‘Developers are fleeing the Unreal Engine,’ Epic tells court

On Monday, Epic Games and Apple faced off in the first hearing of their ongoing legal fight, held in a public Zoom call because of the ongoing quarantine restrictions. The hearing sought to determine whether Epic’s developer privileges should be legally protected – initially by a temporary restraining order, setting the stage for a more powerful preliminary injunction that would remain in force for the duration of the trial.

Judge Yvonne Gonzalez Rogers opened the hearing by indicating she was likely to take action to protect the Unreal Engine, but let the Fortnite ban stand.

“I am not inclined to grant relief with respect to the games,” the judge said, “but I am inclined to grant relief with respect to the Unreal Engine.”

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Judge Rogers seemed uncertain which side would succeed on the merits of the case, which will have bearing on whether the injunction will be granted. “This is not something that is a slamdunk for Apple or for Epic Games,” Judge Rogers said.

Fortnite was removed from the app store on August 13th, in response to the implementation of a new program sidestepping Apple’s mandatory in-app payment system. But Apple has also moved to restrict Epic’s ability to work on the Unreal Engine, which is widely used by third-party game developers. A

Microsoft executive submitted testimony on Sunday that revoking Epic's ability to maintain the Unreal Engine would cause significant problems for iOS versions of games using the engine, including Microsoft's *Forza*.

Apple says it is within its rights to remove developers that violate the platform rules, which Epic did clearly and deliberately. "Developers who work to deceive Apple, as Epic has done here, are terminated," the company said in a filing last week.

The judge's primary concern was Epic's own role in bringing about the crisis, and the company's ability to restore its iOS privileges by simply restoring the pre-August version of the app.

"So far," Judge Rogers said, "I haven't heard anything that suggests they can't just flip the switch to the way it was August 3rd."

"We can't just flip a switch and reenter an anti-competitive environment," replied Cravath's Katherine Forrest, representing Epic. "There's no technical reason it can't be done, but it's something the law does not and should not require."

Judge Rogers was significantly more skeptical about Apple's efforts to restrict Epic's ability to maintain the Unreal Engine. "It does to me look retaliatory, and I don't see any harm to Apple to restrain you from not impacting the Unreal Engine on that platform," Judge Rogers said. "It looks like overreach to me."

Representing Apple, Gibson Dunn's Richard Doren defended the move by citing Apple's long-standing App Store policies for responding to developers who breach its terms.

"When Apple is dealing with an entity that is breaching its contracts, its practice is to terminate the accounts of all

related parties," Doren said. "The reason Apple does this is so that it doesn't become a shell game…. The concern is that the misconduct will simply be transferred to another Epic entity."

Forrest also emphasized the damage done by limiting the Unreal Engine's capabilities on iOS, as many developers had sought out the engine specifically for its cross-platform capabilities.

"It will no longer be a usable engine," Forrest said. "Developers are fleeing the Unreal Engine. It's happening now. It's not speculative."

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