

# Apple's App Store: Exploring the Future of Antitrust Laws

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## Introduction

Apple, the well renowned technology company is acknowledged for an incredibly unique and successful business model, targeting consumers with its exclusivity. The company's distinctiveness is not limited to the physical design, it is also distinctive because of its iOS software, Apple Music, and App Store. The App Store was introduced to Apple users in 2008, growing from only 500 apps to billions of apps.<sup>1</sup> Developers are required to enter an App enrollment program and pass a series of guidelines to develop his or her app through Apple.<sup>2</sup> This means that no third party developer can function properly on Apple devices or be added onto Apple products without illegally changing the software of the Apple interface, also known as "jailbreaking."<sup>3</sup> Jailbreaking and other forms of unauthorized modification of iOS products "is a violation of the iOS end-user software license agreement" and "may deny service for an iPhone, iPad, or iPod touch that has installed any unauthorized software."<sup>4</sup> Apple's right to void a user's warranty and Apple Care support incentivizes Apple users to strictly use the App Store. The particularly exclusive ecosystem of the App Store may be threatened by

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<sup>1</sup> *The App Store Turns 10*, Apple Newsroom, December 08, 2018, <https://www.apple.com/newsroom/2018/07/app-store-turns-10/>, (last visited January 27, 2019.)

<sup>2</sup> *Apple App Review*, Apple, <https://developer.apple.com/discover/>, (last visited January 27, 2019.)

<sup>3</sup> *Unauthorized Modification of IOS*, Apple Support. June 15, 2018, <https://support.apple.com/en-us/HT201954>, (last visited January 27, 2019.)

<sup>4</sup> Id.

an antitrust lawsuit before the Supreme Court, which will either strengthen the protections afforded by the Sherman Antitrust Act<sup>5</sup> or weaken the overall legality of antitrust laws for the future.

### ***Apple Inc. v. Robert Pepper: In Regards to the Apple iPhone Antitrust Litigation***

An ongoing case, *Apple Inc. v. Robert Pepper*<sup>6</sup>, goes over the material facts of Apple's recognized App Store. It emphasizes the fact that Apple makes it increasingly difficult and nearly impossible for its consumers to purchase applications other than through its monopolistic store. The App Store takes a 30% commission<sup>7</sup> from every application purchase from the developers, which ultimately forces many developers to increase the overall price of the applications. Therefore, Apple consumers pay Apple much more for the apps than they would typically pay in a competitive market, because the commission costs are inevitably trickled down to the consumer with no other alternative. The Plaintiff's argument in the *Apple v. Pepper* case states that if multiple individual firms or third party developers sold applications outside of Apple's closed system (creating an alternative competitive market), subsequently Apple users would pay a significantly lower price. *Pepper*

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<sup>5</sup> Sherman Antitrust Act, 15 U.S.C. §§ 1-38, Cornell Law School, [https://www.law.cornell.edu/wex/sherman\\_antitrust\\_act](https://www.law.cornell.edu/wex/sherman_antitrust_act), (last visited March 19, 2019.)

<sup>6</sup> *Apple Inc. v. Pepper*, 138 S. Ct. 2647, 201 L. Ed. 2d 1049 (2018), Leagle, <https://www.leagle.com/decision/insco20180618c39>, (last visited March 19, 2019.)

<sup>7</sup> *Brief for the United States as Amicus Curiae*. WestLaw. May 18, 2018. <https://1-next-westlaw-com.ezproxy.fau.edu/Document/I6aa55b35541811e8a2e69b122173a65f/View/FullText.html?listSource=RelatedInfo&list=Filings&rank=21&docFamilyGuid=I6aa55b36541811e8a2e69b122173a65f&originationContext=filings&transitionType=FilingsItem&contextData=%28sc.Search%29>, (last visited January 27, 2019.)

is seeking damages for consumers who purchased apps from the App Store. He is seeking a monetary reward for the overcharge of app purchases as well as a petition to allow third-party applications across all Apple products.<sup>8</sup> Consumers similarly situated may argue that Apple's App Store establishes a monopoly.

### *Apple v. Robert Pepper: The Aftermath*

Ultimately, the U. S. District Court for the Northern District of California dismissed the case due to a lack of stated antitrust injury,<sup>9</sup> based upon the requirements of the *Clayton Act*<sup>10</sup>, the *Sherman Antitrust Act*,<sup>11</sup> and the *Illinois Brick Doctrine*.<sup>12</sup> Robert Pepper later appealed the dismissal to the U. S. Court of Appeals for the Ninth Circuit in California.<sup>13</sup> Apple appealed the case,<sup>14</sup> allowing the lower courts to send their records of the case up to the Supreme Court in hopes that it would review the verdict. The Supreme Court granted Apple's petition in 2018.<sup>15</sup>

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<sup>8</sup> *Apple Inc. v. Pepper*, 138 S. Ct. 2647, 201 L. Ed. 2d 1049 (2018), Leagle, <https://www.leagle.com/decision/insco20180618c39>, (last visited March 19, 2019.)

<sup>9</sup> Basem Besada, and Isaac Idicula, *Apple Inc. v. Pepper*, Cornell Law School, November 20, 2018, <https://www.law.cornell.edu/supct/cert/17-204>, (last visited January 27, 2019.)

<sup>10</sup> *Clayton Act*, 15 U.S. Code § 12, Cornell Law School, <https://www.law.cornell.edu/uscode/text/15/12>, (last visited March 19, 2019.)

<sup>11</sup> *Sherman Antitrust Act*, 15 U.S.C. §§ 1-38, Cornell Law School, [https://www.law.cornell.edu/wex/sherman\\_antitrust\\_act](https://www.law.cornell.edu/wex/sherman_antitrust_act), (last visited March 19, 2019.)

<sup>12</sup> *Illinois Brick Doctrine Law and Legal Definition*, USLegal, <https://definitions.uslegal.com/i/illinois-brick-doctrine/>, (last visited March 19, 2019.)

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Apple Inc. v. Pepper*, 138 S. Ct. 2647, 201 L. Ed. 2d 1049 (2018), Leagle, <https://www.leagle.com/decision/insco20180618c39>, (last visited March 19, 2019.)

### **Defense of the *Illinois Brick Doctrine***

The Supreme Court case will question whether developers and consumers have the right to sue Apple through antitrust laws. Antitrust laws were developed to eliminate any hindrances with free competition and “protect trade and commerce against unlawful restraints and monopolies.”<sup>16</sup> Apple has remained protected from these lawsuits due to its defense using the theory behind the court’s decision in *Illinois Brick Co. v. Illinois*.<sup>17</sup> This case concluded that consumers could not sue the alleged non-competitive company if consumer/business transactions were actually with intermediaries and not the named company in the law suit. Apple considers themselves to be a middleman between the consumer and the developer of the Apps. Therefore, only individual developers could potentially file a lawsuit against the company, not the consumers. Essentially, the developers are paying Apple to distribute applications to its iOS users. Therefore, the developers are the only direct purchasers of Apple’s services that could sue Apple, meaning that the plaintiff, Pepper, lacks standing to sue because there is not a direct link between them and Apple.<sup>18</sup> Apple argues that in addition to the protection under the *Illinois Brick Doctrine*, Apple also technically does not “possess key price-setting power,”<sup>19</sup> The developers are ultimately controlling the price of applications, not Apple.

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<sup>16</sup> 15 U.S.C.A. § 12 Title 15, WestLaw. November 02, 2002. [https://1-next-westlaw-com.ezproxy.fau.edu/Document/NBEB622A0AFF711D8803AE0632FEDDFBF/View/FullText.html?originationContext=documenttoc&transitionType=CategoryPageItem&contextData=\(sc.Default\)](https://1-next-westlaw-com.ezproxy.fau.edu/Document/NBEB622A0AFF711D8803AE0632FEDDFBF/View/FullText.html?originationContext=documenttoc&transitionType=CategoryPageItem&contextData=(sc.Default)), (last visited January 27, 2019.)

<sup>17</sup> *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), Justia, <https://supreme.justia.com/cases/federal/us/431/720/>, (last visited March 19, 2019.)

<sup>18</sup> Id.

<sup>19</sup> Basem Besada, and Isaac Idicula, *Apple Inc. v. Pepper*, Cornell Law School, November 20, 2018, <https://www.law.cornell.edu/supct/cert/17-204>, (last visited January 27, 2019.)

When analyzing Apple's argument from the consumer's position, it is reasonable to assume that the consumer believes it is engaging in a single transaction with Apple, given that Apple receives the consumer's payment and billing information and it appears that the product, the app, is being delivered by Apple. The *Illinois Brick Co.* case should be reevaluated, especially since many states have already questioned the ruling in this case. Twenty-nine states as of November 2018 filed an *Amici Curiae* brief, asking for the court decision to be overturned. These states claim that the Brick Doctrine is "grounded in predictions and policy concerns that have been undermined by subsequent experience and events."<sup>20</sup>

According to the court, some of the public policy purposes for litigating the Illinois case was not to force Congress to enact additional antitrust statutes, but to protect businesses from lawsuits from both the consumer and developer for the same damages.<sup>21</sup> This is why some may agree with Apple's defense. But, in regards to this upcoming Apple case, consumers and developers would be seeking damages for different injuries. Consumers would be suing for overpriced applications in a monopoly and developers would be suing for a loss of profit due to the commission as well as the overall higher price of its applications.

### Conclusion

The Supreme Court decision is still pending.<sup>22</sup> After successful yet

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<sup>20</sup> *Class Action Issues*, American Antitrust Institute, November 5, 2018, <https://www.antitrustinstitute.org/work-product/class-action-issues-update-november-2018/>, (last visited Jan. 27, 2019.)

<sup>21</sup> *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), Justia, <https://supreme.justia.com/cases/federal/us/431/720/>, (last visited March 19, 2019.)

<sup>22</sup> *Apple Inc. v. Pepper*, 138 S. Ct. 2647, 201 L. Ed. 2d 1049 (2018), Oyez, <https://www.oyez.org/cases/2018/17-204>, (last visited March 19, 2019.)

controversial mergers such as the AT&T Time Warner merger,<sup>23</sup> it is reasonable to assume that Apple's defense may be proven credible at the Supreme Court level. If Apple wins this case, it will establish a trend whereby other companies behave in a more monopolized and closed off fashion. On the other hand, if Apple is found actively engaging in antitrust activities, other companies will be pressured to act more morally, especially if it means these companies can be sued by consumers and developers for the same actions taken by the company. Until then, the Supreme Court will debate potential verdicts of the case and whatever the outcome, it will profoundly impact the future of company business models as we currently know them.

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<sup>23</sup> Herbert Hovenkamp, *Is the AT&T-Time Warner Decision a Blow Against Antitrust?*, Knowledge at Wharton, June 19, 2018, <http://knowledge.wharton.upenn.edu/article/impact-att-time-warner-decision/> (last visited Jan. 27, 2019.)