

**The Microsoft Case:
Antitrust, High Technology, and Consumer Welfare**

By William H. Page and John E. Lopatka
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Antitrust law in the United States has been the focus of much debate in its century of existence. The Sherman Act, which made monopolization illegal, was written in a very vague manner, leaving it to the courts to delineate what business practices would be considered “in restraint of trade.”¹ The United States, the District of Columbia, and nineteen other states’ action against Microsoft in 1998 was the most recent major antitrust case, and also one of the most important. The case was highly publicized and scrutinized because of the impact it would have on the ever-evolving technology markets. Microsoft’s seeming stranglehold over the operating system (OS), or platform, market was about to come to an end, or so its rivals hoped.

In *The Microsoft Case*, William H. Page and John E. Lopatka analyze every minute detail of the case, from its initial holding, through the appellate decision, and down to the final remedies meted out by the court. While the authors feel the case had many issues that should have been dealt with in a drastically different fashion, several aspects of the action were quite beneficial, both to the market itself and to future antitrust actions. Through their exhaustive analysis, the authors discuss the pros and cons of the two main schools of thought on antitrust law, and how the evolution and application of them affect consumer welfare.

The original concept for antitrust law was to maintain a balance between laissez-faire

¹ WILLIAM H. PAGE AND JOHN E. LOPATKA, *THE MICROSOFT CASE: ANTITRUST, HIGH TECHNOLOGY, AND CONSUMER WELFARE* (Chicago University Press 2007).

economic policy and heavy-handed, costly intervention by the government. The main focus was always to make certain that the market remained competitive while still preventing corporations from resorting to predatory methods. This policy went through slight variations, but the language from court decisions continued to be vague. Finally, in the 1970s, the Chicago School view began to grow, which put forth the idea that a monopoly could exist in a market using merely superior efficiency and active competition. According to the Chicago School, the only time the government should intervene is when consumers are being harmed by a corporation using predatory pricing, tying arrangements, or exclusive dealing contracts.² Those policies reduce economic efficiency, which then affects the end consumer. The Chicago School was not as concerned with the effects a dominant firm's policies had on its rivals.

Over the last two decades, several post-Chicago theories have achieved some clout. The most important one for the Microsoft case was the theory of network effects. Network effects arise when a user receives a network benefit beyond the inherent benefit of the product, which increases as the number of other users increases.³ This theory helped economists quantify how Microsoft was able to tie its products together in order to stay ahead of its rivals. The integration of code between the Windows platform and Microsoft's Internet Explorer ("IE") was an altogether new concept that the court had to struggle with in order to establish whether this form of marketing was actually hurting or benefitting the consumer.

After describing the history of antitrust law in the United States and how the Microsoft action finally arrived at the court, the authors describe the strategies of each side and the myriad holdings announced at each level of the judicial process. This section is rather densely packed with information, but it is a necessary evil when dealing with a case of this magnitude. The

² *Id.* at 15.

³ *Id.* at 24.

authors do an excellent job of summarizing several years' worth of complicated judicial findings in order to lay the groundwork for their economic analysis in the subsequent chapters.

In the following sections, the authors evaluate the manner in which the United States handled the case against Microsoft. This is broken into three major sections. The first section addresses defining the market, which is the first essential piece in an antitrust suit. This case was especially perplexing because Netscape and Java, the main competitors of Microsoft according to the prosecution, were not a part of the market that Microsoft was allegedly monopolizing. The government attempted to establish a browser market, so that it could more easily attack the integration of IE and Windows. The court, however, ruled that no browser market existed.

This was, oddly enough, not completely devastating because the court still found that Microsoft had acted to maintain its monopoly. The authors discuss these inconsistent holdings as a major downfall in this case. The main reason for the inconsistencies is that a monopoly in the OS/platform market could actually benefit the consumer in many ways, and the government was having difficulty bringing forth enough evidence that integrating IE and Windows, which clearly hurt Netscape, was forcing greater costs on the consumer in the long run. In addition, the market was changing as the case went on, so theories put forth at the beginning of the proceedings were slowly being shown to be implausible or unnecessary, such as the main theory of a Netscape/Java browser platform hybrid. The authors don't decry the original plausibility of the government's case, but rather the lack of focus from the outset and inability to come to a reasonable solution more efficiently.

Another interesting aspect of the case was the idea that if Microsoft was weakened by the court, it would just be producing a “new monster.”⁴ The court of appeals seemed concerned with this problem during oral arguments, but never addressed it in its official opinion in 2001.

4 PAGE AND LOPATKA, THE MICROSOFT CASE at 151.

However, the authors discuss how successive monopolies can be the most efficient model for this type of market, in order to spur innovation. As one monopoly becomes set in its ways, an upstart is able to quickly grab market share because of its sheer ingenuity.

The second of Microsoft's major monopolistic policies was its exclusionary contracts made with original equipment manufacturers ("OEMs"). Microsoft supposedly decided to create these contracts after Netscape declined to divide the market with it during a 1995. After that, Microsoft executed multiple contracts with companies whereby IE was required to be the exclusive browser with any Windows PC. In addition, Microsoft eliminated the ability of either the OEM or the end user to remove it. The court found the majority of these practices to be illegal, with the notable exception of making IE the default in some cases.

The remedies eventually created were not dramatically different than those discussed at the very beginning of the litigation, yet the arduous process continued for years due to pressure from certain states. The authors look to how much the end consumers benefit after the enormous costs of an antitrust action. Microsoft has now set up appropriate oversight measures and is working on educating its employees about the steps necessary to prevent monopolistic practices. The rise of Google's online functionality and the recent release of Windows Vista are the next major test for Microsoft, but with the close eye of the court's focused conduct remedies, most problems should be dealt with efficiently.

The Microsoft Case is a thoroughly researched and exhaustive analysis of one of the most important cases in the past decade. Although the book begins with a rather dry history of antitrust law and the complete background of the case, both are necessary and useful in order to understand the authors' thesis clearly. Any person interested in emerging technology, intellectual property, or antitrust law should read this book. Page and Lopatka do an excellent job breaking

down the courts' various opinions, and how they might affect future litigation in a constantly changing industry.