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INTERNET AND TELECOMMUNICATIONS REGULATION

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CHAPTER 8
Antitrust in Networked Industries

Insert on page 351 before note 1:

0.5 "Old" and "Odd" Parallel Case. In a parallel action, forty-six states (plus the District of Columbia and the Island of Guam) sued Facebook alleging that the Instagram and WhatsApp acquisitions were violations of the antitrust laws. In New York v. Meta Platforms, Inc., 66 F.4th 288 (D.C. Cir. 2023), the District of Columbia Court of Appeals, remarking that "the States' lawsuit is not only odd, but old," upheld a district court ruling – also by Judge Boasberg – that the states had waited too long to act. The Circuit Court ruled that "the judicially-devised doctrine of laches, developed in the 18th century English Chancery Court and imported into our laws, took care of long-delayed claims for relief" and approved the district court's four-year limitation "because the typical remedy of divestiture, if ordered well after the merger has closed, will usually prejudice the defendant."

How should time factor into a merger review? Between 1921 and 1924, the ICC (which then had jurisdiction over telecom) approved 223 AT&T acquisitions of the 234 independent local telephone companies that existed in the US at that time. The latches doctrine did not deter Judge Greene more than a half-century later in United States v. AT&T. on page 99 of the casebook.

Insert at the top of page 353, replacing pages 353-358 (before Notes and Questions):

EPIC GAMES, INC. v. APPLE, INC.

67 F.4th 946 (2023)

Opinion for the court filed by Circuit Judge M. SMITH, in which District Judge McSHANE concurs and Circuit Judge THOMAS concurs in part and dissents in part.

M. SMITH, Circuit Judge:

Epic Games, Inc. sued Apple, Inc. pursuant to the Sherman Act, 15 U.S.C. §§ 1–2, and California's Unfair Competition Law (UCL). Epic contends that Apple acted unlawfully by restricting app distribution on iOS devices to Apple's App Store, requiring in-app purchases on iOS devices to use Apple's in-app payment processor, and limiting the ability of app developers to communicate the availability of alternative payment options to iOS device users. Apple counter-sued for breach of contract and indemnification for its attorney fees arising from this litigation.

FACTUAL AND PROCEDURAL HISTORY

I. The Parties

Apple is a multi-trillion-dollar technology company that, of particular relevance here, sells desktop and laptop computers (Macs), smartphones (iPhones), and tablets (iPads). In 2007, Apple entered, and revolutionized, the smartphone market with the iPhone—offering consumers, through a then-novel multi-touch interface, access to email, the internet, and several preinstalled "native" apps that Apple had developed itself. Shortly after the iPhone's debut, Apple decided to move on from its native-apps-only approach and open the iPhone's (and later, the iPad's) operating system (iOS) to third-party apps.

This approach created a "symbiotic" relationship: Apple provides app developers with a substantial consumer base, and Apple benefits from increased consumer appeal given the ever-expanding pool of iOS apps. Apple now has about a 15% market share in the global smartphone market with over 1 billion iPhone users, and there are over 30 million iOS app developers. Considering only video game apps, the number of iOS games has grown from 131 in the early days of the iPhone to over 300,000 by the time this case was brought to trial. These gaming apps generate an estimated $100 billion in annual revenue.

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Despite this general symbiosis, there is periodic friction between Apple and app developers. That is because Apple, when it opened the iPhone to third-party developers, did not create an entirely open ecosystem in which developers and users could transact freely without any mediation. Instead, Apple created a "walled garden" in which Apple plays a significant curating role. Developers can distribute their apps to iOS devices only through Apple's App Store and after Apple has reviewed an app to ensure that it meets certain security, privacy, content, and reliability requirements. Developers are also required to use Apple's in-app payment processor (IAP) for any purchases that occur within their apps. Subject to some exceptions, Apple collects a 30% commission on initial app purchases (downloading an app from the App Store) and subsequent in-app purchases (purchasing add-on content within an app).

Epic is a multi-billion-dollar video game company with three primary lines of business, each of which figures into various aspects of the parties' appeals. First, Epic is a video game developer—best known for the immensely popular *Fortnite*, which has over 400 million users worldwide across gaming consoles, computers, smartphones, and tablets. Second, Epic is a gaming-software developer that offers several apps on Apple's App Store. Third, Epic is a video game publisher and distributor. It offers the Epic Games Store as a game-transaction platform on PC computers and Macs and seeks to do the same for iOS devices. As a distributor, Epic makes a game available for download on the Epic Games Store and covers the direct costs of distribution; in exchange, Epic receives a 12% commission—a below-cost commission that sacrifices short-term profitability to build market share. The Epic Games Store has over 180 million registered accounts and over 50 million monthly active users. Through the Epic Games Store, Epic is a would-be competitor of Apple for iOS game distribution and a direct competitor when it comes to games that feature cross-platform functionality like *Fortnite*.

II. The Developer Program Licensing Agreement

Apple creates its walled-garden ecosystem through both technical and contractual means. To distribute apps to iOS users, a developer must pay a flat $99 fee and execute the Developer Program Licensing Agreement (DPLA). By agreeing to the DPLA, developers unlock access to Apple's vast consumer base—the over 1 billion users that make up about 15% of global smartphone users. They also receive tools that facilitate the development of iOS aps, including advanced application-programming interfaces, beta software, and an app-testing software. In essence, Apple uses the DPLA to license its IP to developers in exchange for a $99 fee and an ongoing 30% commission on developers' iOS revenue.

The DPLA contains the three provisions that give rise to this lawsuit and were mentioned in the introduction. First, developers can distribute iOS apps only through the App Store (the distribution restriction). Epic Games, for example, cannot make the Epic Games Store available as an iOS app and then offer *Fortnite* for download through that app. Second, developers must use Apple's IAP to process in-app payments (the IAP requirement). Both initial downloads (where an app is not free) and in-app payments are subject to a 30% commission. Third, developers cannot communicate out-of-app payment methods through certain mechanisms such as in-app links (the anti-steering provision).

In 2010, Epic agreed to the DPLA. Over the next few years, Epic released three games for iOS, each of which Apple promoted at major events. In 2015, however, Epic began objecting to Apple's walled-garden approach. Epic's CEO Tim Sweeney argued, in an email seeking a meeting with Apple senior leadership, that it "doesn't seem tenable for Apple to be the sole arbiter of expression and commerce" for iOS users, and explained that Epic runs a competing game-transaction platform that it "would love to eventually" offer on iOS. Nothing came of this email, and Epic continued to offer games on iOS while complying with the DPLA's terms. In 2018, Epic released *Fortnite* on iOS—amassing about 115 million iOS users.

In 2020, Epic renewed the DPLA with Apple but sought a "side letter" modifying its terms. In particular, Epic desired to offer iOS users alternatives for distribution (the Epic Games Store) and in-app payment processing (Epic Direct Pay). Apple flatly rejected this offer, stating: "We understand this might be in Epic's financial interests, but Apple strongly believes these rules are vital to the health of the Apple platform and carry enormous benefits for both consumers and developers. The guiding principle of the App Store is to prove a safe, secure, and reliable experience for users."

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Once Apple rejected its offer, Epic kicked into full gear an initiative called "Project Liberty": a two-part plan it had been developing since 2019 to undermine Apple's control over software distribution and payment processing on iOS devices, as well as Google's influence over Android devices. Project Liberty coupled a media campaign against Apple and Google with a software update expressly designed to circumvent Apple's IAP restriction. On the media-campaign side, Epic lowered the price of *Fortnite*'s in-app purchases on all platforms but Apple's App Store and Google's Google Play Store; it formed an advocacy group (the Coalition for App Fairness), tasking it with "generating continuous media …pressure" on Apple and Google; and it ran advertisements portraying Apple and Google as the "bad guys" standing in the way of Epic's attempt to pass cost- savings onto consumers.

On the IAP-circumvention side, Epic submitted a *Fortnite* software update (which Epic calls a "hotfix") to Apple for review containing undisclosed code that, once activated, would enable *Fortnite* users to make in-game purchases without using Apple's IAP. Unaware of this undisclosed code, Apple approved the update and it was made available to iOS users. Shortly thereafter Epic activated the undisclosed code and opened its IAP alternative to users. That same day, Apple became aware of the hotfix and removed *Fortnite* from the App Store. Apple informed Epic that it had two weeks to cure its breaches of the DPLA, or otherwise Apple would terminate Epic Games' developer account.

Three days after Apple removed *Fortnite* from the App Store, Epic filed a 62-page complaint against Apple, asking for permanent injunctive relief pursuant to the Sherman Act and the UCL. Epic's requested relief would essentially convert iOS into an entirely open platform: Developers would be free to distribute apps through any means they wish and use any in-app payment processor they choose. Taken together, this relief would create a pathway for developers to bypass Apple's 30% commission altogether, though Epic made open-ended assurances at trial that its relief would allow Apple to collect a commission—just not in the manner that the DPLA establishes. Apple brought counter-claims for breach of contract.[1]

III. Market Definition

The district court began its analysis by defining the relevant market for Epic's Sherman Act claims. Epic proposed two *single-brand* markets: the *aftermarkets* for iOS app distribution and iOS in-app payment solutions, derived from a *foremarket* for smartphone operating systems. Apple, by contrast, proposed the market for *all* video game transactions, whether those transactions occur on a smartphone, a gaming console, or elsewhere. The district court ultimately found a market between those the parties proposed: mobile-game transactions—*i.e.*, game transactions on iOS and Android smartphones and tablets. Compared to Epic's proposed aftermarkets, the district court's relevant market was both broader and narrower—broader in that it declined to focus exclusively on iOS, but narrower in that it considered only video game transactions instead of all app transactions. Compared to Apple's proposed market, the district court's relevant market was narrower—excluding game-console and streaming-service transactions.

The district court rejected Epic's proposed single-brand markets on several grounds. It held that there was no foremarket for smartphone and tablet operating systems because Apple does not license or sell iOS. More critically, it analyzed Epic's aftermarkets in the alternative and found a failure of proof. Epic presented no evidence regarding whether consumers unknowingly lock themselves into Apple's app-distribution and IAP restrictions when they buy iOS devices. A natural experiment facilitated by Apple's removal of *Fortnite* from the App Store showed that iOS *Fortnite* users switched about 87% of their pre-removal iOS spending to other platforms—suggesting substitutionality between the App Store and other game-transaction platforms. The district court also rejected Epic's relevant market-definition expert as "weakly probative" and "more interested in a result [that] would assist his client than in providing any objective ground to assist the court in its decision-making." Among other flaws, the expert's analysis contradicted his own academic articles on how to analyze two-sided markets; used consumer-survey wording that departed from well-established market-definition principles; failed to account for holiday-season idiosyncrasies; and excluded minors (who are an important segment of mobile-game purchasers). The district court then turned to Apple's proposed relevant market definition and refined it from *all* game transactions to *mobile* game transactions by relying extensively on the "practical indicia" of markets.

[1] The same day, Epic filed a 60-page complaint against Google, challenging its policies regarding the Google Play Store on Android devices—*i.e.*, smartphones and tablets that use the main operating- system alternative to iOS. *See* Complaint for Injunctive Relief, Epic Games, Inc. v. Google LLC, No. 3:20-cv-05671 (filed Aug. 13, 2020 N.D. Cal.).

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ANALYSIS

On appeal, Epic challenges the district court's Sherman Act and breach of contract rulings. We affirm the district court's denial of antitrust liability and its corresponding rejection of Epic's illegality defense to Apple's breach of contract counterclaim. Though the district court erred as a matter of law on several issues, those errors were harmless. Independent of the district court's errors, Epic failed to establish—as a factual matter—its proposed market definition.

I. Market Definition

Epic argues that the district court incorrectly defined the relevant market for its antitrust claims to be mobile-game transactions instead of Epic's proposed aftermarkets of iOS app distribution and iOS in-app payment solutions. Epic contends both that the district court erred as a matter of law by requiring several threshold showings before finding a single-brand market and that, once those errors are corrected, the record compels the conclusion that Epic established its single-brand markets. We agree that the district court erred in certain aspects of its market-definition analysis but conclude that those errors were harmless.

A. General Market-Definition Principles

The Sherman Act contains two principal prohibitions. Section 1 targets *concerted* action, rendering unlawful "every contract, combination …, or conspiracy, in restraint of trade." Section 2 targets *independent* action, making it unlawful to "monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States."

In most cases, a "threshold step" is defining the relevant market in which the alleged restraint occurs. The relevant market for antitrust purposes is "the area of effective competition"—*i.e.*, the arena within which significant substitution in consumption or production occurs. A market comprises "any grouping of sales whose sellers, if unified by a monopolist or a hypothetical cartel" could profitably raise prices above a competitive level.). If the "sales of other producers could substantially constrain the price-increasing ability of the monopolist or hypothetical cartel, these other producers must be included in the market. To conduct this inquiry, courts must determine which products have a reasonable interchangeability of use or sufficient cross-elasticity of demand with each other.

Often, this inquiry involves empirical evidence in the form of a "SSNIP" analysis, whether a hypothetical monopolist could profitably impose a **S**mall, **S**ignificant, **N**on-transitory **I**ncrease in **P**rice above a competitive level. As we have previously summarized:

> [A]n economist proposes a narrow geographic and product market definition and then iteratively expands that definition until a hypothetical monopolist in the proposed market would be able to profitably make a small but significant non-transitory increase in price ("SSNIP"). At each step, if consumers would respond to a SSNIP by making purchases outside the proposed market definition, thereby rendering the SSNIP unprofitable, then the proposed market definition is too narrow. At the next step, the economist expands the proposed geographic or product market definition to include the substituted products or area. This process is repeated until a SSNIP in the proposed market is predicted to be profitable for the hypothetical monopolist.

B. Single-Brand Aftermarkets

In some instances one brand of a product can constitute a separate market. More specifically, the relevant market for antitrust purposes can be an *aftermarket*—where demand for a good is entirely dependent on the prior purchase of a durable good in a *foremarket*.

In Eastman Kodak Co. v. Image Tech. Servs., 504 U.S. 451 (1992), the Supreme Court considered the question of whether a lack of market power in the foremarket (photocopier machines, generally) categorically precludes a finding of market power in the aftermarket (replacement parts for and servicing of Kodak-brand photocopiers), which Kodak had allegedly achieved by contractually limiting customers to Kodak-provided parts and services. The Supreme Court rejected Kodak's invitation to impose an across-the-board rule because it was not convinced that the rule—which "rest[ed] on a factual assumption about the cross-elasticity of demand" in aftermarkets—would always hold true. The Supreme Court thus folded aftermarkets into the framework for assessing markets generally, evaluating cross-elasticity of demand to determine whether a hypothetical monopolist could profitably charge a supracompetitive price. ("The extent to which one market prevents exploitation of another market depends on the extent to which consumers will change their consumption of one product to a price change in another.")

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The *Kodak* Court reasoned that "significant" information costs and switching costs could create a less responsive connection between aftermarket prices and foremarket sales, particularly where the percentage of sophisticated purchasers able to accurately life-cycle price is low. That is, these conditions might "lock-in" unknowing customers such that competition in the foremarket cannot discipline competition in the aftermarkets, meaning a hypothetical monopolist could price its aftermarket products at a supracompetitive level without a substantial number of customers substituting to other products. Whether a plaintiff has proven such a lock-in must be resolved on a case-by-case basis, focusing on the particular facts disclosed by the record.

In sum, to establish a single-brand aftermarket, a plaintiff must show: (1) the challenged aftermarket restrictions are "not generally known" when consumers make their foremarket purchase; (2) "significant" information costs prevent accurate life-cycle pricing; (3) "significant" monetary or non-monetary switching costs exist; and (4) general market-definition principles regarding cross-elasticity of demand do not undermine the proposed single- brand market.

D. Epic's Legal Challenges

With these principles in mind, we now turn to Epic's arguments that the district court committed legal error when it held that a market can never be defined around a product that the defendant does not license or sell.

We agree with Epic that the district court erred by imposing a categorical rule that an antitrust market can *never* relate to a product that is not licensed or sold—here smartphone operating systems. To begin, this categorical rule flouts the Supreme Court's instruction that courts should conduct market-definition inquiries based not on formalistic distinctions but on actual market realities.

Moreover, the district court's rule is difficult to square with decisions defining a product market to include vertically integrated firms that self-provision the relevant product but make no outside sales. For example, the D.C. Circuit in *Microsoft* noted that "Apple had a not insignificant share of worldwide sales of operating systems," even though Apple did not sell or license macOS but instead only included it in its own Mac computers. While the *Microsoft* court ultimately excluded macOS from its market, it did so on fact-bound substitutability grounds, not the categorical grounds that the district court used here.

Finally, the district court's rule overlooks that there may be markets where companies offer a product to one side of the market for free but profit in other ways, such as by collecting consumer data or generating ad revenue. *See, e.g.*, FTC v. Facebook, Inc. (D.D.C. 2022) It puts form over substance to say that such products cannot form a market because they are not directly licensed or sold.

Epic also argues that it is entitled, as a factual matter, to a finding in favor of its proposed aftermarkets. Though Epic attempts to avoid the clear-error label, its argument requires it to carry the heavy of burden on appeal of showing that the district court clearly erred in finding that (1) Epic failed to show a lack of general consumer awareness regarding Apple's restrictions on iOS distribution and payment processing, (2) Epic failed to show significant switching costs, and (3) the empirical evidence in the record support a market of mobile- game transactions, not Epic's iOS-specific aftermarkets.[2]

Beginning with the first prong, Epic had the burden of showing a lack of consumer awareness—whether through a change in policy or otherwise. Epic identified a purported change in policy, contrasting the App Store's now-immense profitability with a pre-launch statement from Steve Jobs that Apple did not "intend to make money off the App Store[’s]" 30% commission. The district court reasonably found this statement to simply reflect Jobs's "initial expectation" about the App Store's performance, not an announcement of Apple policy. Especially in light of the district court's finding that Apple has "maintained the same general rules" for distribution and payment processing since the App Store's early days, it did not clearly err in concluding that Epic failed to prove a lack of consumer awareness through a change of policy.

Nor did the district court clearly err in finding that Epic otherwise failed to establish a lack of awareness. Indeed, the district court squarely found: "[T]here is *no evidence* in the record demonstrating that consumers are unaware that the App Store is the sole means of digital distribution on the iOS platform" (emphasis added). And on appeal, Epic fails to cite any evidence that would undermine the district court's characterization of the record.

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[2] The district court did not rule against Epic on the remaining prong of the *Kodak* test: the presence of significant information costs that make accurate life-cycle pricing difficult.

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Because of this failure of proof on the first prong of Epic's *Kodak* showing, we need not reach—and do not express any view regarding—the other factual grounds on which the district court rejected Epic's single-brand markets.

Moreover, the district court's finding on *Kodak's* consumer-unawareness requirement renders harmless its rejection of Epic's proposed aftermarkets on the legally erroneous basis that Apple does not license or sell iOS as a standalone product. To establish its single-brand aftermarkets, Epic bore the burden of rebutting the economic presumption that consumers make a knowing choice to restrict their aftermarket options when they decide in the initial (competitive) market to enter a contract. Yet the district court found that there was "no evidence in the record" that could support such a showing. As a result, Epic cannot establish its proposed aftermarkets on the record before our court—even after the district court's erroneous reasoning is corrected.

CONCLUSION

There is a lively and important debate about the role played in our economy and democracy by online transaction platforms with market power. Our job as a federal Court of Appeals, however, is not to resolve that debate—nor could we even attempt to do so. Instead, in this decision, we faithfully applied existing precedent to the facts as the parties developed them below.

THOMAS, Circuit Judge, concurring in part and dissenting in part:

I agree with much of the majority opinion. I agree that the district court erred in defining the relevant market. However, unlike the majority, I would not conclude that these errors were harmless. An error is harmless if it "do[es] not affect the substantial rights of the parties." 28 U.S.C. § 2111. The district court's errors relate to threshold analytical steps, and the errors affected Epic's substantial rights. Thus, I would reverse the district court and remand to evaluate the claims under the correct legal standard.

A threshold step in any antitrust case is to accurately define the relevant market. The district court rejected the foremarket of mobile operating systems because Apple does not sell or license its operating system separately from its smartphones. But we have previously recognized that such a market can exist. The district court then rejected Epic's proposed aftermarket of iOS app payment processing ("IAP") because IAP is integrated into the operations system. This conclusion was not only legally erroneous, but in contradiction to the district court's factual finding of separate demand.

The majority holds that the errors were harmless given the district court's analysis of the remaining steps in the Rule of Reason analysis. However, there is no direct authority for that proposition, and it amounts to appellate court fact-finding. Indeed, the Supreme Court has instructed that courts usually cannot properly apply the rule of reason without an accurate definition of the relevant market.

Correction of these errors would have changed the substance of the district court's Rule of Reason analysis. Unless the correct relevant market is identified, one cannot properly assess anticompetitive effects, procompetitive justifications, and the satisfaction of procompetitive justifications through less anticompetitive means. Relying on the district court's market does not solve this problem. The parties formulated arguments around their own markets—not the district court's market. Remand would have given the parties an opportunity to argue whether the DPLA worked unfair competition in the district court's market.

Therefore, I respectfully concur in part and dissent in part.

Insert on page 359 before note 2:

2. Epic as a New Platform. The court tellingly observed that Epic had three lines of business that were each implicated in Apple's restrictive "walled garden" platform policies: Epic creates games, sells software for other games developers, and is a game publisher and distributor. Through this first role – as a games creator – it has been frustrated by Apple's 30% commission. But through other two roles, and especially in its role as an independent publisher and distributor, Epic appears to aspire towards offering its own platform, one that rivals Apple's App Store, and is more stymied by the DLPA's requirement for payment and distribution exclusivity. Accordingly, the court noted that "Through the Epic Games Store, Epic is a would-be competitor of Apple for iOS game distribution and a direct competitor when it comes to games that feature cross-platform functionality like *Fortnite*." The 30% tax could be characterized as a monopoly price, whereas the exclusivity requirement could be characterized as an entrenchment of monopoly power.

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Do these two competitive concerns have equal weight under the antitrust laws? Should we view Epic's effort to challenge Apple's market dominance – and the restraints that deter them from doing so – differently from Epic's complaints about Apple's exercise of its market dominance?

Insert on page 359, to replace notes 2 and 3:

3. A Partial Victory. In addition to making claims under the Sherman Act, Epic also sued Apple under California's Unfair Competition Law. The 9th Circuit (in sections not included above) upheld the district court's conclusion that certain anti-steering provisions in Apple's DPLA violated California's Unfair Competition Law (UCL). To remedy that violation, the court issued a nationwide, permanent injunction preventing Apple from enforcing the anti-steering provisions, which extends to all app categories (not just gaming apps). In effect, the injunction gives app developers the ability to avoid Apple's 30% IAP commission by directing users to external websites for in-app purchases. If state law can stop what the Sherman Act cannot, is that a failure of the Sherman Act?

4. Multiple Suits. As was noted in FN1, Epic also sued Google for similar restraints on its Google Play Store. In addition, software developers separately sued Apple for the same conduct, and the parties reached a comprehensive settlement. Indeed, these lawsuits were already pending before the Supreme Court well before the commencement of this action. The first, Apple iPhone Antitrust Litigation, 4:11-cv-6714-YGR (Pepper), was filed in 2011 on behalf of a class of iOS device consumers alleging harm from the commission rate. The second, filed in 2019 after Pepper returned from the Supreme Court, was Donald Cameron v. Apple Inc., 4:19-cv-3074-YGR (Cameron), which was filed on behalf of a class of iOS app developers also alleging violations of antitrust and competition laws. If these courts all follow the conclusion, decided by the district court and upheld by the 9th Circuit, that Apple's App Store is not its own aftermarket, is the result of all of these cases— including those against Google—predetermined?

Insert on page 387, to replace note 5:

5. Antitrust Enforcement, Big Tech, and Vertical Agreements. At around the time the Department of Justice brought this suit, other antitrust enforcers brought similarly conceived actions against other dominant internet platforms. In 2021, the District of Columbia sued Amazon, claiming the internet retail giant was illegally securing its monopoly through a "Fair Pricing Policy" that prohibited its vendors from selling goods on other platforms at prices lower than those on Amazon (the suit was dismissed in an oral ruling in 2022). Also in 2021, a group of state attorneys general accused Google of forcing restrictive terms on software developers that sell apps on the Google Play Store, the same theory used by Epic in its suit against Apple. And multiple state and national authorities continued to scrutinize Apple's App Store restrictions even after its victory over Epic (see § 8.A.1). And in 2023, the FTC (with seventeen state attorneys general) sued Amazon for, among other charges, preventing vendors from selling at lower prices through other online retailers, biasing Amazon search results to preference Amazon products, and conditioning sellers' ability to obtain "Prime" eligibility for their products on their using Amazon's fulfillment service.

Note that all of these cases claimed that the monopolist-defendant violated the Sherman Act by implementing vertical restraints that secured its market power. Why do you think this is the prevailing theory behind these antitrust actions? Reciprocally, if this is the prevailing approach of enforcers, why do you think internet giants continue to rely so heavily on vertical restraints? Do these cases offer any additional insight to the materials discussed in Chapter 5, especially part 5.C, that detailed the many statutory and regulatory prohibitions preventing telecommunications networks from engaging in vertical agreements?

Insert on page 428, before note 3:

2.5. Worst Merger Ever? In 2021, less than four years after its acquisition of Time Warner, AT&T spun off its Warner Media assets and ceded management control to Discovery. *The New York Times* described the transaction as "a stunning retreat" by AT&T and an "about face" from the Time Warner purchase. The move also revealed how costly the merger turned out to be. The *Times* calculated that at the time of the spin off, AT&T shareholders' stake in the Time Warner assets were worth less than $20 billion, which amounts to a loss of about $47 billion from an original valuation of $109 billion valuation. See James Stewart, "Was This $100 Billion Deal the Worst Merger Ever?" New York Times (Nov.19. 2022). Does the failure of the deal, and AT&T's inability to foreclose (let alone profit from) downstream markets suggest that the Justice Department's lawsuit was wrongheaded?

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Stewart, in his post-mortem of the acquisition's failure, faults a clash of corporate cultures for the merger's failure ("In the eyes of former Time Warner executives, a vibrant culture of creative energy and success nurtured over decades was destroyed in months.") But a close reading of Stewart's account, especially in light of Judge Leon's opinion, reveals that much of the organizational clash came from AT&T effort "to promote Warner's streaming content exclusively through AT&T's streaming service" and to prevent HBO subscriptions from being sold on other platforms. In short, Stewart's reporting appears to confirm the Justice Department's fear, and to contradict testimony offered by AT&T executives, that AT&T would withhold Time Warner content to target rival distributors.

Insert on page 428, after note 4:

5. More Failed Challenges to Vertical Mergers. Despite failing to stop the AT&T-Time Warner merger, the antitrust enforcement agencies have continued to bring challenges to vertical mergers. The record has not been good. In September 2022, a federal court denied the Justice Department's effort to prevent UnitedHealth Group, one of the nation's largest health insurers, from acquiring Change Healthcare, a provider of revenue and payment services. The DOJ argued that the $13b purchase would allow United to access and restrict Change's data on competitors' plans, thereby foreclosing competition among insurers. In February 2023, a federal court rejected the FTC's challenge to Meta's $400m acquisition of Within Unlimited, a virtual reality (VR) software developer. The FTC had argued that because of the breadth of Meta's platform, its acquisition of Within would substantially lessen competition in the market for VR fitness apps. And in July 2023, Microsoft, which owns (among other things) the Xbox console and a game streaming service, defeated the FTC's challenge to its $69b acquisition of Activision, maker of *Call of Duty, Candy Crush,* and other popular games. The FTC maintained that the vertical merger would give Microsoft outsized power to make Activision content exclusive to Xbox and foreclose Activision's popular offerings to competing consoles.

This string of losses might reflect a deeply-held skepticism in the judiciary that vertical mergers cause competitive harm. Put more forcefully, they might signal that there are few legal impediments to vertical acquisitions, even by monopolist platforms. Alternatively, they might suggest that the economics of vertical integration is either poorly understood or extremely difficult to explain in a legal setting. Or, more mundanely, a product of poor case selection or legal strategy among antitrust enforcers eager to halt vertical integration.

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CHAPTER 13
Privacy Regulation

Insert on page 706 before note 1:

0.5 Subsequent History. In July 2023, the Seventh Circuit affirmed the district court's judgment, but wholly on standing grounds. Dinerstein v. Google, LLC, 73 F.4th 502 (7th Cir. 2023). The court wrote that the plaintiff had not suffered "injury in fact," under federal standing doctrine, for two main reasons. First, the court found that plaintiff had not suffered any privacy injury sufficiently similar to a common-law privacy injury to sustain the cause of action. The court relied on Google's promising not to de-identify the health data it has received and on the plaintiff's failure to establish that "medical records privacy" was similar to common law privacy harms. As to breach of contract, the court held that the common law availability of a cause of action for breach of contract in the absence of monetary damages was insufficient for article III standing purposes, even if a common law court would award nominal damages in such a case. The court's view, in all likelihood, would also prevent Congress from creating an enforceable cause of action in such circumstances. If this is correct, then private rights of action for many modern privacy intrusions might be compensable only in state courts under state law, which of course impacts the question of whether regulation should be federal or state.

Insert on page 705 after the second full paragraph:

Momentum for state privacy regulation has increased, with a total of five states having comprehensive consumer privacy laws in effect as of the end of 2023: California, Colorado, Connecticut, Virginia, and Utah. Several other states have passed legislation taking effect in 2024, including Oregon, Montana, and Texas, and many other states have pending legislation. Categorizing these laws is difficult, but most bear significant resemblance to the California and European schemes. The International Association of Privacy Professionals is one organization that seeks to track developments across the states: https://iapp.org/resources/article/us-state-privacy-legislation-tracker/. Another is the National Conference of State Legislatures: https://www.ncsl.org/technology-and-communication/2023-consumer-data-privacy-legislation.

Insert on page 716 at the end of footnote 2:

See also Rebecca Janßen. Reinhold Kesler, Michael E. Kummer, Joel Waldfogel, GDPR and the Lost Generation of Innovative Apps, NBER Working Paper 30028 (May 2022) (https://www.nber.org/system/files/working_papers/w30028/w30028.pdf) (estimating that "GDPR induced the exit of about a third of available apps" on the Google Play Store and "in the quarters following implementation, entry of new apps fell by half").

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CHAPTER 15
General Protection for Intermediaries of User-Generated Content: Section 230

Insert on page 785 after note 4:

5. "Material Contribution." As the *Jones* court notes (and as is reflected by *Roommates.com*), many courts of appeals have converged on the "material contribution" test for platform authorship—that is, the platform loses its section 230 immunity if it "materially contributes" to the unlawfulness of the content. Materiality, however, is a very general term, perhaps not as capacious as "reasonable" in the law but nearly so. A contribution is material when it is important enough (to the illegality of content) that a reasonable person would consider it material. In *Roommates.com*, the court said that the site's contribution was "direct and palpable" in contributing to the meaning of the ultimate posting, while the court in *Jones* said that the quips did not add to the defamatory content of the user posts.

The material contribution test obviously creates the possibility of argument as well as differing interpretations. For example, in Henderson v. Source for Public Data, 53 F.4th 110 (4th Cir. 2022), the court wrote that a material contribution is any activity that goes "beyond the exercise of traditional editorial functions," *id.* at 128, and held that a site that edited public records and provided summaries had made a material contribution. Because summaries, in the court's view, were beyond usual editorial functions, section 230 did not provide protection. On the facts of the case, the court's decision not to apply section 230 makes sense, because the plaintiffs' essential claim was that the site's summaries were inaccurate. But traditional editorial functions often include materially contributing to content, say by clarifying it or streamlining it or, really, any significant editing. Indeed, the court says that any "change [to] the substance of the content" eliminates section 230, *id.* at 129, which sweeps more broadly than either *Zeran* or *Roommates.com*.

Insert on page 798 after note 6:

7. *Gonzalez v. Google* and *Twitter v. Taamneh*. In 2022, the Supreme Court granted certiorari in two cases implicating section 230, which reflected in part the discontent over the breadth of its interpretation in the lower courts. Both cases involved claims seeking to impose secondary liability on the internet platforms under the Anti-Terrorism Act, *see* 18 U.S.C. § 2333. Plaintiffs alleged that the platforms distributed user-generated content that furthered certain terrorist acts. In the *Google* case, the Ninth Circuit held that section 230 insulated the platform (in that case, YouTube).

In its amicus brief, the United States (through the Solicitor General) took the position that a platform's content moderation practices—specifically its promotion of certain content—was activity outside section 230's immunity and could be the basis for a claim. It distinguished this from claims based on liability for the content actually promoted.

> 1. Plaintiffs' broadest theory of direct and secondary ATA liability is that YouTube is liable for allowing ISIS-affiliated users to create accounts and post videos on the site. The court of appeals correctly held that Section 230(c)(1) precludes liability on that basis. YouTube is undoubtedly a provider of an interactive computer service, and plaintiffs do not allege that YouTube edited or otherwise contributed to the creation of the videos at issue. To the extent plaintiffs allege that YouTube violated the ATA by allowing its platform to be used for the dissemination of videos, Section 230(c)(1) bars their claims.
>
> 2. Plaintiffs' allegations regarding YouTube's use of algorithms and related features to recommend ISIS content require a different analysis. That theory of ATA liability trains on YouTube's own conduct and its own communications, over and above its failure to block or remove ISIS content from its site. Because that theory does not ask the court to treat YouTube as a publisher or speaker of content created and posted by others, Section 230(c)(1) protection is not available. That does not mean that YouTube should be deemed an information content provider with respect to the videos themselves. Although Section 230(c)(1) does not preclude liability premised on YouTube's recommendations if the elements of a private ATA suit are otherwise met, liability must be determined without regard to the fact that the recommended videos appeared on YouTube's own platform. Because the court of appeals did not consider whether plaintiffs have adequately pleaded the elements of ATA liability on that theory, the case should be remanded so that the court may do so in the first instance.

Brief for the United States as Amicus Curiae in Support of Vacatur, *Gonzalez v. Google LLC*, No. 21-1333 (U.S. Sup. Ct., Dec. 7, 2022) (https://www.supremecourt.gov/DocketPDF/21/21-1333/249441/20221207203557042_21-1333tsacUnitedStates.pdf).

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Google and many other amici argued that removing content moderation (and promotion) practices from the scope of section 230 would essentially forbid internet platforms as we know them, and at argument the Justices appeared to struggle to grasp the technical operations. Indeed, Justice Kagan remarked: "[Y]ou know, every other industry has to internalize the costs of its conduct. Why is it that the tech industry gets a pass? A little bit unclear. On the other hand, I mean, we're a court. We really don't know about these things. You know, these are not like the nine greatest experts on the Internet." Tr. at 45 (https://www.supremecourt.gov/oral_arguments/argument_transcripts/2022/21-1333_f2ag.pdf).

Eventually, the Supreme Court ducked the section 230 issues, by holding in each case that the plaintiffs had failed to state claims under the ATA. *See* Twitter, Inc. v. Taamneh, 143 S. Ct. 1206 (2023); Gonzalez v. Google LLC, 143 S. Ct. 1191 (2023).

8. The Digital Services Act. The European Union in 2022 adopted a regulation titled the "Digital Services Act," which governs many practices that, in the U.S., would be protected by section 230. The DSA takes effect in February 2024, and many of the provisions will undergo further definition. But the official EU summary includes the following:

> Some of the obligations for intermediaries include:
>
> - **Measures to counter illegal content online, including illegal goods and services**. The DSA imposes new mechanisms allowing users to flag illegal content online, and for platforms to cooperate with specialised 'trusted flaggers' to identify and remove illegal content;
> - **New rules to trace sellers** on online market places, to help build trust and go after scammers more easily; a new obligation **by online market places to randomly check** against existing databases whether products or services on their sites are compliant; sustained efforts to enhance the traceability of products through advanced technological solutions;
> - **Effective safeguards for users**, including the possibility to challenge platforms' content moderation decisions based on a new obligatory information to users when their content gets removed or restricted;
> - Wide ranging **transparency measures for online platforms**, including better information on terms and conditions, as well as transparency on the algorithms used for recommending content or products to users;
> - New obligations for **the protection of minors on any platform in the EU**;
> - **Obligations for very large online platforms and search engines** to prevent abuse of their systems by taking risk-based action, including oversight through independent audits of their risk management measures. Platforms must mitigate against risks such as **disinformation or election manipulation**, **cyber violence against women, or harms to minors online**. These measures must be carefully balanced against restrictions of freedom of expression, and are subject to independent audits;
> - A new **crisis response mechanism** in cases of serious threat for public health and security crises, such as a pandemic or a war;
> - **Bans on targeted advertising on online platforms** by profiling children or based on special categories of personal data such as ethnicity, political views or sexual orientation. Enhanced transparency for all advertising on online platforms and influencers' commercial communications;
> - A ban on using so-called **'dark patterns'** on the interface of online platforms, referring to misleading tricks that manipulate users into choices they do not intend to make…

Questions and Answers: Digital Services Act (April 23, 2023) (https://ec.europa.eu/commission/presscorner/detail/en/QANDA_20_2348).

As particularly applicable to very large platforms, the DSA imposes affirmative obligations to monitor and to correct for several categories of harmful content, obligations not present under section 230 (and obligations that may also violated the first amendment).