of a writ. A writ was a remedy. Thus, the theory of the common law was that remedies preceded rights. The preoccupation was with procedure. If you could plead your case to fit within one of the traditional remedies, you were allowed to proceed with your case. Because the **Statute of Westminster** in 1285 limited the number of writs that were available, anyone alleging a new cause of action had to fit it within one of the old forms. Whether your rights were violated depended upon whether you could procedurally fit yourself into an existing cause of action. There was no abstract discussion of rights by university scholars; common law lawyers and judges battled over whether the existing writs might give a party relief in a particular fact situation.

In the United States, procedure is also emphasized in the **Bill of Rights**. The due process clauses of the **Fifth** and **Fourteenth Amendments** are a guarantee of fair procedures in both civil and criminal cases. The **Fourth, Fifth, Sixth,** and **Eighth Amendments** also guarantee specific procedural protections in criminal cases. These procedures have an independent value that the courts and government are required to uphold.

The Importance of Precedent

The common law has no code. The common law was largely unwritten. Judges looked to basic principles to determine the common law. Slowly the doctrine of judicial precedent, of *stare decisis*, was developed. The style was inductive and not deductive. In the middle ages lawyers kept notes of important decisions and these were reported in Yearbooks. Commentators such as Lord Coke and later Blackstone discussed important precedents in the common law. By the 18th Century, case opinions of the judges were regularly reported and our modern doctrine of *stare decisis* was formalized. Under the principle of *stare decisis*, lower courts are bound by the decisions of higher courts and higher courts are bound by their own precedents. Because prior decisions are never strictly on point, lawyers and judges engage in analogical reasoning when applying prior precedents.

The rule of *stare decisis* has been applied flexibly in the United States, and more strictly in England. However, because of the interest in continuity and uniformity, courts are loath to depart from their prior precedents except in the most exceptional circumstances. At first, common law lawyers and judges were skeptical if legislation could change the common law. It was thought that legislation could supplement the common law by filling in gaps and clarifying ambiguities, but legislation could not overrule the common law. Today the common law recognizes that legislation is indeed law and legislators frequently overturn common law precedents. But most Americans are so used to applying judicial precedent that they are often uncomfortable with new legislation until it has been interpreted and applied by the courts.

Michael P. Seng is a Professor at the John Marshall Law School in Chicago, Illinois, where he teaches courses in Constitutional Law and Comparative Law. He was a Visiting Professor at the Faculty of Law of Masaryk University in Brno in 1996. Since 1993, he has been coordinating the John Marshall's legal exchange program in the Czech Republic.

United States v. Microsoft Corporation – a War on Many Fronts

Sherman Act Goes Online

Ondřej Vondráček

July 2000. Bill Gates' Microsoft Empire seems ruined. The judge of the District Court of the District of Columbia, Thomas Penfield Jackson, orders Microsoft to be split into two separate entities. One year later, Court of Appeals brings Microsoft to life again: proposed divestiture of the company is rejected. Judge Jackson is disqualified. The war resumes...

New Legal and Economic Challenges

Indisputably, none of the cases in the last decade has provoked so wide a response among so many professions; lawyers, economists and engineers have all been showing a profound interest in this case. This fact attests to the extreme complexity of the disputed issue. The judges are faced with the finest technological details and with the latest economic theories of the e-market to which old antitrust principles are rarely applicable. Furthermore, very few older cases apply to this new field. Thus, there is little precedent to guide future decisions. Consequently, the parties in dispute try to come up with brand-new theories. Microsoft, for instance, introduced its own theory on the e-market dynamics when in an attempt to defend its market controlling conduct, claimed that the classical structure of several firms competing in the market no longer applies to the software market. In this market, according to Microsoft, one firm gains for a limited time the dominant share in the market through technological innovation, and then another replaces it in the same manner. Microsoft tried thereby to demonstrate that, monopoly is a natural and inevitable occurrence in the software market.

The key term to work with when discussing software cases is so called *network effect*. *Network effect* characterizes most of the communications markets, including the e-market. If a company wants to succeed in this market, it has to attract a certain crucial number of users in order to create a profitable network. This number of users - called a critical mass - assures a prosperous functioning of the network. A sufficiently large network tends to attract new customers simply by the fact that the advantages grow with the number of users. However, if other, already well established, market participants succeed in raising anti-competitive barriers and in keeping the number of the new firm's users below the level of critical mass, they can conveniently maintain their dominant power and reduce the competition in the market.

U.S. Antitrust Law in Brief

U.S. antitrust law attempts to counter these market effects. Two federal statutes - the **Sherman**[1] and **Clayton**[2] **Acts** - serve as the cornerstones of U.S. antitrust law.

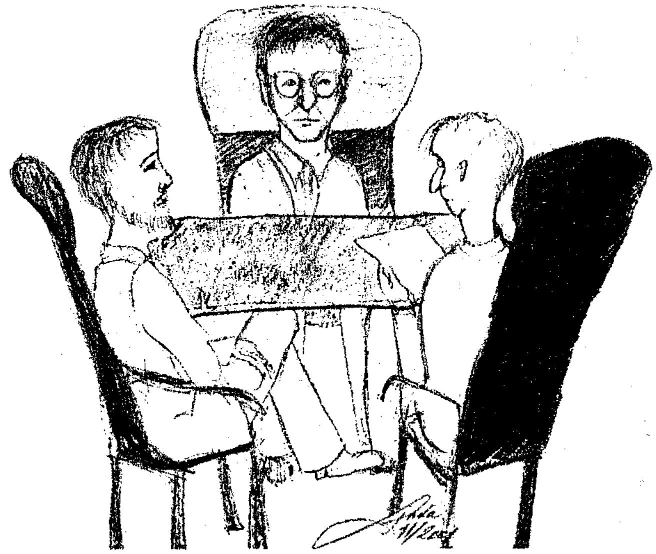
In the *Microsoft* case, the interest remains focused on the **Sherman Act,** specifically on the §1 and the §2. Section 1 of the Act restricts unreasonable restraints on trade that are undertaken collectively. Thus, a single firm cannot be found liable under this section. The first section applies primarily to cartels.[3] In contrast however, Section 2 prohibits monopolisation and attempts to monopolise on the part of a single person or a single corporation.

Now - what is a *monopoly*? Monopoly is defined as "an exclusive control of a particular market that is marked by the power to control prices and exclude competition;"[4] monopoly means also a person or a corporation that possesses this exclusive control. Why are monopolies considered bad? "Big conglomerations of economic resources are thought to be injurious to the public and individuals because such trusts minimise, if not obliterate normal marketplace competition, and yield undesirable price controls. These, in turn, cause markets to stagnate and sap individual initiative."[5]

History of the Case

Microsoft's legal woes began in July 1994 when it was charged by the Department of Justice (DOJ) on behalf of the United States with "unlawfully maintaining a monopoly in the operating system market." However, before the trial itself got underway, the parties reached a settlement through a consent order.[6]

Three years later, the DOJ charged Microsoft with violation of some of the provisions contained in the previous agreement.[7] On May 18, 1998, "shortly before issuance of the *Microsoft II* decision, the United States and a group of State plaintiffs filed separate complaints, asserting antitrust violations by Microsoft and seeking preliminary and permanent injunctions against the company's allegedly unlawful conduct."[8]



"The problem, Mr. Gates, is that you control 95 percent of the PC market... but only 2 percent of the congressmen."

The official trial started on October 19, 1998. One year later, the Court made public Findings of Fact.[9] Then on April 3, 2000, the District Court issued Conclusions of Law[10] followed by its Final Judgement on June 7, 2000. Microsoft appealed against the decision and the case was sent directly to the Supreme Court. However, the Supreme Court declined to hear the case and returned it back to the Court of Appeal. The appellate judgement was released on June 28, 2001.

Charges

Plaintiffs (the United States and 20 individual states) charged four distinct violations of the **Sherman Act:**

(1) unlawful exclusive dealing arrangements in violation of § 1;

(2) unlawful tying of Internet Explorer (IE) to Windows 95 and Windows 98 in violation of § 1;

(3) unlawful maintenance of a monopoly in the PC operating system market in violation of § 2; and

(4) unlawful attempted monopolisation of the Internet browser market in violation of § 2.

The District Court determined that Microsoft had maintained a monopoly in the market for Intel-compatible PC operating systems in violation of § 2; attempted to gain a monopoly in the market for internet browsers in violation of §2; illegally tied two purportedly separate products, Windows and IE.[11]

Monopolisation

Possession of a monopoly does not in and of itself constitute a violation of antitrust laws; it must be combined with an unlawful activity: monopolisation. Monopolisation therefore requires fulfilment of two conditions: "(1) the possession of monopoly power in the relevant market and (2) the wilful acquisition or the maintenance of that power..."[12] The first prerequisite is met when a firm possesses a dominant share of a relevant market. Some courts have defined the predominant share as 87% of a given market.[13]

In our case, the District Court faced two questions: What is the relevant market or, put differently, of what market does Microsoft allegedly own the dominant share? Secondly: How large is Microsoft's share of that market?

It was determined by the District Court and affirmed by the Court of Appeals that the relevant market represents a market of Intel-compatible PC operating systems. Further, the District Court found that Microsoft does possess a monopoly as it controls a greater than 95% share of this market, and as there are "currently no products and ... there are not likely to be any in the near future"[14] that might menace Microsoft's position. The first condition in order to commit monopolisation is thereby fulfilled.

In order to fully prove that Microsoft committed major antitrust violation, however, the second requirement - acquisition or maintenance of monopoly - must be satisfied. This acquisition or maintenance is achieved through anti-competitive methods. These methods must be marked by exclusionary conduct with anti-competitive effects, which try to extinguish the competition. Exclusionary conduct means a use of practices aimed at barring other products from competing with those of the violator's. This conduct creates barriers to entering the market and further secures the monopolist's position. If exclusionary conduct, along with dominance in the market, is proven, the accused firm is guilty of anti-competitive conduct. However, it still has one chance to justify its conduct: to propose a *pro-competitive justification* in which it shows that its actions affected the competition positively.

Let us turn back to charges (3) and (1), the latter being implicitly comprised in the first. Microsoft has engaged in a number of dealings that have been regarded as exclusionary, particularly with Original Equipment Manufacturers (OEMs),[15] Internet Access Providers (IAPs),[16] Internet Content Providers (ICPs),[17] Independent Software Vendors (ISVs),[18] Apple Computer and others. All agreements made with the aforementioned entities had one common element: they more or less required the companies to use or propagate the IE-Windows features in exchange for Microsoft's support of their products. Thus, Microsoft's products were not made attractive by its technological progress, but through anti-competitive contracts restricting the competitors' product usage. The District Court held, and the Court of Appeals agreed, that Microsoft was liable for the agreements with OEMs, IAPs, ISVs and Apple - all of these to attain one goal: to reduce the usage of Netscape's Navigator and to advance IE and to thereby keep application developers focused on Windows. Moreover, it was determined that enumerated agreements did have injurious effect on the competition as they foreclosed a substantial portion of the market.

Attempted Monopolisation

To establish a § 2 violation - attempted monopolisation - "a plaintiff must prove (1) that the defendant has engaged in predatory or anti-competitive conduct with (2) a specific intent to monopolise and (3) a dangerous probability of achieving monopoly power." (*Spectrum Sports, Inc. v. McQuillan*, 1993). The most important of these conditions is the third, the dangerous probability of achieving monopoly power. To prove this requirement, one needs to define the same conditions as one had to define in the case of a monopoly - a definition of the relevant market, and an existence of significant protective barriers restricting other products entry into the market.

However, the plaintiffs failed to define the relevant market for browsers and they contented themselves with the belief that the monopolisation in the operating system market implies the attempted monopolisation in a completely different market - the browser market. As to the second point, the Court of Appeals held that Microsoft might have posed barriers to entry, but did not found them to be significant. Although the District Court held Microsoft liable for attempted monopolisation in the browser market, the Court of Appeal rejected its determination as the plaintiff's evidence was shown to be insufficient.

Tying

The second charge made by the plaintiffs, as adjudicated by the Court, accuses Microsoft of bundling two separate products: a browser (IE) with an operating system (Windows). The bundling of two separate products is believed to be harmful to the market, since the tied product - in our case IE - is exempted from the competition, as the consumer has to buy both products together, although he would like to have only one of them. In fact, not all bundling arrangements are unlawful per se, i.e. that the mere arrangement constitutes a violation of the **Sherman Act** whichever effect it may have. According to the Supreme Court "it is only after considerable experience with certain business relationships that courts classify them as per se violations." The Court of Appeals found only four cases dealing with software bundling. This number was insufficient. Due to the lack of precedent, a per se analysis should have been impossible, and the District Court should have adopted another approach - the *rule of reason*. Under the *rule of reason*, it would have been necessary to identify whether the bundling is of any value to the consumer; in other words, the Court should have decided whether it is efficient for the consumer to buy the respective products together. Unless the efficiencies of the bundling were to outweigh its negative effects, the tying arrangement would be illegal.

The District Court, however, did not adopt the *rule of reason* and simply stated that the Windows-IE arrangement is unlawful per se. In contrast, direct testimonies prove that nearly all OS vendors, despite the fact that they offer the possibility of uninstalling the browser, do bundle a browser with their OS. That indicates - clearly - that there must be some benefit in this type of bundling. However, it is extremely difficult to foretell whether the technological tying is more innovative, and thus beneficial, or more restrictive and, consequently, injurious because the software market evolves in a very unpredictable way. The Court of Appeal therefore remanded the case for new evaluation by the District Court. The District Court will have to determine whether the various operating system vendors have sold the operating systems with browsers only at a bundled price or whether they have offered a discount for the non-browser version. If the first is true, and the bundling is thereby shown to be efficient, Microsoft will not be likely held liable for the Windows-IE tying arrangement.

Remedies

After reaching the conclusion that Microsoft did act as a monopolist, let us turn to the remedies that should compensate for the negative effects of Microsoft's conduct. The District Court ordered that the most appropriate way of remedy would be a divestiture of Microsoft into two separate entities: one producing operating systems, the other IE. However, the Court of Appeals, rejected the District Court's view and took a different attitude towards the proposed relief. In considering an appropriate remedy, the Court of Appeals weighed two principal questions: the first, whether the court-ordered divestiture represented the most appropriate remedy, and the second, whether the Court reached its decision on the split of Microsoft correctly.

Divestiture, according to the Supreme Court, has been used as a traditional remedy for violations of the **Sherman Act**. However, it is usually employed in cases where the unlawful monopoly was achieved through a fusion or acquisition. Clearly, Microsoft is not that kind of enterprise, since, from the beginning of its existence, it has always acted as a single unified company. As a consequence, the proposed divestiture would not have the desired positive effect on the market competition. The Court of Appeals has therefore annulled the respective part of the District Court judgement.

An important principle of the U.S. judicial system is that factual disputes must be resolved through an evidentiary hearing.[19] An evidentiary hearing is, in this case, designed to determine the best remedy to compensate for the effects of Microsoft's monopolisation. Only when no facts are in question or when the other party gives up its right to the hearing, the evidentiary hearing can be waived. Microsoft offered a number of explanations which suggested that the possible divestiture might not have the effect the plaintiffs had proposed. Even the District Court acknowledged that there existed divergent opinions regarding the effects of the remedy decree. From the alleged facts, it is evident that there were not even small controversies in the District Court's subsequent decree. Nevertheless, the District Court refused to admit the necessary evidentiary hearings. The Court of Appeals therefore determined that the District Court applied law incorrectly and had to vacate its judgement.

Judicial Misconduct

The last issue that the Court of Appeal addressed in its judgement was the alleged judicial misconduct of Judge Thomas P. Jackson. The guidelines for the conduct of a judge are contained in the **Code of Conduct for United States.** Among other things, this Code orders judges to "avoid public comments on the merits of the cases,"[20] to "avoid impropriety"[21] and to not let their "impartiality be reasonably questioned."[22] After the Court passed its final judgement on June 28, 2000, various press interviews with judge Jackson appeared in newspapers; sometimes these interviews were made even before the day of the final judgement. The judge expressed a very hostile position towards Microsoft, and thus, he permitted his impartiality be doubted.[23] After considering the scope and the number of such interviews, the Court of Appeals disqualified judge Jackson and ordered the reassignment of judge.

Conclusion

So far, at least three things are certain. First, a woman, Colleen Kollar-Kotelly (58), former government lawyer, has been assigned to preside over the case. Furthermore, it is certain that Microsoft did commit monopolisation in the operating systems market and thereby did violate U.S. antitrust law. Both the District Court and Court of Appeal supported this finding and the Supreme Court is reluctant to hear and possibly review the case. Finally, it has been determined that some kind of remedy to compensate for the adverse effects of Microsoft's conduct on the market is needed. The actual form this remedy will take remains uncertain, although the DOJ announced that it would not attempt to break-up Microsoft. Moreover, the Court has still to decide whether the bundling of IE and Windows was lawful or not, and whether or not Microsoft attempted to monopolise the browser market.

On October 25 (2001), the new Windows XP operating system containing much of the disputed aspects appeared. The legal war is far from over...

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1 The Sherman Act: passed 1890, prohibits direct or indirect interference with the freely competitive interstate production and distribution of goods. Black's Law Dictionary, Abridged 7th Ed., West Group, 2000, p. 1110.

2 The Clayton Act: enacted in 1914, prohibits price discrimination, tying arrangements, and exclusive-dealing contracts (...) Black's Law Dictionary, Abridged 7th Ed., West Group, 2000, p. 199.

3 Klayman, E.I. , Bayby, J.W. , Ellis, N.S., Irwin's Business Law, 1994.

4 FindLaw for Legal Professionals: Legal Dictionary at http://dictionary.lp.findlaw.com/.

5 Legal Information Institute: Antitrust Law: An Overview; at http://www.law.cornell.edu/topics/antitrust.html.

6 *United States v. Microsoft Corp.*, "Microsoft I" (1995).

7 *United States v. Microsoft Corp.*, "Microsoft II" (1998).

8 *United States v. Microsoft Corp.* (1999).

9 A determination by a judge of a fact supported by the evidence presented at the trial or hearing, Black's Law Dictionary, Abridged 7th Ed., West Group, 2000, p. 511.

10 An inference on question of law, made as a result of factual showing, (Black's Law Dictionary, Abridged 7th Ed., West Group, 2000, p. 233).

11 Conclusions of Law.

12 "... as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." (*United States v. Grinnell Corp., 1966*).

13 85 to 100% - monopoly, 51 to 84% - area of court discretion, 50 – 0% no monopoly, ...

14 Conclusions of Law.

15 OEMs - companies that assemble and sell computers, for example Dell.

16 IAPs - companies that provide access to the Internet.

17 ICPs - companies that develop websites.

18 ISVs - companies that specialise in the development and sale of software, CCI High Tech Dictionary at http://www.computeruser.com.

19 Full exploration of facts is usually necessary in order properly to draw decree so as to prevent future violations and eradicate existing evils. *United States v. Ward Baking Co.* (1964).

20 Code of Conduct of United States, Canon 3A (6).

21 Code of Conduct of United States, Canon 2.

22 §455a, Judicial Code.

23 Many of these comments appeared in: Auletta, K., World War 3.0, 2001.

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FindLaw for Legal Professionals: Legal Dictionary at http://dictionary.lp.findlaw.com/.
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Ondřej Vondráček is a third-year student at the Charles University Law Faculty in Prague. He is a member of the Committee of the Common Law Society and of the Editorial Board of the Common Law Review.

A Brief Note on the Sherman Anti-Trust Act

Jan Šefranka

This brief article will attempt to explain the fundamental historical background of the **Sherman Anti-Trust Act** of 1890, and will use examples to illustrate its application in the first decade of its existence.

Historical Background

The year 1890, when the **Sherman Anti-Trust Act** was passed was memorable for some of the most significant legislation drafted in the last two decades of the 19th century. In addition to the **Sherman Anti-Trust Act,** President Grover Cleveland approved the **Dependent Pension Act,** the **Sherman Silver Purchase Act,** the **McKinley Tariff,** and the admission of the last of the "omnibus states," Idaho and Wyoming, which followed the admission of the Dakotas, Montana, and Washington in 1889. In fact, this period can be perceived as a shift in the attitudes of American public. The years between 1870 and mid-1890s are often referred to as the "Gilded Age,"[1] after a novel by Mark Twain and Charles Dudley Warner. The most unforgettable character in the book was an engaging mountenback, Colonel Beriah Sellers, who always embroiled in some slippery scheme to trade on political favors and who had his counterparts in real political life. Corruption and abuses of industrial "robber barons" were widespread.

However, the early 1890s brought in a new strain in political thinking and general attitudes. It was, above all, the spread of trusts and their growing power that gave rise to public concern and outcry aimed against such figures as John D. Rockefeller, who was determined to "pay nobody a profit." His strategy was simple. In order to consolidate scattered business interests, Rockefeller and other entrepreneurs resorted to the legal device of the trust. Long established in law to enable one or more people to manage property belonging to others, such as children or the mentally incompetent, the trust was used for new purpose - the centralized control of business. The model was set by Standard Oil of Ohio, which was not permitted to hold property out of state. In 1872, it began to place properties or companies acquired elsewhere in trust, usually with Henry M. Flagger, the company secretary. This became impractical, however, as the death of the trustee would endanger the trust. To get around this problem, all of thirty-seven stockholders in various Standard Oil enterpri-