

**Appeal Nos. 21-16506 & 21-16695**

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**IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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EPIC GAMES, INC.,

*Plaintiff/Counter-Defendant,  
Appellant/Cross-Appellee,*

v.

APPLE INC.,

*Defendant/Counterclaimant,  
Appellee/Cross-Appellant.*

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On Appeal from the United States District Court  
for the Northern District of California  
Hon. Yvonne Gonzalez Rogers  
Case No. 4:20-cv-05640-YGR-TSH

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**BRIEF OF LAW AND BUSINESS PROFESSORS AS *AMICI CURIAE*  
IN SUPPORT OF APPELLEE/CROSS-APPELLANT APPLE INC.**

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**IDENTITY AND INTEREST OF *AMICI CURIAE*<sup>1</sup>**

*Amici curiae* are professors with expertise in intellectual property issues. They are interested in the intersection of intellectual property and antitrust laws, and write to share their perspective on the procompetitive nature of Apple’s licensing of its technology and underlying IP. *Amici* are identified in the Appendix.

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<sup>1</sup> Pursuant to Fed. R. App. P. 29(a)(4)(E), all parties consent to this brief’s filing. No party’s counsel authored any portion of this brief, in whole or in part. No person or entity other than *amici* and *amici*’s counsel has or is expected to contribute money intended to fund the preparation or submission of this brief.

## INTRODUCTION AND SUMMARY OF ARGUMENT

In 2007, Apple—which had never before produced a mobile phone—decided to compete with a large number of already successful phone manufacturers by introducing the iPhone. Apple chose to compete not only by making the iPhone “smarter,” *i.e.*, more functional and versatile than any prior phone, but also by prioritizing device security and the reliability of the user experience.

In order to deliver this new idea, Apple developed its own proprietary mobile operating system software, now called “iOS,” which provides functionality that includes the ability to run applications (known as “apps”). Apple also developed an iPhone software development kit (“SDK”) enabling developers to create apps that would work with iOS and an App Store to distribute those apps. Apple’s proprietary SDK and App Store were both introduced to the public in 2008. In 2009, Apple introduced its proprietary In-App Purchase (“IAP”) functionality, which enables developers to easily and seamlessly—and with the trust of users—make sales within third-party apps in the Apple marketplace.

Apple invested tremendous research and development (“R&D”) into the iPhone, iOS, the first iPhone SDK and later SDKs, the App Store, and related technologies, generating extensive intellectual property (“IP”) rights including a vast

array of patents and copyright protections.<sup>2</sup> Apple could have kept its technology and underlying IP to itself, as entitled by law, and could have chosen to prohibit third-party applications from using its technology and associated IP. Instead, Apple chose to provide access to its proprietary technologies to third-party app developers through licensing on terms and conditions that are consistent with Apple’s goals of versatility, security, reliability, and innovation. The App Store permits third-party developers to use Apple’s technology and underlying IP and conduct transactions with users in Apple’s marketplace so long as they comply with Apple’s license terms and conditions.

The particular license terms that Epic contests in this case are set forth in the Developer Program License Agreement (the “DPLA”). The DPLA grants developers access to Apple’s technology and underlying IP relating to apps and the App Store—including many application programming interfaces (“APIs”), an extensive library of developer documentation, such as tutorials, articles, source code, and other technology—that help developers quickly and efficiently develop iOS-

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<sup>2</sup> “Apple’s intellectual property as it relates to the iOS ecosystem generally are significant. The record is undisputed that Apple holds approximately 1,237 U.S. patents with 559 patent applications pending. With respect to the App Store itself, Apple holds an additional 165 U.S. patents with 91 more U.S. patent applications pending.” 4:20-cv-05640-YGR, Dkt. 812, at 34 (hereinafter, D. Ct. Op.). In addition, all iOS, App Store and SDK and other software code is copyrighted. *Id.* at 28.



compatible apps. Developers may also offer in-app purchases in compliance with Apple's terms.

Apple's licensing of its technology and underlying IP relating to the App Store under the terms of the DPLA is consistent with the goals of competitive licensing practices, including the licensing guidelines promulgated by the DOJ & FTC ("the Antitrust Licensing Guidelines").<sup>3</sup> Permitting licensors to set conditions on the terms of their licenses can serve "procompetitive ends" by incentivizing licensors to share their technology and associated IP rather than excluding others from using the technology and IP they rightly earned rights to commercialize.<sup>4</sup>

Such procompetitive ends were dramatically advanced by Apple's decision to license third-party app developers under Apple's IP so that developers may use the licensed technology to develop native iPhone apps and use the App Store. Apple's decision enabled an explosion of innovation, competition, and commercial success. For example, the number of available iOS apps increased from a mere 500 apps in July 2008 to 1.8 million apps available to the public by November 2020, with over

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<sup>3</sup> DOJ & FTC Antitrust Guidelines for the Licensing of Intellectual Property § 2.0 (Jan. 12, 2017), available at [https://www.ftc.gov/system/files/documents/public\\_statements/1049793/ip\\_guidelines\\_2017.pdf](https://www.ftc.gov/system/files/documents/public_statements/1049793/ip_guidelines_2017.pdf).

<sup>4</sup> *Id.* ("Field-of-use, territorial, and other limitations on intellectual property licenses may serve procompetitive ends by allowing the licensor to exploit its property as efficiently and effectively as possible.").

180 billion cumulative downloads.<sup>5</sup> Since its inception, the App Store has generated enormous revenue for developers, including approximately \$8.5 billion from 2010 to 2013 and approximately \$44 billion by 2016 paid to developers in physical goods transactions.<sup>6</sup> Developers have earned even more on apps and transactions for which Apple charges no commission, including over \$400 billion in 2019 alone.<sup>7</sup> Similarly, developers' licensed use of the IAP functionality—a focus of Epic's claims in this case—has generated over \$260 billion in earnings.<sup>8</sup>

Moreover, prevailing antitrust principles instruct that launching a new product or improving product design alone does not constitute an antitrust violation. That is because antitrust laws—just like intellectual property laws—are intended to promote innovation and competition—and thus product introduction; the market itself will deal with unattractive products. The design choices related to Apple's App Store and approach to in-app payments, as well as the terms of Apple's DPLA and other license agreements that facilitate third-party developers' access to them, have remained unchanged in all material ways since their inception.

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<sup>5</sup> Dkt. 745-2 ¶ 21.

<sup>6</sup> Dkt. 778-3 ¶ 224.

<sup>7</sup> Trial Tr. 2769:7–18 (Schiller).

<sup>8</sup> See Apple Newsroom, *Apple services enrich peoples' lives throughout the year* (Jan. 10, 2022), <https://www.apple.com/newsroom/2022/01/apple-services-enrich-peoples-lives-throughout-the-year/>.

Properly considered, there is no merit to Epic’s challenges to the terms of Apple’s DPLA—including the requirements that iOS apps be distributed through the App Store and in-app purchases of digital content use Apple’s IAP functionality. Like thousands of app developers, Epic used Apple’s proprietary technology and underlying IP in connection with the App Store. Epic agreed to the terms of Apple’s DPLA in exchange for permission to make use of that technology and IP—to Epic’s great success and profitability. Now, having benefitted tremendously from using Apple’s technology and IP, Epic has complained about the very conditions that guaranteed its success. There is nothing inherently wrong with a licensor setting conditions on a license to use its technology and associated IP. On the contrary, legal authority and sound public policy support licensors setting conditions on the use of their IP in ways that promote healthy competition—precisely what Apple did here by licensing its technology and underlying IP to enable innovation and competition for iPhone apps.

### **BACKGROUND**

The terms under which Apple licenses use of its technology and underlying IP to third-party app developers flow directly from events and circumstances surrounding the early days of the iPhone. Apple released the first iPhone in 2007.<sup>9</sup> The iPhone and its operating system (now called iOS) resulted from an extraordinary

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<sup>9</sup> Trial Tr. 2719 (Schiller).

R&D effort by Apple that created a wide range of proprietary new hardware and software technologies.<sup>10</sup> Apple’s innovations are protected by a broad portfolio of patent, copyright, and trademark rights, among others.<sup>11</sup> Many of Apple’s innovative technologies and associated IP are used by app developers to program their apps and distribute them via the App Store.<sup>12</sup>

As an entirely new entrant in the smartphone market in 2007, Apple identified security and reliability as integral to the success of its innovative device.<sup>13</sup> The iPhone quickly became a secure repository and portal for consumers to store and access everything from personal photos to banking to health information, and to share and communicate personal information on social media, dating, and messaging apps. An insecure device that regularly crashed when running apps or unnecessarily risked exposure of users’ private information would have hindered consumers’ safety and comfort in adopting this device or any third-party apps available on it. Apple’s development of the technologies necessary to ensure seamless installation and distribution of native apps on iOS—including, among other things, the creation

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<sup>10</sup> See Trial Tr. 2720-22 (Schiller).

<sup>11</sup> See, e.g., David Orozco, *Legal Knowledge as an Intellectual Property Management Resource*, 47 Am. Bus. L.J. 687, 720-21 (2010) (describing Apple’s “overlapping and layering strategy of intellectual property integration that spans utility patents, design patents, and trademarks”).

<sup>12</sup> See Trial Tr. 2731-35 (Schiller).

<sup>13</sup> D. Ct. Op. at 27.

of APIs for use by third parties and the vetting and review of third-party apps—took considerable time and effort in conjunction with the launch of the iPhone.<sup>14</sup>

In view of these considerations, from the outset Apple protected the security and privacy of the iPhone, while also maintaining control of Apple’s proprietary technology and underlying IP, by restricting users’ ability to download apps not developed or approved by Apple.<sup>15</sup> At launch in June 2007, the iPhone contained only preinstalled native apps that functioned on Apple’s proprietary iOS.<sup>16</sup> However, Apple soon received feedback from app developers who wanted to create their own apps for the iPhone.<sup>17</sup> This prompted Apple to announce it would provide an SDK for developers within months—a “tremendous” effort given the resources, APIs, developer tools, documentation, and sample code Apple would need to provide to developers to assist in development of third-party native apps.<sup>18</sup> Unfortunately, some actors engaged in “jailbreaking” (hacking) the iPhone in order

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<sup>14</sup> See Trial Tr. 2728:7-11 (Schiller) (“We’re trying to deliver our first generation iPhone with an entirely new operating system and architecture. Getting that done was a huge task. There just wasn’t time to consider many third-party APIs and tools and distribution.”).

<sup>15</sup> D. Ct. Op. at 27.

<sup>16</sup> *Id.*

<sup>17</sup> See Trial Tr. 2729: 8-24 (Schiller) (describing developer “feedback that led us to decide to make native app distribution a plan for the iPhone”).

<sup>18</sup> See Trial Tr. 2731-32 (Schiller).

to load their own native apps onto the device.<sup>19</sup> Because such apps were not vetted and verified by Apple, however, they posed significant security and interoperability risks. These concerns helped motivate Apple to prevent users from downloading unverified third-party apps that may jeopardize the device's security, reliability, and user experience.<sup>20</sup>

In response, Apple provided access to its proprietary iOS by creating and licensing iOS developer tools for third-party developers to create approved native apps for the iPhone using Apple's technology and associated IP.<sup>21</sup> Certain licensing conditions have been crucial to ensuring that third-party apps did not create security or privacy threats or risk the reliability and safety of the iPhone. This includes distribution of apps exclusively through the App Store, ensuring vetting of each app by Apple to satisfy those concerns. Those conditions were set forth in the DPLA.

Apple introduced the App Store in March 2008, less than a year after the initial launch of the iPhone.<sup>22</sup> In the App Store, developers could conduct transactions with users, who could buy and download approved apps certain to work within iOS and

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<sup>19</sup> To jailbreak an iPhone, a developer must modify the iPhone's operating system and override its prohibition on the installation of unauthorized apps. *See* D. Ct. Op. at 28.

<sup>20</sup> *Id.*

<sup>21</sup> Trial Tr. 2733:16-22 (Schiller).

<sup>22</sup> D. Ct. Op. at 73.

on the iPhone. The licensing regime that enabled developers to transact with users through the App Store not only enhanced the opportunity for developers large and small to reach users easily,<sup>23</sup> but also constituted cost-savings relative to other distribution channels that were dominant at the time.<sup>24</sup>

Soon thereafter, in September 2009, Apple introduced the IAP functionality.<sup>25</sup> Apple developed IAP to secure and centralize sales, payments and commissions for its technology and underlying IP. The goal of IAP “was to make it easier for developers to sell digital goods” safely and securely on iOS, through the App Store.<sup>26</sup> IAP was originally available only for paid apps, but just a month after launch, in October 2009, Apple expanded IAP to so-called “freemium” apps. With freemium apps, which also use Apple’s proprietary iOS and IP, users pay nothing initially in order to download and install the app, but are offered optional premium features that may be purchased in-app. The IAP system has facilitated an efficient mechanism through which developers have collected revenue through purchases on iPhone apps

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<sup>23</sup> See Trial Tr. 2737:16-24 (Schiller) (describing how Apple enabled a wide range of developers, from the smallest of individual and student developers to the largest corporations like Epic, to reach their customers).

<sup>24</sup> See *id.* at 2726-27 (describing the estimated “50 to 70 percent” cost to developers per sale from then-prevailing physical distribution platforms, including payment for desirable store shelf space, flyers, advertisements, and software box “facings”).

<sup>25</sup> 4:20-cv-05640-YGR, Dkt. 410 at 11.

<sup>26</sup> *Id.*

that use Apple's technology and underlying IP. A single payment process for both apps and in-app purchases has bolstered consumer confidence and obviated the need for a riskier decentralized system in which thousands of app developers each create their own payment systems, which may or may not be secure.

Apple's business model with respect to the DPLA and IAP is simple. Under the DPLA, third-party developers are licensed to use Apple's technology and underlying IP to create iOS-based apps that can be submitted to Apple for review, vetting, approval, hosting, and distribution through the App Store. The licensed Apple technology and IP made available to those developers includes patented and copyrighted software and technology resulting from Apple's tremendous R&D effort.<sup>27</sup> In exchange for the value the developer obtains from using Apple's technology and underlying IP, the developer agrees to certain terms and conditions. One of those conditions is the use of IAP for in-app transactions in digital content. The developer is responsible for setting the price for a given IAP transaction; the user pays Apple and Apple pays the developer, typically retaining a 30% commission (subject to some exceptions).<sup>28</sup> When a user downloads an app for free (which happens in the vast majority of transactions), Apple receives no commission

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<sup>27</sup> D. Ct. Op. at 28, 34.

<sup>28</sup> D. Ct. Op. at 33, n.198 (subscriptions), 35 (small businesses), 123 (reader rule).



for use of its technology and associated IP. This business model has seen no material changes since the choice was made to implement it over a decade ago.

Since the App Store's inception, Apple has distributed more than \$260 billion in earnings to developers from paid app downloads and in-app purchases using Apple's technology and underlying IP. The economic impact of the App Store on third parties is even larger when considering other developed revenue streams, such as advertising and the sale of physical goods.

### **ARGUMENT**

Epic claims that two conditions of the DPLA are anticompetitive: (1) requiring that native apps created by third-party developers be made available solely through Apple's App Store (despite the fact that they all use Apple-licensed technology and underlying IP to operate on iOS), and (2) requiring that native apps use Apple's IAP functionality to process any payments for in-app purchases (again, despite the fact that they rely on Apple IP). Neither of these terms is anticompetitive under well-settled federal and California state law. Rather, these license terms are appropriate conditions to use Apple's technology and IP that Apple implemented at the launch of the iPhone and the App Store, long before either the iPhone or its App Store achieved commercial success. Apple was well within its rights under intellectual property law to withhold its technology and underlying IP or to place reasonable conditions on access to it in exchange for its free use. Apple's

tremendous R&D investments related to its technology and IP have generated procompetitive benefits for Apple, third-party app developers like Epic, and customers alike. As such, the district court correctly rejected Epic's antitrust claims.<sup>29</sup>

**I. The App Store and Challenged DPLA Terms, Including The IP-Licensing Provisions, Embody Procompetitive Design Choices (Not Changes) That Facilitate Competition Where None Would Have Existed.**

Well-settled principles of antitrust law support Apple's innovative, procompetitive design choices in developing its App Store and licensing its applicable technology and IP to third-party developers. Apple's development of the App Store, and its decision to develop and license its technology and IP to third-party app developers so that they could distribute apps through the App Store, were procompetitive design choices that have facilitated competition where it otherwise would not have existed.

**A. Apple's Applicable License Terms Applied From The Beginning.**

The terms and conditions of Apple's IP licensing agreement, including those challenged by Epic, were not recently imposed. Nor has Apple changed the terms and conditions in any material respects since the launch of the App Store and IAP. Nonetheless, having reaped the benefits of using Apple's technology and underlying

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<sup>29</sup> This brief does not address whether the challenged DPLA provisions constitute unilateral or concerted conduct for purposes of Section 1 of the Sherman Act, and none of the arguments made herein within depend on that question.

IP for years pursuant to the DPLA, Epic now complains about a handful of the terms and conditions it once accepted, but now claims not to like. But those terms and conditions are part and parcel of the competitive proposition that Apple adopted from the outset—a proposition that Epic exploited to its great success. Because the challenged terms were original features of Apple’s procompetitive opening of its proprietary platform, not after-the-fact changes, they cannot constitute a violation of the antitrust laws.

From the beginning, Apple had procompetitive reasons for its design choices and associated licensing regime. Apple initially chose to design its iPhone so as not to allow apps developed and installed by third parties because it needed to ensure the reliability and security of the device, in turn protecting the user and the user’s experience.<sup>30</sup> This approach benefited user security and the device’s competitiveness by ensuring that any apps installed on the device were compatible with the device and its operating system, thereby limiting risks from poorly designed or malicious apps.

Upon the iPhone’s launch, developers made clear their desire to create native apps for the iPhone. As such, Apple almost immediately developed the inventive

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<sup>30</sup> See Trial Tr. 2727-28 (Schiller) (describing how the “huge task” of developing “an entirely new operating system and architecture” did not leave room “to consider many third-party APIs and tools and distribution” that could risk user security and privacy at the launch of the iPhone).

SDK necessary to accomplish this result.<sup>31</sup> During that time, however, users and developers began jailbreaking iPhones—circumventing iPhone security to develop and load unauthorized native apps.<sup>32</sup> Without Apple’s oversight, jailbreaking facilitated the distribution and installation of apps riddled with operational errors and security flaws.<sup>33</sup> Such apps often installed malware; harvested users’ private data without notice or consent; excessively drained the device’s battery; and hogged data.<sup>34</sup>

To protect its initial product choices, Apple responded by creating the App Store and made available its technology and underlying IP to third-party developers in the form of SDKs, allowing them to develop reliable native apps for the iPhone using proprietary tools designed by Apple.<sup>35</sup> To ensure that third-party apps do not undermine the device’s reliability and security, the terms under which Apple provided access to its technology and underlying IP to third-party developers

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<sup>31</sup> See Trial Tr. 2731-32 (Schiller).

<sup>32</sup> Trial Tr. 2729:19-24 (“[W]e saw users and developers starting to try anyway. They were creating what’s called ‘jailbreaking,’ a way to sideload software onto iPhone, and they were writing apps without any documented APIs to build with that were creating great quality risks, so we saw this beginning of demand and quality and security risks on the iPhone.”).

<sup>33</sup> *Id.* at 2729-30.

<sup>34</sup> 4:20-cv-05640-YGR, Dkt. 410 at 9.

<sup>35</sup> *Id.* at 6 (“In response to input from developers about their desire to develop native iOS apps, Apple revisited the issue and decided to create the ability for third parties to develop native iOS apps.”).

included criteria for apps and an oversight framework to vet third-party apps prior to being made available in the App Store.<sup>36</sup>

Launching a new product or new and improved product design, as Apple did with the iPhone and App Store, cannot alone constitute an antitrust violation. Rather, there must be “some associated conduct” that “supplies the violation.” *Allied Orthopedic Appliances Inc. v. Tyco Health Care Grp. LP*, 592 F.3d 991, 999 (9th Cir. 2010) (citation omitted). Specifically, a plaintiff must allege that the introduction of the new product or product design involves “some associated conduct which constitutes an anticompetitive abuse or leverage of monopoly power, or a predatory or exclusionary means of attempting to monopolize the relevant market, rather than aggressive competition on the merits.” *Id.* (citation omitted). Epic failed at trial to satisfy its burden of making that showing for any of Apple’s innovations at issue.

At the time Apple launched the iPhone in 2007, it was a new entrant. Epic thus does not allege—nor could it—that the introduction of the iPhone itself was anticompetitive. Apple’s design choices related to its nascent App Store shortly after the launch of the iPhone, including development of its SDK, licensing of its technology and underlying IP to third-party developers, and facilitation of

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<sup>36</sup> *Id.* at 6, 24 § 106.6.

developers' capacity to sell their native apps and in-app content directly to customers, do not change the inquiry. After a new product has lawfully entered the market, "a design change that improves [the] product by providing a new benefit to consumers does not violate [antitrust laws] absent some associated anticompetitive conduct." *Id.* at 998-99. While *changes* in product design are not immune from antitrust scrutiny, "[a]s a general rule, courts are properly very skeptical about claims that competition has been harmed by a dominant firm's product design changes." *Id.* at 998 (quoting *United States v. Microsoft Corp.*, 253 F.3d 34, 65 (D.C. Cir. 2001)). Notably, every case cited in Amicus Brief for the Committee to Support the Antitrust Laws relating to product design involved (i) product changes (ii) made by an already dominant firm to protect that position. Indeed, in the *Allied Orthopedic Appliances* case emphasized in that Amicus Brief, the Court analyzed *changes* in design undertaken at a time when Tyco was already a monopolist and still found that the conduct did *not* violate the antitrust laws. *See* 592 F.3d at 998-1003.<sup>37</sup> None of

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<sup>37</sup> *See also* *Abbott Labs v. Teva Pharm. USA, Inc.*, 432 F. Supp. 2d 408, 421 (D. Del. 2006) (analyzing "introduction of a new product by a monopolist"); *In re Keurig Green Mountain Single-Serve Coffee Antitrust Litig.*, 383 F. Supp. 3d 187, 212-13 (S.D.N.Y. 2019) (evaluating various steps Keurig took "regain its 'complete control' of the market"); *Nespresso USA, Inc. v. Ethical Coffee Co.*, No. 16-194-GMS, 2016 WL 11697058, at \*1 n.2 (D. Del. Sept. 7, 2016) (finding that the complaint plausibly alleged that "Nespresso redesigned its capsule housing for the purpose of excluding [competitors]" at a time when it already had monopoly power) (emphasis added); *United States v. Microsoft Corp.*, 253 F.3d 34, 65 (D.C. Cir. 2001) (evaluating monopolist's change to product design to foreclose competitors); *Xerox Corp. v.*

those cases supports the notion that Apple’s decision to license its proprietary technology and IP to developers in exchange for compliance with its terms of service violates state or federal antitrust law.

Epic does not challenge any *changes* that Apple made after 2009, at which point Apple concededly did not have market power.<sup>38</sup> Rather, Epic challenges design *choices* that Apple made when it *first* introduced the App Store. As discussed above, these early design choices served to improve the reliability and security of Apple’s new devices while fostering competition between Apple and other device manufacturers as well as between App developers. Conduct is procompetitive when the “[defendant’s] actions widen consumer choice[.]” *NCAA v. Board of Regents*, 468 U.S. 85, 102 (1984); *Paladin Assocs., Inc. v. Mont. Power Co.*, 328 F.3d 1145, 1157 (9th Cir. 2003) (“Improving customer choice is procompetitive”). This is because each innovative product introduction—whether that product is altogether new or differentiated to some degree from the products previously available—expands the set of products from which consumers can choose. Put simply, innovating firms—like Apple in developing its iPhone, iOS, and the App Store—

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*Media Scis. Int’l, Inc.*, 511 F. Supp. 2d 372, 378, 388-89 (S.D.N.Y. 2007) (evaluating design changes undertaken in markets when Xerox was already the only seller or had “market share of over 90%”).

<sup>38</sup> D. Ct. Op. at 66, n.331 (“Epic Games does not claim that Apple had market power in 2009”).

have every incentive to innovate and design products competitively so they will be perceived by customers as valued and superior to other available choices.

**B. Apple's Licensing Of Its Technology And IP To Third-Party Developers Via the DPLA Is Procompetitive, Facilitating Competition Among App Developers.**

Epic asserts that Apple acted anticompetitively by deciding to license its technology and IP to third-party developers to allow them to create native apps for the iPhone pursuant to the DPLA. This claim is unfounded. Indeed, the exact opposite is true. Apple's use of licensing *facilitated* competition among app developers. By providing a license to third-party developers, Apple equipped them with the resources and tools—Apple's proprietary technologies and the IP rights protecting those technologies—necessary to compete with each other to create native apps for the iPhone and, later, process in-app purchases, thereby fostering competition among developers. Without the DPLA license, developers (including Epic) would not have been authorized, or able, to create reliable apps for the iPhone.

For these reasons, Epic's position with respect to Apple's IP is illogical on its face. Epic effectively argues that if Apple had categorically *refused* to license its technology and underlying IP, there would have been no problem under the competition laws, but because Apple voluntarily licensed it on certain terms and conditions that have remained unchanged from the outset, it is in violation of those laws. Epic's position ignores the substantial benefits Epic has received from using



Apple's technology and underlying IP and flies in the face of procompetitive IP licensing law and policy, as discussed further below.

Epic complains about the requirement in the DPLA and its addenda that any in-app purchases of digital content be processed using Apple's proprietary IAP. The IAP experience generally, and the protocols related to payment through the App Store and its IP, operate to give users confidence in the security and safety of making payments for digital goods and apps on iOS. These features also provide consumers the efficiency of sharing payment details with a single vendor, Apple. In disregard of these benefits and of Apple's IP, Epic seeks an app ecosystem where any and all app developers must be allowed to offer their own payment processes, requiring consumers to repeatedly enter credit card or other payment details to complete what are typically very small transactions which may or may not be secure. There is no precedent supporting such a request.

Apple's IAP functionality allowed it to ensure the security of transactions processed through the App Store, protect users' sensitive information, and shield consumers from fraudulent transactions by using Apple's technology and underlying IP. This facilitated consumer trust: iOS users know that when they transact on the App Store, they are using a reliable and secure platform based on Apple technology and IP and will receive a product that has been vetted to meet Apple's high standards. This consumer confidence in turn enriched the App Store ecosystem (and

developers) as well as competition therein, because users became more prone to download, use, and pay for developers' apps and make in-app purchases. Thus, in addition to the DPLA, Apple's IAP design choices and IP enhanced the consumer experience initially envisioned by Apple by improving the product and facilitating competition on multiple levels.

Importantly, Apple's design choices regarding third-party apps realize Apple's product vision. They benefit consumers by improving the reliability and security of the iPhone using Apple's technology and associated IP. Through the App Store, DPLA, and IAP, Apple preserved the iPhone's reliability and security while also expanding its functionality. This allowed Apple's iPhone to compete successfully with existing mobile devices. Epic has also benefitted tremendously from exploiting Apple's technology and IP. Epic—like other app developers—licensed Apple's technology and underlying IP, including its software tools and APIs under the DPLA, and has benefited from cooperation with Apple when optimizing its apps for use on iOS.<sup>39</sup> Apple has given Epic access to Developer Events, which provides developers with technical details and guidance from Apple experts, Technical Support, Developer Forums, and Membership Support.<sup>40</sup> Without a

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<sup>39</sup> *See* Trial Tr. 2897-98 (Schiller).

<sup>40</sup> For instance, Apple invited Epic to participate in its 2014 Worldwide Developers Conference presentation launching its low-level graphics framework, Metal. *See* Trial Tr. 2898-99 (Schiller).

DPLA license and access to the resources that Apple has chosen to make available, competition among third-party developers and its accompanying benefits to consumers would not exist. The procompetitive benefits of Apple’s design choice, as reflected in the DPLA and IAP and related IP, are evident from the success of third-party developers in the App Store. Since the App Store’s inception, Apple has distributed more than \$260 billion in earnings to developers from paid app downloads and in-app purchases. Consumers have also benefited from Apple’s decision to license technology and IP to third-party developers by gaining a robust, competitive marketplace for apps.<sup>41</sup> The end harm would be to consumers who would then lack choice—precisely the opposite of protecting competition.

In short, Epic used Apple’s technology and underlying IP to its great benefit, and Apple was appropriately compensated for that use. Epic failed to meet its burden of showing that Apple’s choices, which benefited consumers with respect to security, privacy, and other areas, were predatory, exclusionary, or otherwise anticompetitive in violation of antitrust law.

**C. Under Relevant IP Laws, Apple Was Entitled To License Or Withhold Its IP At Its Choosing.**

Not only has Apple’s licensing scheme been procompetitive from the outset, but Apple was well within its rights under prevailing IP laws to license the

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<sup>41</sup> See Trial Tr. 3634-35 (Malackowski).

technology and underlying IP at issue on its preferred terms. Indeed, Apple was entitled to withhold its technology and underlying IP from third-party developers altogether—an alternate world that would have been worse for developers, users, and Apple.

“Intellectual property law bestows on the owners of intellectual property certain rights to exclude others. These rights help owners profit from the use of their property,” allowing them to restrict the way licensees may use their IP “efficiently and effectively.”<sup>42</sup> The challenged licensing restrictions in Apple’s DPLA create incentives for Apple to license its IP rather than withhold it from the market. Without such protections, Apple would have strong incentives to refuse sharing of its technology and underlying IP rather than make it available to third-party developers on reasonable terms, as it has done.

Licensing IP is thus “generally procompetitive,”<sup>43</sup> though it is not immune from antitrust scrutiny. According to the DOJ & FTC Antitrust Guidelines for the Licensing of Intellectual Property, a licensing arrangement raises antitrust concerns primarily when it “harms competition among entities that would have been actual or potential competitors in a relevant market in the absence of the license”—*i.e.*,

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<sup>42</sup> DOJ & FTC Antitrust Guidelines for the Licensing of Intellectual Property §§ 2.1, 2.3.

<sup>43</sup> *Id.* § 2.

entities in a horizontal relationship.<sup>44</sup> However, even having significant “market power does not impose on the intellectual property owner an obligation to license the use of that property to others.” *Intergraph Corp. v. Intel Corp.*, 195 F.3d 1346, 1362 (Fed. Cir. 1999) (quotation marks omitted) (citing Antitrust Licensing Guidelines (1995) 4). IP licenses, including the DPLA, incentivize innovation and competition by the licensor and the licensees, resulting in procompetitive effects where none would have otherwise existed.<sup>45</sup>

If Apple were required by law to permit third-party app developers to use its IP—unrestricted and without compensation—to create native apps and install them on iPhones, developers would be able to free-ride on Apple’s investments and innovations in building the iPhone and developing the high-quality reputation of the iOS ecosystem. Protecting a firm’s proprietary information and IP and preventing free-riding are indisputably legitimate business justifications. *See Gorlick Distrib. Ctrs., LLC v. Car Sound Exhaust Sys., Inc.*, 723 F.3d 1019, 1026 (9th Cir. 2013); *Technical Res. Servs., Inc. v. Dornier Med. Sys., Inc.*, 134 F.3d 1458, 1467 (11th

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<sup>44</sup> *Id.* § 3.1.

<sup>45</sup> *Id.* § 2.3 (“Field-of-use, territorial, and other limitations on intellectual property licenses may serve procompetitive ends by allowing the licensor to exploit its property as efficiently and effectively as possible.”). *See also* Ariel Katz, *Making Sense of Nonsense: Intellectual Property, Antitrust, and Market Power*, 49 *Ariz. L. Rev.* 837, 846 (2007); C. Scott Hemphill, *Intellectual Property and Competition Law*, in *Oxford Handbook of Intellectual Property Law* 12 (Rochelle C. Dreyfuss & Justine Pila, eds. 2018).

Cir. 1998); *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 461 (1992). This is because a firm’s desire to exclude others from, or exclude their profiting from, a firm’s IP is presumptively legitimate and procompetitive. See *Image Tech. Servs., Inc. v. Eastman Kodak Co.*, 125 F.3d 1195, 1219 (9th Cir. 1997). “[A] different business model” that spurs “competitive innovations,” increasing output and “improving the quality of the services” is also procompetitive. *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2282 (2018).

An inventor, in this case Apple, would be rightly reluctant to allow others to make use of its technology and underlying IP, without an assurance that it would not be excluded from reaping the benefits. IP licensing regimes enable inventors to put such protections in place, allowing firms to combine complementary factors of production,<sup>46</sup> which thereby promote innovation where none would have otherwise existed.

Imagine a world where Apple, in order to protect its IP and prevent free riding, declined to license its technology and associated IP around the iPhone and iOS, as Apple was entitled to do. Apple could have chosen to remain the exclusive developer of iOS apps. The 1.8 million third-party iOS apps and billions of dollars in developer revenues would not have existed. Instead, Apple chose to make

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<sup>46</sup> DOJ & FTC Antitrust Guidelines for the Licensing of Intellectual Property § 2.0.

available the iOS ecosystem to third-party developers, permitting developers to use Apple’s technology and associated IP under the license terms and conditions. Apple’s choice led to an “integration [that] [facilitated] a more efficient exploitation of the intellectual property, benefiting consumers through the reduction of costs and the introduction of new products.”<sup>47</sup> Without that license, third-party developers would not have been able to access the tools necessary to build secure native apps for the iPhone, thereby allowing competition and benefits to consumers. As such, the licensing restrictions do not harm “competition among entities that would have been actual or potential competitors in a relevant market in the absence of the [license]”<sup>48</sup> because the competitors in this context (app developers who provide apps for the iPhone) could not exist without access to Apple’s technology and underlying IP. Apple is willing to make that technology and associated IP available so long as it can rely on the restrictions in the license to protect itself, the iPhone, and the iPhone’s customers from opportunistic behavior. Apple’s licensing restrictions, therefore, are procompetitive because they facilitate licensing that opens the marketplace and fosters competition. The App Store generated over \$260 billion in payments to App developers that would not exist but for the invention.

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<sup>47</sup> *Id.* § 2.3.

<sup>48</sup> *Id.* § 5.5.

In the district court, Epic repeatedly invoked *Microsoft* to argue that intellectual property rights do not insulate a firm from antitrust liability. *See, e.g.*, Dkt. 777-3 at ECF pp. 506, 532, 565, ¶¶ 165, 251, 351. That is true as far as it goes. The court in *Microsoft* rejected an intellectual property justification as pretextual in fact—not illegitimate as a matter of law. *United States v. Microsoft Corp.*, 87 F. Supp. 2d 30, 41 (D.D.C. 2000). The court here, by contrast, sustained Apple’s intellectual property justification as non-pretextual. D. Ct. Op. at 114. Thus, what is most relevant here from *Microsoft* is that court’s *rejection* of the claim that Microsoft engaged in anticompetitive conduct when it designed a Java Virtual Machine, which did not work with an operating system developed by a rival. *Microsoft*, 253 F.3d at 75. As the court explained, even “a monopolist does not violate the antitrust laws simply by developing a product that is incompatible with those of its rivals.” *Id.*

## **II. Requiring Apple To Design Its Products For The Benefit Of Its Competitors—The Relief Epic Seeks—Is Unsupported In Law And Against Public Interest.**

Epic seeks to launch its own app store and distribute apps to iPhone users without having these apps go through Apple’s App Store, thereby presumably seeking to avoid paying Apple a commission for its use of Apple’s technology and underlying IP on any downloads from Epic’s App Store. Were it to secure the relief it seeks, Epic would be able to free ride on Apple’s investments in developing its technology and associated IP in the iPhone iOS, reputation, and user base by opening



its own app store and circumventing Apple's App Store, including the security protections provided by the App Store and Apple's App Review process. This would allow Epic to reap the benefits of Apple's investments in technology and IP without incurring any of the costs—effectively giving Epic a compulsory license to Apple's IP.

Epic's requested relief is not supported by precedent. In fact, the district court expressly asked Epic to provide precedent for the injunction it sought, and Epic was not able to identify any.<sup>49</sup> The requested relief also is not supported by the facts and circumstances of this case. Problematically, Epic has not—and cannot—identify a limiting principle in the number of additional app sellers or app stores that the law would require Apple to sanction. Yet there is no reason to believe this phenomenon would be limited to Epic. Rather, were Epic's proffered relief granted, numerous other app developers could create their own app stores with their own payment methods. Thus, as the district court held, this Court should deny Epic's request for a sanctioned free ride on Apple's technology and IP that would detrimentally harm Apple, its customers, its App Store, the iPhone's overall user experience.

Epic's requested relief asks this Court to ignore Apple's competitive decision-making and compel Apple to (i) redesign its products to suit Epic's preferred

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<sup>49</sup> See 4:20-cv-05640-YGR, Dkt. 130, Oct. 19, 2020 Hrg. Tr. at 10:22-24; Dkt. 276 at 149:7-19.

strategy, and (ii) compel Apple to license Epic on Epic’s preferred terms once iOS and all other software products have been rewritten to suit Epic’s strategy.<sup>50</sup> Such a compulsory licensing of patents and copyrights—which has no legal basis—would have adverse impacts on public policy and social welfare, eroding incentives for investment and innovation.

**A. Epic’s Requested Injunction Would Impermissibly Require Apple To Redesign Its Technology To Benefit Others, Effectively Providing A Compulsory License And Ignoring IP Investment.**

It is well-settled that IP owners generally are, and should be, free to set the terms and conditions to license their IP in ways that ultimately serve procompetitive ends. As the Antitrust Licensing Guidelines explain, permitting licensors to set restrictions on the use of their IP may “increase the licensor’s incentive to license.”<sup>51</sup> Licensors that otherwise have no obligation to license their IP may be willing to grant licenses, thereby facilitating competition among market participants that use the licensed IP, so long as the license terms include appropriate terms and conditions that do not end up negating the licensor’s investment in the IP.

Epic seeks to violate these principles with an order that would prevent Apple from “restricting, prohibiting, impeding or deterring the distribution of iOS apps

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<sup>50</sup> 4:20-cv-05640-YGR, Dkt. 276-1, at 3-7.

<sup>51</sup> DOJ & FTC Antitrust Guidelines for the Licensing of Intellectual Property § 2.3.

through a distribution channel other than the App Store[.]”<sup>52</sup> In effect, Epic asks the Court to compel Apple to forego return on the technology and underlying IP it developed through its R&D and redesign its products for the benefit of others. Were Epic’s proposed relief to be granted, Apple’s decade-old efforts to improve the iPhone’s competitiveness by vetting all apps before they may be installed would become unlawful, to the detriment of Apple, its App Store, the iPhone user experience, and iPhone customers. Rather than foster competition to consumers’ benefit, such a state of affairs would undoubtedly harm consumers.<sup>53</sup>

Epic effectively seeks a compulsory license to this not-yet-created software on the terms desired by Epic, depriving Apple of the right to determine how and whether to license the technology and underlying IP Apple developed from its deep investment in R&D. However, like all businesses, Apple should be “free to choose

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<sup>52</sup> 4:20-cv-05640-YGR, Dkt. 276-1, at 3.

<sup>53</sup> At the end of an antitrust case, “the court’s most important task is to devise a remedy that is reasonably well calculated to restore competitive conditions.” Areeda & Hovenkamp, *An Analysis of Antitrust Principles and Their Application* § 325a (citing *United States v. Glaxo Grp.*, 410 U.S. 52, 64 (1973)). “The purpose of relief in an antitrust case is ‘so far as practicable, (to) cure the ill effects of the illegal conduct, and assure public freedom from it continuance.’” *Glaxo Grp.*, 410 U.S. at 64 (citing *United States v. U.S. Gypsum Co.*, 340 U.S. 76, 89 (1950)). Members of the Academy have criticized the remedy in *Microsoft*, in which a court tried and *failed* to impose a remedy capable of making software transparent to competitors’ benefit. See Carl Shapiro, *Microsoft: A Remedial Failure*, 75 ANTITRUST L.J. 739, 761 (2009); see also Dennis W. Carlton, *Does Antitrust Need to Be Modernized*, Econ. Analysis Group, Discussion Paper No. 07-3 (2007), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=956930](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=956930).

the parties with whom [it] will deal, as well as the prices, terms, *and conditions* of that dealing.” *Pac. Bell Tel. Co. v. linkLine Commc’ns, Inc.*, 555 U.S. 438, 448 (2009) (emphasis added). Apple has no obligation—under the antitrust laws or otherwise—to redesign its proprietary systems to accommodate Epic, nor does it have an obligation here to license its technology and associated IP out to would-be competitors on terms favorable to those firms. Just the opposite—an alleged monopolist “is much more likely to be held liable for failing to leave its rivals alone than for failing to come to their aid.” *Novell, Inc. v. Microsoft Corp.*, 731 F.3d 1064, 1072 (10th Cir. 2013) (Gorsuch, J.).

The law compels no duty to deal “under the terms and conditions preferred by [a competitor’s] rivals.” *Aerotec Int’l, Inc. v. Honeywell Int’l, Inc.*, 836 F.3d 1171, 1184 (9th Cir. 2016) (alterations in original) (citation omitted). Nor does Epic find any support in this Court for expanding the scope of *Aspen Skiing*’s limited exception to this rule.<sup>54</sup>

At bottom, Epic’s claims center on complaints about certain terms and conditions required in order to gain the valuable benefits of access to Apple’s technology and underlying IP. But Apple has no legal duty to share its technology and IP with Epic at all, let alone on terms that Epic desires. No legal authority requires Apple to license its patents to Epic or permit Epic to use Apple’s

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<sup>54</sup> *Aspen Skiing v. Aspen Highlands Skiing*, 472 U.S. 585 (1985).

copyrighted software. *See* 35 U.S.C. § 154(a)(1) (a patent confers “the right to exclude others” from using the patented subject matter); 17 U.S.C. §§ 106 *et seq.* (defining exclusive rights of copyright). Apple also “certainly has no duty to deal under terms and conditions that [Epic] find[s] commercially advantageous.” *Pac. Bell Tel. Co.*, 555 U.S. at 450. Antitrust claims premised on an IP owner’s refusal to license can threaten the very purposes of IP *and* antitrust law.<sup>55</sup>

[S]uch claims will detract from the advantages lawfully granted to the holders of patents or copyrights by subjecting them to the cost and risk of lawsuits based upon the effect, on an arguably separate market, of their refusal to sell or license. The cost of such suits will reduce a patent holder’s incentive to risk the often enormous costs in terms of time, research, and development. Such an effect on patent and copyright holders is contrary to the fundamental and complementary purposes of both the intellectual property and antitrust laws, which aim to encourage innovation, industry and competition.

*Image Tech. Servs.*, 125 F.3d at 1218 (cleaned up). Apple’s choice to use its IP here must be protected.

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<sup>55</sup> Of course, this statement does not apply to situations such as an IP owner’s refusal to license a standard essential patent voluntarily committed to licensing on fair, reasonable, and non-discriminatory terms. *See Broadcom Corp. v. Qualcomm Inc.*, 501 F.3d 297, 314 (3d Cir. 2007) (“[I]n a consensus-oriented private standard-setting environment, [] a patent holder’s intentionally false promise to license essential proprietary technology on FRAND terms, [] coupled with [a standard-setting organization’s] reliance on that promise when including the technology in a standard, and [] the patent holder’s subsequent breach of that promise, is actionable anticompetitive conduct.”).

**B. Erroneously Condemning Procompetitive Behavior Could Cause Greater Injury Than Failing To Condemn Harmful Behavior.**

A holding against Apple and in favor of Epic could cause great injury to innovation across the technology sector. Technology markets are particularly dynamic; in fifteen years, Apple transformed cellphones from pocket-sized payphones to personalized and secure mobile computers that also make telephone calls. In 2007, as it prepared to launch the iPhone, Apple did not ask a court to require Nokia or Motorola to install iOS. Instead, Apple built a better phone.

Decision theory identifies two types of error costs. Type 1 errors are “false positives,” meaning the wrongful prohibition of conduct that benefits competition and consumers. The cost of false positives includes not just the costs associated with the parties before the court (or agency), but also the loss of procompetitive conduct by other actors. Risks arising from Type I errors are particularly acute in innovative technology markets. “Courts have been especially prone to Type I error in cases involving novel business practices and innovation—a tendency sufficiently ingrained in antitrust institutions to earn its own label—the ‘inhospitality tradition.’”<sup>56</sup> Precedent makes clear the need to avoid Type I errors, *i.e.*, overenforcement errors that undermine an IP rightsholder’s long term strategy.

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<sup>56</sup> Joshua D. Wright and Murat C. Mungan, *The Easterbrook Theorem: An Application to Digital Markets*, 130 Yale L.J. Forum 622, 634 (2021) (citation omitted).

Because Apple's decision to allow third-party developers to use its technology and associated IP had procompetitive effects and benefited consumers, an injunction condemning this decision would have a chilling effect on licensing and innovation. Moreover, the injunction Epic seeks would effectively signal to the technology industry that a patentee may not rely on IP licensing agreements to limit their competitors' use of the patent. Worse, such an injunction could signal that technology companies that innovate ought to keep all innovations to themselves.

**C. Requiring Apple To Change Its Policies Could Significantly Impair The App Store's Functioning After A 12-Year Track Record Of Success And Positive Impact To Consumers And Competition.**

In 2008, Apple opened the App Store, launched the iPhone SDK, and agreed that it would license its technology and associated IP subject to the terms and conditions of the license grant. For twelve years, third-party app developers have abided by Apple's rules and reached millions of iPhone users, profiting from Apple's App Store functionality. Epic's requested remedy would allow Epic to use Apple's technology and underlying IP to profit from Apple's own consumer base, all without abiding by Apple's DPLA license covering that technology and IP. They would, in essence, be allowed to squat on Apple's property rent free.

Thousands of third-party developers, like Epic, use Apple's iOS licensed technology and associated IP to build iPhone apps that are then listed in the App Store. Epic mistakenly believes that these policies, which have allowed third-party

developers to thrive for over twelve years, should not apply to Epic, or anyone else once they have used Apple's technology and underlying IP to become successful in their own right. Epic wants to leverage only the parts of Apple's technology and underlying IP that benefit Epic, without abiding by Apple's policies, and without regard to the damage that its requested changes would have on Apple's ecosystem, including consumers and other third-party developers. Such unfairness should not be countenanced.

### **CONCLUSION**

Apple's design choices surrounding the App Store and IAP, as well the requirements of its DPLA licensing agreement related to Apple's related IP, not only shield Apple from opportunism (such as free riding), but they also foster competition at both the device and app level. Epic's demand that the Court order Apple to abandon policies, rules, and license agreements adopted by Apple to protect its investment in its technology and underlying IP when it was a new entrant in mobile devices should be rejected.



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UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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I hereby certify that on this March 31, 2022, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system. Counsel for all parties to the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

/s/ Kathleen R. Hartnett  
Kathleen R. Hartnett