Antitrust & Computing

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Introduction

Why Legal History?
The Problem of Narrative
Why Students Should Care
Outline

How Lawyers See the World
Roots of Antitrust Law
Antitrust for the Information Economy
IBM, Microsoft I, II, III, IV …
Subject Matter?

Defendant Wins

No.

Yes.

Liability

Defendant Wins

No.

Yes.

Defenses & Justifications

Defendant Wins

No.

Yes.

Relief

Defendant Wins

No.

Yes!

Yes! Plaintiff Wins

How Lawyers See The World
How Lawyers See The World, ctd. …

Common Law & Precedent
Roots of Antitrust Law

1623: Statute of Monopolies

Why We Dislike Monopoly

\[ \Pi \]

\[ \text{DWL} \]

\[ P^* \]

\[ P_{\text{comp}} \]

Marginal Cost

Quantity

Price

IP vs. Monopoly
Roots of Antitrust Law

1890: The Sherman Act.
Populism vs. Microeconomics

“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 necessaries of life.”

-- John Sherman

“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

“Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.”
15 USC § 1.

“Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony…
15 USC § 2.
Roots of Antitrust Law

1911: The *Standard Oil* Case
Rule of Reason
*Per Se* Rules

1911 - ?: Rules for the Old Economy

1930s: DoJ and IBM/Remington Leasing Collusion.
Roots of Antitrust Law

1940s: The New Deal attack on patents. IP vs. Antitrust

1960s: Are Monopolists Different? Standards New \textit{Per Se} Rules?

1969 - ? Rules for the Information Economy

IBM, Microsoft I, II, III, \textit{etc.}
IBM

CPU

Printers

Software

Peripherals

Disk Drives

Service

Tape Drives
IBM

1964: IBM 360 Released

1967: Competing Tape Drives Gain Market Share

1970: IBM Task Force

- IBM 370 Launched
  - Repackaged Disk Controller
  - IBM Moves Out of Tape Drives
- Price Cuts
1971  Long Term Leases  
- 25-30% Cuts in Exchange for Lock-In  
- No Cost to IBM

1972  SMASH Program  
- Price Below Competitors’ Cost  
- Force Redesigns
Was IBM a rational monopolist?
A Competitive Sector is Good for Profits
The Toehold Problem and Financing
The Lawsuit:

1969  Complaint (a political lawsuit?)
1975  Trial Starts (Liability Phase)
1982  Trial Ends (Projected)
1984  Judgment (Projected)
????  Damages Phase
????  Appeals End
Was Lipsky Right?

Relief

Damages
Fines
Injunction
Structural Relief
Legal Signaling
Criminal Penalties
Is Antitrust Possible?
Transaction Costs vs. Market Responses
Delay
Changing Laws
A Changing Market
Innovation Policy vs. Antitrust
Is IBM Irreplaceable?
Microsoft I & II

Microsoft I (1994)

- Maintaining a monopoly through licensing and software developer agreements.
  - Consent Decree

Microsoft II (1998)

- Contempt Action
Microsoft III

O.S.   Apps.
Theories

Exclusive Dealing [§1]
Monopolizing PC Market [§2]
Attempted Monopoly of Browsers [§2]
Tying Windows to Explorer [§1]
Theory 1:
Monopolizing PC Market [§2]
Monopolization of the PC Market

Elements

1) Market Power

+ 

2) Anticompetitive Conduct
Monopolization: Market Power

Defining Market Share
What is the Market?

Defining Barriers to Entry
The Applications Barrier

Alternative Argument:
Microsoft ignores competitors’ prices.
Preamble: Network Externalities
I care what you use…
Commons standards benefit consumers.

The Entrenchment Issue
The Externalities Issue
Network Externalities: The Entrenchment Issue

“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]
The Entrenchment Issue, *ctd.* …

“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”

Schumpeter’s Ghost…
The Externalities Issue

Does the Court “Get It”??

Theory I

Microsoft III
Anticompetitive Conduct
Monopolization
Anticompetitive Conduct:

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

Microsoft III/ Theory 1

No.

Yes.

Liability
Monopolization

Anticompetitive Conduct:

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

Microsoft III/ Theory 1

No. Liability

Yes.
Monopolization
Anticompetitive Conduct:

3. Agreements With Internet Access Providers

License Restrictions
Free Tool Kits Are OK
Monopolization
Anticompetitive Conduct:

4. Agreements With Independent Software Providers
Browser Defaults

Microsoft III/
Theory 1

No. Liability

Yes.
Monopolization
Anticompetitive Conduct:

5. Threatening Apple Courts *Understand* Threats . . .
Monopolization
Anticompetitive Conduct:

6. Java
Incompatible Java is OK!
Deception & Threats to Intel
What’s the Alternative?

Microsoft III/Theory 1

No. Liability

Yes.
IP vs. Antitrust

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]

Competition vs. Innovation
Monopolization:

Copyright Defense:

“Drastic Variation”

“Stable and Consistent Platform.”

A Principled Distinction?

Microsoft III/ Theory 1

Defenses & Justifications

No.

Yes.
Monopolization:

Bundling

No Justification for Commingling or Taking IE Off Add/Remove List

“Valid Technical Reasons” for Overriding Browser Choice
Monopolization:

Agreements With IAPs & ISVs

“No Justification”
Theory 2:
Attempted Monopolization of the Browser Market [§2]
Microsoft III/
Theory 2

Liability Yes.

No. Section 2/Attempted
Monopolization
(Browsers)

(1) Anticompetitive conduct
(2) Specific intent to monopolize
(3) Dangerous probability of success.
At tempted Monopolization

Microsoft III/
Theory 2

Dangerous Probability of Success
- What barriers to entry?

No. Liability

Yes.
Theory 3:
Tying Browser to Operating System [§2]
Section 1/Tying:

“Enmesh[ing] the courts in product design decisions.” [p. 80].

Microsoft III/ Theory 3
Section 1

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.

Microsoft III/ Theory 3

Liability

No. Yes.
Section 1
Tying

Traditional rationale:
Leveraging Monopoly
An Incoherent Doctrine?

Law
Economics

Microsoft III/
Theory 3

Liability

No.

Yes.
Section 1
Tying

New Rationale: Consumer choice.

- Efficiency of integration; “Novel, purported efficiencies” [p. 79].
Section 1/Tying:

- Enmesh[ing] the courts in product design decisions.” [p. 80].
Structural Relief
Judge Jackson’s Sin
The Cournot Problem
Microsoft III/Relief

Ordinary Case: The Shoe Monopolist
Microsoft III/Relief

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

District Court (Kotelly-Kolar)
Proportionate Relief
The Middleware Fight
The Clones Issue?

Microsoft III/Relief

Yes.

No.
2004 - ?: Microsoft IV (E.C.)
Server Market
Media Player
Designing Relief

The EC

Fines

Compulsory Licensing

Opening The Interface

Unbundling Media Player

Microsoft IV
Conclusion: Taking Stock

Old Issues:

Is Antitrust Necessary?
Delay, Cost
Available Relief
Balancing IP against Monopoly.
“Misusing” Patents
Breaking Up
“Irreplaceable” Institutions
New Issues:

Beyond Classical Microeconomics
Intrinsically Imperfect Markets
Network Effects, Entrenchment,
and Externalities

Entanglement (and Fear of Entanglement) in Technology Choices

Conclusion:
Taking Stock