

Google Enters 2024 Fighting For Search, Play & Ad Tech

By Bryan Koenig

Law360 (January 1, 2024, 8:02 AM EST) -- Google enters the new year with few resolutions to litigation targeting its dominance over search, Android app distribution and auctions technology placing ads on third-party websites, and more fights are coming.

Epic Games, the Justice Department and state attorneys general all have brought cases seeking to fundamentally change the company's business models. Two of those cases already went to trial in 2023, with some painful results for the search giant after Epic won a California federal court jury verdict in December holding that Google illegally maintained monopolies over the distribution of apps on Android devices and for in-app billing services.

A remedies phase for that trial is expected early in the new year, where Epic will likely seek an order forcing Google to open up the Android operating system to alternative app stores like the one the video game developer wants to offer.

Later in 2024, Google is facing closing arguments in the U.S. Department of Justice case targeting the contracts that make it the default search engine on every Android, iPhone and Firefox browser in the United States. And Google is facing not one but two more trials from the DOJ and state attorneys general targeting its role in every part of display advertising technology.

"Google is facing far-reaching attacks on multiple aspects of its business model," said John Briody of McKool Smith. Those attacks, he continued, "find common ground in the size of the company and what it's been able to achieve."

An Epic Fight Over The Play Store

Epic's Dec. 11 win was the culmination of a 3½-year battle sparked in 2020 when it started offering players of its popular Fortnite video game a direct payment option for in-game purchases on both Android and Apple devices. The move prompted Apple and Google to kick Fortnite off their platforms for violating their app store policies. Epic then separately sued the tech giants for antitrust and other violations.

While the jury found for Epic in that company's case against Google, a judge found that Apple's policies do not violate antitrust law following a bench trial in 2021, although the court did find Apple's rule against sending users to outside payment methods violated California's unfair competition law.

Apple and Epic are both petitioning the U.S. Supreme Court to take up that case after the Ninth Circuit largely affirmed the trial court's findings in April. Google has also vowed to appeal the jury verdict against it, so it's not clear yet what impact the cases will ultimately have.

Epic's case against Google focuses on allegations that the tech giant obstructs competition for applications on Android devices by making it hard to install apps from outside the Google Play Store and by forcing developers to pay hefty fees for in-app purchases on Google Play. It also alleges Google violated the federal Sherman Act by entering into agreements to dissuade major app developers from opening app stores that would compete with Google Play.

Google argued throughout the trial that the market at issue should not be limited to Android devices, since those devices compete against Apple's iPhone. The company also contended that the 15% to 30% commission it charges on Play Store purchases is the same or less than the fees charged by other app stores.

What the case is really about, Google said, is that Epic wants to use the Google Play Store for free.

The jury was only asked questions about liability and injury, so it's not clear yet what remedies the court could impose on Google. The game developer has not requested financial damages and is instead pushing for changes to Google's business practices, although Epic's CEO acknowledged at trial that his company could make billions if the court blocks Google from taking a 30% cut of players' game-purchase revenue.

Attorneys for Epic also told the court during trial that the company wants the freedom to launch an app store on Android phones that could viably compete with the Google Play Store, for Google to make it less difficult for apps to be downloaded on Androids outside the Play Store, and for Google to stop cutting deals with app developers and phone manufacturers that discourage competition.

Multiple types of plaintiffs had challenged Google's control over the Play Store, but only Epic got all the way to trial, thanks to settlements, including with the Match Group, consumers and developers. Most important, more than 50 attorneys general cut a deal made public in December under which Google will pay \$700 million and must permit alternative billing options that can circumvent its up-to-30% commissions. Epic has decried those concessions as offering "no true relief for consumers or developers."

Perhaps contributing to Epic's courtroom success, and hanging over Google's other cases as well, are Google policies that plaintiffs contend hid key evidence. The Play Store judge, U.S. District Judge James Donato, went so far as to instruct jurors that they could infer that internal chats, deleted under a default policy scrubbing them after 24 hours, "contained evidence that would have been unfavorable to Google."

Google Search: The Verb, The Business Model, The Monopoly?

Google's other 2023 trial lasted 10 weeks in a D.C. federal courtroom. But that case likely remains years away from resolution on the government's antitrust allegations targeting the contracts that make Google the default search engine on the devices and browsers used by most Americans.

U.S. District Judge Amit P. Mehta won't hear closing arguments in the dual monopolization cases from the Justice Department, backed by a small coalition of state attorneys general, and a larger group of

state enforcers, until early May 2024 — six months after the D.C. federal court bench trial wrapped Nov. 16.

To help guide those first next steps, Judge Mehta will be sorting through 1,900 pages of post-trial filings spread across proposed conclusions of fact, proposed conclusions of law, post-trial briefs, and response submissions. Collectively, all that work means the judge may not turn out an opinion on Google's liability under Section 2 of the Sherman Act, which bars monopolistic conduct, until late 2024.

After Judge Mehta's decision comes inevitable attempts to appeal, no matter who loses, and potentially a remedies phase if the DOJ wins, meaning another lengthy trial with further prospects for appeal.

The DOJ argues that Google has hopelessly foreclosed DuckDuckGo and Bing from large swaths of the market and needed user scale, through billions of dollars' worth of default contracts with the likes of Apple, Samsung, Mozilla and Verizon. Google contends it won those contracts in open competition by being the best option.

A major point of contention throughout the trial was the exact bounds of the market in which Google operates. The DOJ pushed a definition limited to general search services and the ads that accompany their results, where Google has a roughly 90% share. But Google argued it competes broadly with specialized vertical search providers such as Expedia, Yelp and Booking.com, with one expert contending there's competition every time a user decides how they want to run a search.

If the case does get as far as a remedies phase, even after or in spite of any appeals, it remains unclear what kind of fix Judge Mehta could or would impose on Google. The search trial that kicked off Sept. 12 focused heavily on whether to impose choice screens as European and Russian regulators do, which ostensibly gave rivals like Bing and DuckDuckGo a fighting chance, although Google fought tooth and nail to argue the European choice screen, in particular, did little to erode its market share.

Also overhanging any remedy would be the obligations Google and other tech giants face under the European Union's new Digital Markets Act. The European Commission has already pursued multiple enforcement actions against Google, yielding billions in fines.

Imposing a choice screen in the United States, at least through the DOJ litigation, would likely be difficult. That's because a choice screen would be the purview of distributors like Apple and Samsung. The DOJ, however, did not sue those companies, meaning Judge Mehta couldn't order them to do anything.

The DOJ has kept tight-lipped about any prospective remedy it might seek.

Perhaps the most likely option would be an injunction banning Google from inking default contracts. Yet that would not block Apple and other distribution partners from picking Google as their default search engine anyway, albeit likely based on dramatically reduced revenue sharing. And Apple Senior Vice President Eddy Cue testified that the company never really needed to consider "inferior" alternatives to Google Search. A reduced revenue share could prove calamitous for Mozilla, which draws nearly 90% of its income from search revenue.

Two Ad Tech Trials, Two Rocket Dockets

Unlike the Play Store and Search, Google's Ad Tech business is facing not just one major trial in 2024 but

potentially two, although the company is trying to convince a Texas federal judge that a state attorneys general case can't be ready for trial until mid-2025.

The DOJ case, joined by a separate coalition of state enforcers, still appears bound for a 2024 trial in the Eastern District of Virginia, which, like the Eastern District of Texas, is known as a "rocket docket."

The litigation accuses Google of buying up the tech used to sell and place advertisements on third-party websites, known as display ads, in order to corner the market.

When Google picked up DoubleClick in 2008, it gained a foothold in the display ad space that enabled it to deploy different anti-competitive practices to increase its control over the system, according to **the DOJ suit** first filed in January 2023. Specifically, the case centers on split-second auctions that are used to place the ads that show up each time a website is loaded as well as the mechanisms used to connect website publishers, advertisers and consumers for these auctions.

In addition to expressly seeking, unlike the Search case, a court order to break up that part of its business, the DOJ suit importantly is seeking damages based on allegations that Google overbilled federal agencies for advertising, including the U.S. Department of Defense.

Google contends government agencies lack standing to pursue damages. If those arguments fail, the damages bid tees up the case for a trial in front of a jury instead of a bench proceeding like the Search case across the Potomac River.

The state enforcers case led by the Texas attorney general took a more circuitous route. First filed in late 2020, the case was later included in a much slower-moving multidistrict litigation centralized in the Southern District of New York with similar cases from advertisers, publishers and others.

The U.S. Judicial Panel on Multidistrict Litigation issued an order in June remanding the Texas-led case after finding that the State Antitrust Enforcement Venue Act, passed by Congress as part of the omnibus appropriations bill at the end of 2022, exempted the case from inclusion in the MDL.

Google lodged a mandamus petition with the Second Circuit seeking to undo the transfer, arguing that the Venue Act does not apply retroactively. But the appeals court rejected the bid a day after hearing oral arguments.

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