersuit for breach of contract.[140]

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126 *Id.*
127 *Id.* at 936-37.
128 *Id.* at 937.
129 *Id.* at 939.
130 *Id*. at 940.
131 *Id.*
132 *Id.*
133 *Id.*
134 *Id.*
135 *Id.*
136 *Id.* at 941.
137 *Id.*
138 *Id.*
139 *Id.*
140 *Id.* at 923.

In its complaint, Epic brought claims under § 1 of the Sherman Act, claiming Apple's iOS app distribution aftermarket and in-app payment solutions aftermarket were unlawful restraints of trade.[141] Apple answered by providing three procompetitive justifications for the challenged restraints: security, interbrand competition, and protection of intellectual property.[142] Epic then argued that a less restrictive alternative would be for Apple to replace its app distribution restrictions with the enterprise or notarization model.[143] The enterprise model is an already-existing model where Apple reviews and approves companies to sign apps for distribution.[144] Epic argued that, under this model, Apple could focus on certifying app stores instead of apps, while still maintaining standards for privacy and security.[145] The notarization model is also an already-existing model where Apple uses automatic tools to scan apps and "notarize" them as safe before Apple can distribute the apps.[146] Apple currently uses the notarization model on macOS and not iOS.[147] Epic claimed a less restrictive alternative for Apple's app distribution restrictions would be to expand this model to iOS.[148]

Additionally, Epic sought relief under the "unfair" provision of California's Unfair Competition Law for the same conduct Epic challenged under the Sherman Act.[149] Epic argued it had standing under the Unfair Competition Law as a potential competitor and as a consumer.[150] Apple did not dispute Epic's standing as a competitor since Epic essentially wanted to start a competing iOS game store.[151] However, Apple challenged Epic's standing as a consumer.[152] Epic argued it was a customer of Apple's app store and suffered a financial injury due to its inability to distribute games straight to consumers for lower prices.[153] Apple claimed separate analysis under the Unfair Competition Law for the same claims challenged under the Sherman Act was inappropriate.[154]

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141 *Id.* at 1033.
142 *See id.* at 922-23.
143 *See id*. at 1040.
144 *See id.* at 1008.
145 *Id.*
146 *Id.*
147 *Id.*
148 *Id.*
149 *See id.* at 1051.
150 *See id.* at 1052.
151 *See id.*
152 *See id.*
153 *See id.*
154 *See id.* at 1054.

B. Court Found Apple Was Not an Antitrust Monopoly Under Sherman Act § 1 but Issued an Injunction Barring Apple from Enforcing Anti-Steering Restrictions

U.S. District Judge Yvonne Gonzalez Rodgers issued the trial court decision for this case on September 10, 2021.[155] After evaluating the evidence, the court first determined the relevant market for the case to be the market for digital mobile gaming transactions.[156] The court chose this market, rather than just general app or gaming transactions, because mobile game transactions have the advantage of mobility over other devices.[157] The court also determined the area of effective competition in the geographic market to be global, except for China.[158]

With the determined relevant and geographic markets in mind, the court reviewed the claims under the Sherman Act § 1 and ultimately found Apple was not an antitrust monopolist in the submarket for mobile gaming transactions.[159] The court affirmed that Apple's app distribution restrictions have some anticompetitive effects and found that Apple's 30% commission rate is based on its market power rather than competition in changing markets.[160] The commission rate has barely changed in over a decade, even though Apple's operating margins have exceeded 75% and despite the complaints from developers and regulators.[161] Moreover, Apple controls 55% of the market, and the court determined that Apple's commissions harm competition by preventing large developers from opening competing iOS game stores to compete with other developers on features and price.[162] While Epic demonstrated under the "rule of reason test" that Apple's app distribution restrictions do have anticompetitive effects, the court could not take immediate action since it determined Apple was not a monopoly due to Apple's demonstration of procompetitive effects and Epic's inability to meet its burden of showing less restrictive alternatives.[163]

Regarding Apple's procompetitive justifications, the court found Apple's security justification to be valid and not pretextual since

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155 *See id.* at 1068-69; Bobby Allyn, *What The Ruling In The Epic Games V. Apple Lawsuit Means For iPhone Users*, NPR (Sept. 10, 2021, 7:15 PM), https://www.npr.org/2021/09/10/1036043886/apple-fortnite-epic-games-ruling-explained.

156 *Epic Games*, 559 F. Supp. 3d at 901, 921.

157 *Id.* at 1019.

158 *Id.* at 1027.

159 *Id.* at 922, 1068.

160 *Id.* at 1037.

161 *Id.*

162 *Id.*

163 *See id.* at 1040-41.

restricting app distribution allows Apple to conduct app reviews.[164] This, in turn, creates a safe and trusted iOS experience, enhancing consumer appeal.[165] The court found Apple's justification based on interbrand competition to be legitimate as well.[166] This is because Apple's restriction of intrabrand competition through its centralized app distribution and "walled garden" approach distinguishes Apple from Google, thus promoting interbrand competition that "antitrust laws are designed primarily to protect."[167]

As to Apple's justification related to protection of its intellectual property, the court questioned the specific commission rate itself and found the rate to be pretextual.[168] The court could not find any evidence that Apple's specific commission rate has any relation to the value or cost of its intellectual property, and there was no reference to Apple's intellectual property in the DPLA.[169] However, the court did find that, while the rate itself was pretextual, Apple's procompetitive justification for protection of its intellectual property rights, generally, was not pretextual.[170] Apple has a right to charge a fee when licensing its intellectual property, and Apple's app distribution restrictions accomplish that goal.[171] So, in sum, the court held Apple's procompetitive justifications based on security, interbrand competition, and intellectual property rights in general were valid.[172]

Finally, concerning the three-step burden-shifting framework for determining whether a restraint violates the rule of reason under the Sherman Act § § 1 and 2, the court found that Epic failed to meet its burden to show less restrictive alternatives.[173] Both the enterprise and notarization models suggested by Epic lacked human app review, which provides great protection against violations of privacy, human fraud, and social engineering.[174] The court determined Epic's suggestions were not clearly developed and that they seemed to eliminate app review and left unclear whether and how Apple could collect licensing fees.[175] Epic failed to meet its burden because it could not prove its suggested alternatives were "'virtually as effective' as the current distribution model and [could]

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164 *See id.* at 1038.
165 *See id.*
166 *See id.*
167 *Id.*
168 *See id.* at 1039.
169 *See id.*
170 *See id.* at 1039-40.
171 *See id.* at 1039.
172 *Id.* at 1038, 1040.
173 *See id.* at 1041, 1044.
174 *Id*. at 1041.
175 *Id.*

be implemented 'without significantly increased cost.'"[176] Therefore, because Epic failed to meet its burden, the court held that Apple's app distribution restrictions do not violate § 1 of the Sherman Act and the court could not take immediate action despite finding anticompetitive effects in Apple's app distribution restrictions.[177]

However, the court decided that the anti-steering provisions violated the unfair prong of California's Unfair Competition Law because they '"threaten an incipient violation of an antitrust law' by preventing informed choice among users of the iOS platform."[178] The court found the anti-steering provisions prevent developers from informing consumers about both lower prices on other platforms and Apple's 30% commission rates.[179] The anti-steering provisions could be severed without any serious effect on Apple's iOS ecosystem and are tethered to legislative policy.[180] Apple's anti-steering provisions also failed under the balancing test for California's Unfair Competition Law.[181] Apple could not offer any justification to show the harm caused by its anti-steering provisions could be outweighed by its benefits.[182]

Thus, the court held that Apple's anti-steering restrictions were anticompetitive and issued a permanent injunction to eliminate the anticompetitive provisions.[183] The injunction blocked Apple from preventing developers from including external links within apps to direct customers to purchasing mechanisms.[184] It also blocked Apple from prohibiting developers from using information collected from an app to notify customers of these other storefronts.[185] According to the court, this injunction will "increase competition, increase transparency, increase consumer choice and information while preserving Apple's iOS ecosystem which has procompetitive justifications."[186]

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176 *Id.*
177 *See id.* at 1041, 1044.
178 *Id.* at 1055 (quoting Cel-Tech Commc'ns, Inc. v. L.A. Cellular Tel. Co., 20 Cal. 4th 163, 187 (1999)).
179 *See Epic Games*, 559 F. Supp. 3d at 1055.
180 *See id.*
181 *Id.* at 1056.
182 *See id.* at 1056-57.
183 *Id.* at 1068-69.
184 *Id.* at 1058.
185 *See id.*
186 *Id.* at 1069.

III. COMMENT ON THE *EPIC V. APPLE* DECISION

A. Sherman Act Analysis- Court Correctly Applied Rule of Reason Test Since Vertical Agreements Can Be Procompetitive

The court was correct in applying the "rule of reason" test here rather than judging the anticompetitive effects as *per se* unreasonable.[187] The Supreme Court has previously held vertical agreements "hold the promise of increasing a firm's efficiency and enabling it to compete more effectively."[188] As the Ninth Circuit has noted, the goal of the rule of reason test is to distinguish anticompetitive effects that are harmful to the consumer from anticompetitive effects that are in the consumer's best interest.[189] For example, in *Amex*, American Express's unique business model and its anti-steering provisions, which at first seemed to be anticompetitive, actually turned out to be procompetitive and innovative.[190]

1. Court's Analysis Regarding Anticompetitive Effects Was Justified Because Apple Had No Procompetitive Justifications For Its Commission Rates

In evaluating the anticompetitive effects of Apple's app distribution restrictions, the court correctly identified anticompetitive effects by distinguishing the facts in the case from the facts in *Amex*.[191] Apple's 30% commission rate is pretextual as Apple set the rate "without considering operational costs, benefit to users, or value to developers."[192] The rate has allowed Apple to profit from operating margins of over 75%, notwithstanding developer complaints and regulatory pressure.[193] Unlike the merchant fees in *Amex* which stemmed from competition in changing markets, Apple's ability to charge a 30% commission came from market power.[194] Unlike Amex's fees, which it used to create customer loyalty, making Amex more valuable to merchants, here, Apple's high commission rates do not demonstrate the same benefits to developers who would save on reduced commission rates, the savings of which would

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187 *See id.* at 1036.
188 Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752, 768 (1984).
189 FTC v. Qualcomm Inc., 969 F.3d 974, 989 (9th Cir. 2020) (quoting Ohio v. Am. Express Co., 138 S. Ct. 2274, 2284 (2018)).
190 *Id.*
191 *See Epic Games*, 559 F.Supp. 3d at 1036-37.
192 *Id.* at 1037.
193 *Id.*
194 *See* Ohio v. Am. Express Co., 138 S. Ct. 2274, 2288 (2018); *Epic Games*, 559 F.Supp. 3d at 1037.

likely trickle down to users.[195] Whereas Amex had procompetitive reasoning for its merchant fees, here, Apple did not seem to provide similar justifications for its 30% commission rate.[196] Based on this analysis, the court correctly concluded Apple's app distribution restrictions, particularly Apple's 30% commission rates, establish anticompetitive effects.[197]

2. Procompetitive Rationale

a. Court Correctly Identified Apple's Security Justification as Procompetitive Because It Enhances Consumer Appeal

The court's analysis regarding Apple's security as a valid procompetitive justification for the anticompetitive effects of its app distribution restrictions was justified.[198] The Ninth Circuit has stated in previous cases, such as *Qualcomm*, that procompetitive effects can include those that involve increased efficiency or those that create greater consumer appeal.[199] Here, Apple successfully proved its security justification for centralized app distribution enhances consumer appeal.[200] Apple's centralized app distribution incorporates human reviews on apps in addition to just automated reviews.[201] Human reviews help protect against social engineering attacks, fraud, and privacy intrusions at a level of review beyond what could be achieved with automated app review alone.[202] Automated app review investigates apps based on past threats and is less likely to detect new forms of attack.[203] For this reason, some humans are better at flagging new types of threats that are overlooked by automated tools.[204] These measures help protect security and allow Apple to deliver a safe and trusted user experience.[205] This conduct on Apple's part is mutually beneficial to users and developers by encouraging them to transact freely, thus enhancing consumer appeal and providing a valid procompetitive justification.[206]

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195 *See Am. Express Co*., 138 S. Ct. at 2288; *Epic Games*, 559 F. Supp. 3d at 1037.
196 *See* Am. Express Co., 138 S. Ct. at 2288; *Epic Games,* 559 F.Supp.3d at 1036.
197 *See Epic Games*, 559 F. Supp. 3d at 1037-38.
198 *See id.* at 1038.
199 FTC v. Qualcomm Inc, 969 F.3d 974, 991 (9th Cir. 2020).
200 *Epic Games*, 559 F. Supp. 3d at 1038.
201 *Id.*
202 *Id.*
203 *Id.* at 1004 n.523.
204 *See id.*
205 *See id.* at 1038.
206 *Id.*; *See* FTC v. Qualcomm Inc., 969 F.3d 974, 991 (9th Cir. 2020).

b. Court Was Justified in Holding Interbrand Competition as a Valid Procompetitive Rationale Because It Creates More Consumer Choice

Analysis related to finding interbrand competition to be a valid procompetitive rationale for Apple's app distribution restrictions was also compelling.[207] Similar to how the court ruled in *Leegin* that restricting price competition among retailers who sell a particular product may help the manufacturer of that product compete against other manufacturers, here, Apple's centralized app distribution differentiates Apple from Google, promoting interbrand competition.[208] As explained in the section above, Apple's centralized app distribution provides enhanced security due to its incorporation of human app review.[209] This differentiates Apple iOS devices from Android devices, which have a more open platform, and increases competition between the two companies.[210] This distinction between Apple and Google also ultimately creates more consumer choice since users have the option between purchasing an Android with open distribution or purchasing an iOS device with enhanced security because of the centralized app distribution.[211]

c. Court's Analysis of Intellectual Property Justification Was Valid Because Intellectual Property Has Generally Been Recognized as a Procompetitive Rationale

As far as intellectual property stands as a procompetitive justification, the Ninth District's finding also properly found this not to be a valid procompetitive justification for Apple's specific commission rate.[212] In *NCAA v. Alston*, the Court rejected the procompetitive justification by the NCAA that restrictions on student-athlete compensation were necessary to preserve amateurism and related consumer demand when the NCAA truly set those rules without any reference to consideration of consumer demand.[213] Similarly, Apple has provided no evidence that it set or maintains its specific commission rate with any consideration of the value or cost of intellectual property in mind.[214] Apple's 30% commission rate has remained the same since Apple's inception, and the rate stemmed from

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207 *Epic Games,* 559 F. Supp. 3d at 1038.
208 *Id.*
209 *Id.*
210 *Id*.
211 *Id.*
212 *See id.* 1039.
213 NCAA v. Alston, 141 S. Ct. 2141, 2162-63 (2021).
214 *Epic Games*, 559 F. Supp. 3d at 1039.

a comparison to rates for the distribution of hard goods and software.[215] Apple even conceded that it developed the rate when there were no real comparisons in the market and that it set the rate without bearing costs in mind.[216] Further the *Eastman Kodak* court found on remand that Kodak's arguments for its anticompetitive policies were pretextual because evidence showed that patents and intellectual property did not even cross Kodak's mind at the time Kodak began its policy on limiting the availability of parts and Kodak did not distinguish between patented and unpatented parts in its policy.[217] Similarly, here, Apple provided no evidence to show it considered IP in setting its commission rate and does not list any specific intellectual property in its agreements.[218] While Apple demonstrated it holds 1,237 U.S. patents and 165 U.S. patents related to the App Store, Apple only assumed it validated its 30% commission rate and never specifically justified the rate based on the value of the intellectual property.[219]

However, courts have found protection of intellectual property to be valid procompetitive justifications in previous cases.[220] In *Tech. Res.*, among a list of business justifications the court found to be valid procompetitive rationale was "the need to protect its trade secrets and proprietary information."[221] For this reason, the Ninth Circuit was correct in refuting that Apple's protection of intellection property is pretextual as a procompetitive justification just because the court found Apple's commission rate itself to be pretextual.[222] Intellectual property was generally a procompetitive justification successfully proven by Apple.[223]

B. Court Applied Proper Tests Under Unfair Competition Law Since Epic Had Quasi-Consumer Standing and Properly Found Anti-Steering Provisions to Be Anticompetitive Since They Block Communication About Lower Prices on Other Platforms

The court rightly evaluated whether Epic proved an unfair competition law violation by applying the balancing test in addition to the tethering test in its analysis.[224] The balancing test may have seemed inappropriate since

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215 *Id.* at 947.
216 *See id.* at 997 n.483.
217 Image Tech. Servs., Inc. v. Eastman Kodak Co., 125 F.3d 1195, 1219 (9th Cir. 1997).
218 *Epic Games*, 559 F. Supp. 3d at 1039.
219 *Id.* at 946.
220 *See, e.g.,* Tech. Res. Servs., Inc. v. Dornier Med. Sys., Inc., 134 F.3d 1458, 1467 (11th Cir. 1998).
221 *Id.*
222 See *Epic Games*, 559 F. Supp. 3d at 1039.
223 See *id.* at 1040.
224 *See id.* at 1053.

the Ninth Circuit has held "that *Cel-Tech* effectively rejects the balancing approach."[225] However, the *Cel-Tech* case mainly involved unfairness to competitors rather than consumers.[226] And for suits involving unfairness to consumers, such as *Lozano v. AT&T Wireless Servs., Inc*., the Ninth Circuit has discussed how courts can apply either the tethering test or the balancing test and how neither of the tests are mutually exclusive.[227] Therefore, since the court concluded that Epic had standing as a quasi-consumer rather than solely as a competitor, it was entirely appropriate for the court to evaluate whether there was an unfair competition law violation under the balancing test, in addition to the tethering test.[228] It seems fair that the court evaluated Epic's standing as a quasi-consumer since Epic consumed Apple's distribution services in the same way iOS consumers do.[229] Additionally, Apple's anti-steering practices negatively impacted developers like Epic in the same way it impacted consumers in that both suffered harm from the lack of information surrounding the payment structure of in-app purchases.[230] Furthermore, Epic was able to prove numerous anticompetitive effects that caused harm to users and developers as quasi-consumers, satisfying the balancing test.[231] And, ultimately, the court determined Apple violated the Unfair Competition Law under both the balancing test and the tethering test.[232]

Regarding the tethering test, even though it appears as though the court incorrectly applied the test by not applying it to the relevant market, this factor was not overlooked.[233] Typically, to find liability under the tethering test requires a plaintiff to demonstrate anticompetitive effects or that it "significantly threatens or harms competition" whether the effects are an "incipient" violation of antitrust law or a violation of the "policy or spirit" of antitrust laws.[234] The Supreme Court has stated in *Amex* that a definition of the market is needed to measure the defendant's ability to lessen or destroy competition when applying the Unfair Competition Law to anti-steering provisions in particular.[235] In this case, the court applied the tethering test under § 17200 without evaluating Apple's anti-steering provisions for the relevant market of digital mobile gaming transactions or

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225 Lozano v. AT&T Wireless Servs., Inc., 504 F.3d 718, 736 (9th Cir. 2007).
226 *See id.* at 735.
227 *See id.* at 736.
228 *See generally Epic Games*, 559 F. Supp. 3d at 1053.
229 *See id.* at 1052.
230 A Broken Marketplace, Coal. For App Fairness, https://appfairness.org/issues/broken-marketplace/ (last visited Jan. 26, 2022).
231 *See Epic* Games, 559 F. Supp. 3d at 1056.
232 *Id.* at 1056-57.
233 *See id.* at 1057.
234 *Cel-Tech Commc'ns, Inc., v. L.A. Cellular Tel. Co.*, 973 P.2d 527, 544 (Cal. 1999).
235 Ohio v. Am. Express Co., 138 S. Ct. 2274, 2285 (2018).

any defined market for that matter.[236] But, it did not overlook the relevant market when applying the tethering test.[237] In fact, the court expressly addressed whether it would limit its analysis to the market of digital mobile gaming transactions it applied to the Sherman Act claims and concluded it would look to the anti-steering effects on all apps.[238] The court could not "discern any principled reason for eliminating the anti-steering provisions to mobile gaming only" as the "lack of information and transparency extends to all apps, not just gaming apps."[239]

The court arguably misapplied the tethering test by not considering the relevant market.[240] In the opinion, the court considered evidence from Down Dog and Match Group in evaluating their experiences with off-platform purchase mechanisms.[241] This consideration was despite the fact that neither Down Dog nor Match Group are game developers.[242] Additionally, both Down Dog and Match Group offer subscription apps, which the court expressly stated were outside the scope of the relevant market and refused to include in the analysis.[243] However, the court was aware of these differences as it expressly stated that Down Dog and Match Group offer subscriptions[244] and are not game developers[245] and still did not find those factors to matter for anti-steering provisions.[246] And, as mentioned above, the court decided against limiting the analysis to the market of mobile gaming transactions.[247] Moreover, regardless of whether the court applied the tethering test correctly under § 17200, the court utilized the balancing test to find Apple violated California's Unfair Competition Law.[248]

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236 *See Epic Games*, 559 F. Supp. 3d at 1057.
237 *See id.*
238 *See id*.
239 *Id.* at 1057-58.
240 *See, e.g., Facebook Inc. v. Brandtotal, Ltd.,* No. 20-CV-7182, 2021 WL 2354751, at *15 (N.D. Cal. June 9, 2021) ("starting point" under tethering test is to "identify a product market").
241 *Epic Games*, 559 F.Supp.3d at 993.
242 *See id.* at 995; *See* Zacks Equity Research, *Match Group (MTCH) Acquires Online Dating App The League*, Nasdaq (Jul. 15, 2022, 09:18AM), https://www.nasdaq.com/articles/match-group-mtch-acquires-online-dating-app-the-league.
243 *See Epic Games*, 559 F.Supp.3d at 993; *Id.* at *appen. n.571.
244 *See id.* at 993; Zacks Equity Research, *Match Group (MTCH) Acquires Online Dating App The League*, Nasdaq (Jul. 15, 2022, 09:18AM), https://www.nasdaq.com/articles/match-group-mtch-acquires-online-dating-app-the-league.
245 *See Epic Games*, 559 F.Supp.3d at 995; Zacks Equity Research, Match Group (MTCH) Acquires Online Dating App The League, Nasdaq (Jul. 15, 2022, 09:18AM), https://www.nasdaq.com/articles/match-group-mtch-acquires-online-dating-app-the-league.
246 *See Epic Games*, 559 F.Supp.3d at 993.
247 *Id. at 1057.*
248 *See id. at 1056-57.*

The court properly ignored a market definition analysis of equal proportions to that applied when analyzing Apple's conduct under the Sherman Act when conducting California's Unfair Competition Law's tethering test when Apple argued that separate consideration for the same conduct Epic challenged under the Sherman and Cartwright Acts was inappropriate under California's Unfair Competition Law.[249] *Cel-Tech*, the initial case that introduced the tethering test, allowed an unfair competition claim to go through under the tethering test without a formal market definition analysis.[250] The Ninth Circuit was accurate in its reference to *Cel-Tech's* recognition that '"'incipient' violations of antitrust laws and violations of the 'policy or spirit' of those laws with 'comparable' effects are prohibited."[251] The court in *Cel-Tech* discussed how California's Unfair Competition Law has "broad, sweeping language[] precisely to enable judicial tribunals to deal with the innumerable new schemes which the fertility of [one's] invention would contrive," thus meriting separate consideration from Sherman Act claims.[252] Under Apple's interpretation, that standard would be rendered meaningless because any conduct that fails under the Sherman Act would also fail California's Unfair Competition Law.[253]

In applying the balancing test under the Unfair Competition Law, the Ninth Circuit astutely determined that there were enough anticompetitive effects of Apple's anti-steering provisions to cause injury to users and developers enough to satisfy the test.[254] This is despite the fact that the Supreme Court seems to have recognized anti-steering provisions as having procompetitive effects rather than anticompetitive effects in *Amex*.[255] The Court in *Amex* noted there was nothing anticompetitive about Amex's anti-steering provisions since the agreements "actually stem negative externalities in the credit-card market and promote interbrand competition."[256] And interbrand competition is what "the antitrust laws are designed primarily to protect."[257] In *Amex*, the Court held that American Express's anti-steering provisions were justified since leading users to other payment options weakened the promise of a smooth transaction and all American Express had invested to encourage augmented customer

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249 *Id. at 1053.*

250 Cel-Tech Communications, Inc. v. L.A. Cellular Telephone Co., 20 Cal. 4th 163, 180, 186-87 (1999).

251 *Epic Games.,* 559 F.Supp. 3d at 1053-54.

252 *Id.* at 1054 (quoting Cel-Tech Communications, Inc. v. L.A. Cellular Telephone Co., 20 Cal. 4th 163, 181 (1999)).

253 *Id.* at 1053-54.

254 *See id.* at 1055-56.

255 Ohio v. Am. Express Co., 138 S. Ct. 2274, 2289 (2018).

256 *Id.*

257 Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 895 (2007).

spending on its platform.[258] However, the Ninth Circuit in this case was able to find anticompetitive effects caused by Apple's anti-steering provisions that were not justified by a procompetitive rationale, like in *Amex*.[259] The court in this case acknowledged testimony from both Down Dog and Match Group that the two were unable to "entice users to other platforms with lower prices."[260] Additionally, the Ninth Circuit determined that Apple's anti-steering provisions blocked Down Dog from pointing users to the cheaper prices in order to make purchases.[261] These findings were further bolstered by qualitative evidence such as that "while 90% of Down Dog's Android users make purchases on the web, only 50% of its iOS users do so even though about half of its total revenues still come from iOS users" to support evidence that despite Match Group's implementation of marketing campaigns and promotions for web purchases, app sales continue to dominate.[262] The court ultimately concluded correctly that "Apple's anti-steering restrictions artificially increase Apple's market power by preventing developers from communicating about lower prices on other platforms."[263] Apple's records even indicated that two of the most effective marketing tactics to keep existing users coming back and to increase revenues are push notifications and email outreach.[264] Apple acted anticompetitively in that it blocked developers from using these tactics for Apple's own personal gain through its anti-steering provisions since the developers are blocked from communicating lower prices to users coming from the iOS platform or from communicating their 30% commission to users.[265]

Moreover, in *Amex*, which Apple cited to justify its anti-steering provisions, the Supreme Court never even held Amex's anti-steering provisions were procompetitive.[266] The Supreme Court simply acknowledged anti-steering provisions could be procompetitive, but ultimately rejected the plaintiffs' claims because the plaintiffs could not establish anticompetitive effects.[267] In contrast, here, the court found Apple's anti-steering provisions cause harm to both developers and users, making it so the anti-steering provisions cannot be procompetitive.[268] According to the court, Apple's anti-steering provisions "harm

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258 *Am. Express Co.*, 138 S. Ct. at 2289.
259 *See Epic Games, Inc.,* 559 F. Supp. 3d at 1056-57.
260 *Id.* at 993.
261 *Id.*
262 *Id.*
263 *Id.*
264 *Id.* at 1054.
265 *Id.* at 1055.
266 *See* Ohio v. Am. Express Co., 138 S. Ct. 2274, 2290 (2018).
267 *Id.*
268 *See Epic Games, Inc.,* 559 F. Supp. 3d at 1055-56.

competition and result in supracompetitive pricing and profits."[269] The court appropriately distinguished the current case from *Amex* when applying the balance test as, in *Amex*, there was no lack of knowledge since the facts involved retail brick-and-mortar stores.[270] Here, Apple's iOS platform is a "black box" that uses silence to manipulate information and actively prevent users from gaining knowledge of other platforms where the users can obtain digital goods.[271] In *Amex*, American Express merely prohibited merchants from steering customers towards Visa or Mastercard whereas, here, Apple is prohibiting users from finding out other options exist in the first place.[272]

CONCLUSION

The *Epic* court's decision is significant because, by allowing developers to include links to their own purchasing mechanisms, it will have large impacts on developers' ability to compete in digital mobile gaming transactions.[273] The decision will also promote innovation in mobile gaming since developers will be able to make more money by not having to pay Apple's commission for purchases through their external links.[274] Additionally, the case further implicates future antitrust suits as to how developers should structure their arguments, providing a model for subsequent cases.[275] The fact that Apple was granted an injunction for its anti-steering provisions under the California Unfair Competition Law but was not considered to be in violation of § 1 of the Sherman Act may reveal that developers are better off framing their arguments as "incipient violations of antitrust law" rather than more broadly through the Sherman Act § 1 unfair restraint of trade.

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269 *Id.* at 1057.
270 *Id.* at 1056.
271 *Id.* at 1056-57.
272 *See id.* at 1056.
273 *See* Shannon Liao*, What the Epic v. Apple lawsuit means for the gaming industry*, THE WA. POST (September 13, 2021, 1:51 PM), https://www.washingtonpost.com/video-games/2021/09/13/epic-games-apple-lawsuit-ruling-impact/.
274 *See id.*
275 *See id.*