

IT and Public Policy - Nov. 4, 2004

# Antitrust & The New Economy

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# Introduction

History  
The Microsoft Case  
    Doctrine: What The Court Said  
    Reading the Legal Tea Leaves  
    Policy  
Conclusion: Taking Stock

2

# History

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

3

# History

1969 - 1980: IBM  
    Innovation  
    Relief  
1974 - 1982: AT&T II

4

# History

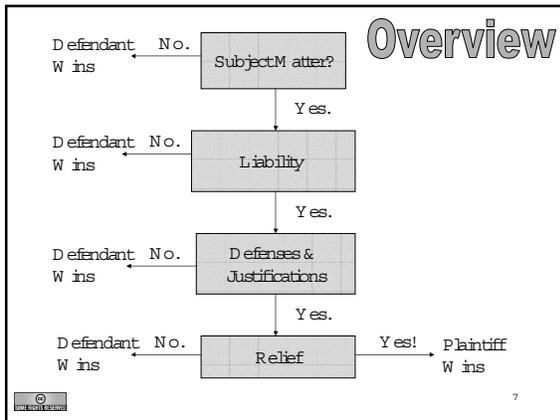
1994 - 1995: Microsoft I  
    Licensing & Developer  
    Agreements  
1998 - 2002: Microsoft II  
    Explorer & Java  
    Trial, Appeal, Relief Phase

5

# History

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

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## AT Law

### Section 1

"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.

## AT Law

### Section 1

Requires Multiple Parties  
What Does It Mean?

## AT Law

### Section 2

"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 . . ."

## AT Law

### Section 2

Does Not Require Multiple Parties  
What Does It Mean?

## AT Law

### 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

**AT**  
Law

← No Subject Matter? ↓ Yes.

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

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**AT**  
Law

← No Subject Matter? ↓ Yes.

An Economic Statute?

"Maximizing Consumer Welfare"  
A Determinate Standard?

"Fostering Competition"  
Early Theories – Modern Approach

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**AT**  
Law

← No Subject Matter? ↓ Yes.

15

**AT**  
Law

← No Subject Matter? ↓ Yes.

An Economic Statute?

"Fostering Competition"  
A Microeconomic Concept  
Competition vs. Innovation

16

**AT**  
Tea Leaves

← No Subject Matter? ↓ Yes.

Schumpeterian  
Competition

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

17

**AT**  
Tea Leaves

← No Subject Matter? ↓ Yes.

Network Externalities  
The Entrenchment Issue  
The Externalities Issue

18

**AT**  
Tea Leaves

The Entrenchment Issue

← No. 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"

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**AT**  
Tea Leaves

The Entrenchment Issue

← No. Subject Matter? ↓ Yes.

Business as Usual?  
Guidance vs. Case-by-case Rules.

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**AT**  
Policy

The Externalities Issue

← No. Subject Matter? ↓ Yes.

Does the Court "Get It"???

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Law

Copyright vs. Antitrust  
(Innovation vs. Competition)

← No. Subject Matter? ↓ Yes.

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]

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Law

Theories

← No. Liability ↓ Yes.

Monopolizing PC Market [S2]  
Attempted Monopoly of Browser [S2]  
Tying Windows to Explorer [S1]

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**AT**  
Law

Section 1

Rule of Reason

← No. Liability ↓ Yes.

Defining The Market  
Balancing Positive and Negative Effects

Per Se Rules

Price Fixing  
Geographic Divisions  
Boycotts  
etc., etc....

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Section 1  
Tying

**AT**  
Law

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.

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Section 1  
Tying

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Law

Traditional rationale:  
Leveraging Monopoly

An Incoherent Doctrine?

Law  
Economics

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Section 1  
Tying

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Law

Microsoft II Rationale: Consumer choice.

- Efficiency of integration; "Novel, purported efficiencies" [p. 79].

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Section 2  
Monopolization  
of the PC Market

**AT**  
Law

Elements

- 1) Market Power
- +
- 2) Anticompetitive Conduct

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Section 2  
Monopolization:  
Market Power

**AT**  
Law

Market Power  
= Market Share + Barriers to Entry

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Section 2  
Monopolization:  
Market Power

**AT**  
Law

Defining Market Share  
What is the Market?  
Should Middleware Count?

Defining Barriers to Entry  
The Applications Barrier

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Section 2  
 Monopolization  
 Anticompetitive  
 Conduct:

**AT**  
Law

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

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Section 2  
 Monopolization  
 Anticompetitive  
 Conduct:

**AT**  
Law

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

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Section 2  
 Monopolization  
 Anticompetitive  
 Conduct:

**AT**  
Law

3 Agreements With Internet Access  
 Providers

License Restrictions  
 Free Tools Are OK

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Section 2  
 Monopolization  
 Anticompetitive  
 Conduct:

**AT**  
Law

4 Agreements With Independent  
 Software Providers

Browser Defaults

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Section 2  
 Monopolization  
 Anticompetitive  
 Conduct:

**AT**  
Law

5 Threatening Apple  
 Courts Understand Threats . . .

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Section 2  
 Monopolization  
 Anticompetitive  
 Conduct:

**AT**  
Law

6 Java

Incompatible Java is OK!  
 Deception & Threats to Intel  
 What's the Alternative?

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Section 2 / Attempted Monopolization (Browser's)

**AT**  
Law

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

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Section 2  
Attempted Monopolization

**AT**  
Law

Dangerous Probability of Success  
- What barriers to entry?

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Section 1 / Tying:

**AT**  
Law

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

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Section 2 / Monopolization:

**AT**  
Law

Copyright Defense:  
"Dramatic Variation"  
"Stable and Consistent Platform."  
No Principled Distinction ...

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Section 2 / Monopolization:

**AT**  
Law

Bundling

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

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Section 2 / Monopolization:

**AT**  
Law

Agreements with IAPs & ISVs  
"No Justification"

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**AT**  
Law

Is Antitrust Futile?  
Abbott Lipsky  
Cell Phones

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Law




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

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Law

Analog Digital Frequency  
Hopping

AM PS GSM CDM A

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Law

Designing Relief

Injunctions  
Criminal vs. Civil  
Constitutional Requirements

Damages

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**AT**  
Law

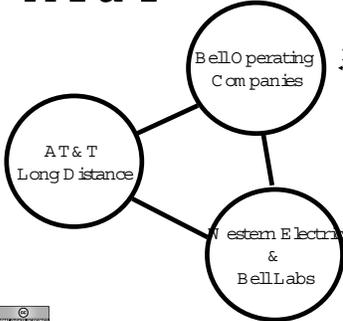
Structural Relief

1. Isolating the Monopoly  
AT&T  
IBM  
Microsoft
2. Innovation Effects?
3. Complementary Monopolies

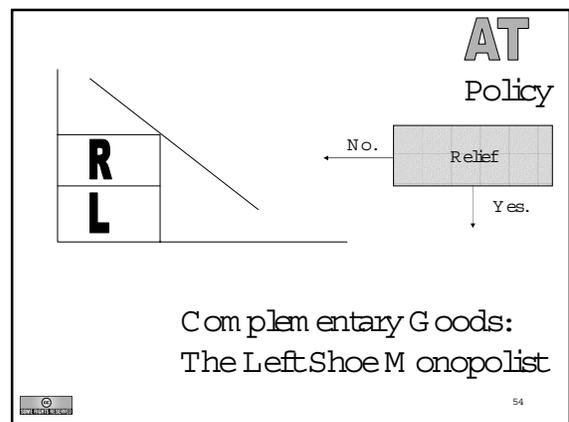
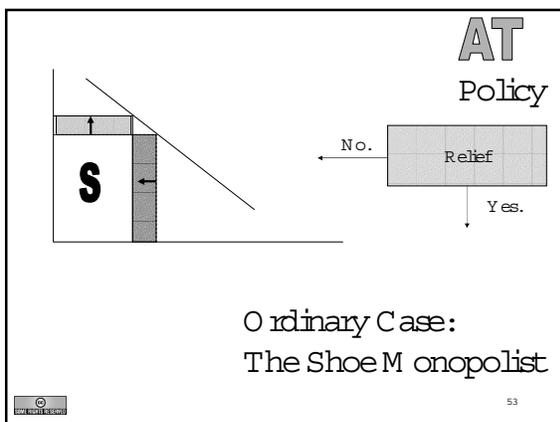
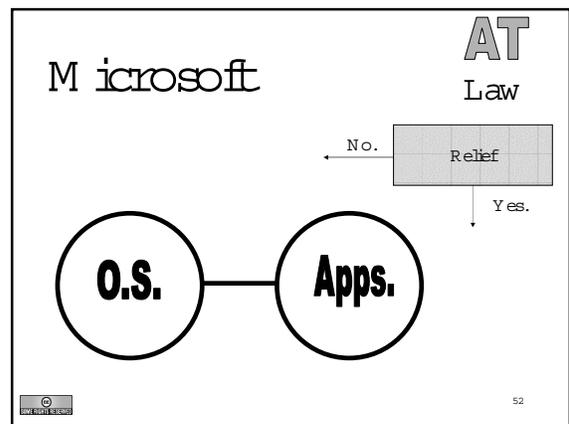
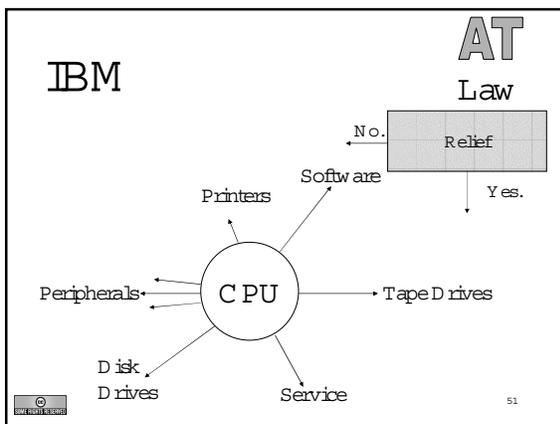
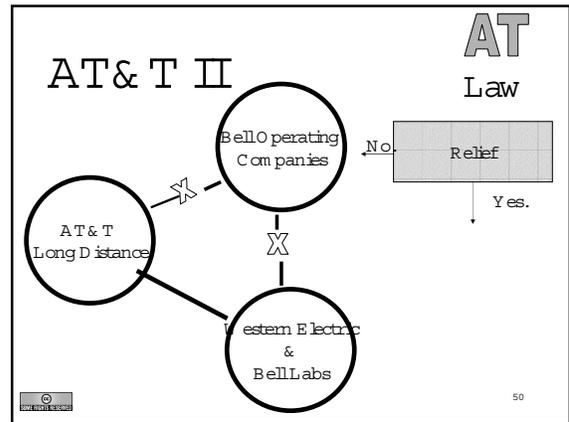
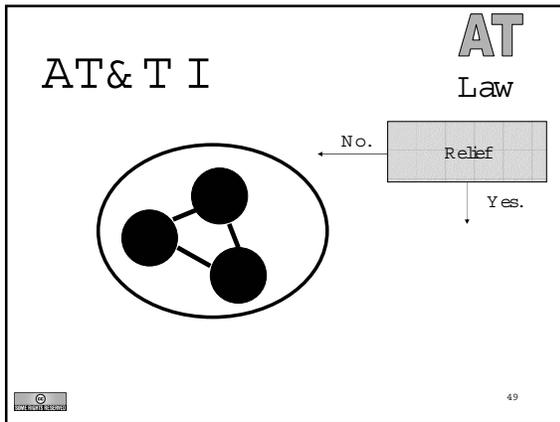
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Law

AT&T



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Policy

Complementary Goods:  
The Left Shoe Monopolist

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Law

Designing Relief

District Court (Judge Jackson):  
Did Microsoft Win?

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Law

Designing Relief

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

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Law

Designing Relief

The EC  
Fines  
Compulsory Licensing  
Opening The Interface  
Unbundling Media Player

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**AT**  
Policy

Criminal Sanctions

Modern Tactics  
Abbot Lipsky  
General Electric  
& The "Phases of the Moon"

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**Conclusion**

Innovation vs. Competition  
Network Effects  
Schumpeterian Competition  
Valuing Network Externalities  
Interfaces  
Market Imperfections - The Desktop  
Technical & Business Judgments  
Appropriate Relief

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