Antitrust & The New Economy

History

1890: The Sherman Act
1911: Standard Oil
1956: AT&T I
Network Effects
Innovation Issues
Relief

1969 - 1980: IBM
Innovation
Relief

1974 - 1982: AT&T II

1994 - 1995: Microsoft I
Licensing & Developer Agreements

1998 - 2002: Microsoft II
Explorer & Java
Trial, Appeal, Relief Phase

2004 - ?: Microsoft III (E.C.)
Server Market
Media Player

History
“Every contract, combination in the form of trust or other conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.”

15 USC § 1.

Section 1

Requires Multiple Parties

What Does It Mean?

Section 2

Does Not Require Multiple Parties

What Does It Mean?

An Economic Statute?

“If we will not endure a king as a political power we should not endure a king over production, transportation, and sale of any of the necessities of life.”

-- John Sherman
An Economic Statute?

“Power that controls the economy should be in the hands of elected representatives of the people, not in the hands of an industrial oligarchy.”

—William O. Douglas

Subject Matter?

Yes.

No.

An Economic Statute?

“Maximizing Consumer Welfare”

A Determinate Standard?

Yes.

Fostering Competition

Early Theories — Modern Approach

Law

Subject Matter?

Yes.

No.

Law

Subject Matter?

Yes.

No.

Fostering Competition

A Microeconomic Concept

Competition vs. Innovation

Law

Subject Matter?

Yes.

No.

Schumpeterian Competition

We decide this case against a backdrop of significant debate among academics and practitioners over the extent to which ‘old economy’ §2 monopolization doctrines should apply to firms competing in dynamic technological markets characterized by network effects.” [11]

Tea Leaves

Subject Matter?

Yes.

No.

Network Externalities

The Entrapment Issue

The Externalities Issue

Tea Leaves

Subject Matter?

Yes.
Indeed, there is some suggestion that the economic consequences of network effects and technological dynamism act to offset one another, thereby making it difficult to formulate categorical antitrust rules absent a particularized analysis of a given market.

Subject Matter? Yes.
Tea Leaves No.

The Externalities Issue
Does the Court "Get It"???

Copyright vs. Antitrust
(Innovation vs. Competition)
Microsoft's argument that copyright allows it to prevent people from changing the desktop "... is no more correct than the proposition that one's personal property, such as a baseball bat, cannot give rise to tort liability" [p. 33]

Subject Matter? Yes.
Tea Leaves No.

Theories

Monopolizing PC Market [§2]
Attempted Monopoly of Browsers [§2]
Tying Windows to Explorer [§1]

Rule of Reason
Defining The Market
Balancing Positive and Negative Effects

Per Se Rules
Price Fixing
Geographic Divisions
Boycotts
etc., etc., etc.
Tying Elements:
1. Two separate products
2. Market power in the tying product
3. Consumers have no choice in the tie
4. Substantial volume of commerce is affected.

Traditional rationale: Leveraging Monopoly
An Incoherent Doctrine?

Law Economics

Microsoft II Rationale: Consumer choice.
- Efficiency of integration; “Novel, purported efficiencies” [p. 79].

Monopolization Elements
1. Market Power
2. Anticompetitive Conduct

Monopolization: Market Power
Defining Market Share
What is the Market?
Should Middleware Count?

Defining Barriers to Entry
The Applications Barrier
Section 2
Monopolization
Anticompetitive Conduct:

1. OEMs and Control of the Desktop
   What's the Alternative?

2. Integrating IE and Windows
   Taking IE Off Add/Remove List
   Commingling Files
   Overriding User Choice of Browser

3. Agreements With Internet Access Providers
   License Restrictions
   Free Tool Kit is OK

4. Agreements With Independent Software Providers
   Browser Defaults

5. Threatening Apple
   Courts Understand Threats...

6. Java
   Incompatible Java is OK!
   Deception & Threats to Intel
   What's the Alternative?
Section 2 Attempted Monopolization (Browsers)

1. Anticompetitive conduct
2. Specific intent to monopolize
3. Dangerous probability of success.

Dangersome Probability of Success

- What barriers to entry?

Section 1/Tying:

"Enmeshing the courts in product design decisions." [p. 80].

Copyright Defense:

"Drastic Variation"
"Stable and Consistent Platform."
No Principled Distinction...

Section 2/Monopolization:

Bundling

No Justification for Commingling or Taking IE off Add/Remove List
"Valid Technical Reasons" for Overriding Browser Choice

Section 2/Monopolization:

Agreements With IAPs & ISVs

"No Justification"
Is Antitrust Futile?
Abbott Lipsky
Cell Phones

Any girl can be glamorous. All you have to do is stand still and look stupid.”
Hedy Lamarr (1913-2000)

Designing Relief
Injunctions
Criminal vs. Civil
Constitutional Requirements
Damages

Structural Relief
1. Isolating the Monopoly
   ATT
   IBM
   Microsoft
2. Innovation Effects?
3. Complementary Monopolies

AT&T
BelO operating Companies
AT&T Long Distance
Western Electric & Bell Labs
AT&T I

Relief

Yes.

AT&T II

Relief

Yes.

IBM

Relief

Yes.

Microsoft

Relief

Yes.

AT Policy

Relief

Yes.

Ordinary Case:
The Shoe Monopolist

Complementary Goods:
The Left Shoe Monopolist
Complementary Goods: The Left Shoe Monopolist

Did Microsoft Win?

District Court (Judge Jackson):

Proportionate Relief

The Middleware Fight

The Clones Issue?

Criminal Sanctions

Modern Tactics

Abbot Lipsky

General Electric

& The "Phases of the Moon"

Innovation vs. Competition

Network Effects

Schumpeterian Competition

Valuing Network Externalities

Interfaces

Market Imperfections – The Desktop

Technical & Business Judgments

Appropriate Relief