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The *Microsoft* Case and Google

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I. INTRODUCTION

In the wake of the U.S. government's unsuccessful prosecution of IBM (begun in 1969 and dropped in 1982), many knowledgeable observers believed that §2 of the Sherman Act was no longer relevant and was too cumbersome to apply to fast-moving high-tech companies. The government's prosecution of Microsoft, settled in 2001, proved them wrong.²

Government antitrust enforcement agencies are now considering the applicability of §2 to certain of Google's practices, like its display of thematic search results. It is crucial that the government get it right. For one thing, an unsuccessful §2 enforcement action is an enormous drain on resources that means significant lost opportunity costs for the government agency. An erroneous enforcement decision also risks undermining hard-won, infrequent government victories like *Microsoft* by creating precedents that will make future §2 enforcement even more difficult than it already is today. And, most importantly, an ill-conceived §2 enforcement action, especially in a rapidly evolving business like search, may actually impair consumer welfare by deterring and distorting innovation. This is a particular concern where the objective of those who encourage government action is to protect less efficient competitors rather than consumers.

Decided nearly twelve years ago, *Microsoft* remains the leading decision on the application of §2 to claims of monopoly maintenance, especially in a high-tech setting. It is instructive, therefore, to consider the applicability of the D.C. Circuit's analysis to the Google situation. Every antitrust case is, of course, unique and the key to understanding *Microsoft* is appreciating the importance of three critical characteristics of the market that were at issue: the applications barrier to entry; the singular potential of middleware to erode that barrier; and the crucial role played by third parties in making middleware available to consumers.

Microsoft was found to have unlawfully maintained its monopoly power in the market for PC operating systems. Its monopoly power, which had persisted over many years, was protected by the applications barrier to entry, which the Court described as follows:

the "applications barrier to entry"—stems from two characteristics of the software market: (1) most consumers prefer operating systems for which a large number of applications have already been written; and (2) most developers prefer to write for operating systems that already have a substantial consumer base. This "chicken-and-egg" situation ensures that applications will continue to be written for the already dominant Windows, which in turn ensures that consumers will continue to prefer it over other operating systems.³

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² See *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001) ("*Microsoft*").

³ *Id.* at 55.

The conduct which the Court found to be anticompetitive was Microsoft's campaign to eliminate the unique threat to its Windows monopoly posed by Netscape's Navigator web browser and Sun's Java technology. Each of these products was a form of middleware, which the Court defined as "software products that expose their own APIs [application programming interfaces]." ⁴ Moreover, each was a middleware product written to run on multiple platforms. ⁵ As the Court explained, middleware like Navigator and Java threatened to erode the applications barrier to entry that protected Microsoft's operating system monopoly:

[A] middleware product written for Windows could take over some or all of Windows's valuable platform functions—that is, developers might begin to rely upon APIs exposed by the middleware for basic routines rather than relying upon the API set included in Windows. If middleware were written for multiple operating systems, its impact could be even greater. The more developers could rely upon APIs exposed by such middleware, the less expensive porting to different operating systems would be. Ultimately, if developers could write applications relying exclusively on APIs exposed by middleware, their applications would run on any operating system on which the middleware was also present. ⁶

Microsoft's attack on middleware was not a mere attempt to disadvantage certain rivals, but rather a "concerted series of actions designed to protect the applications barrier to entry." ⁷ Microsoft tried to thwart the distribution of middleware because it threatened to "commoditize" Windows—*i.e.*, to eliminate Microsoft's ability to charge monopoly prices for the only PC operating system that ran all the applications consumers wanted to use. And the tactics that Microsoft employed were focused on preventing third parties—original equipment computer and chip makers ("OEMs"), software vendors ("ISVs"), and internet access providers ("IAPs")—from dealing with Netscape and Sun, which needed those third parties to distribute their products.

Google's conduct and the characteristics of the market in which it competes are significantly different from those on which the *Microsoft* decision was predicated. That is true with respect to both elements of a §2 offense: exclusionary conduct and monopoly power.

II. EXCLUSIONARY CONDUCT

Google's display of thematic search results stands in sharp contrast to the anticompetitive conduct that gave rise to liability in *Microsoft*. At issue there was a wide variety of exclusionary practices implemented by Microsoft over an extended period of time, including restrictive license agreements with OEMs, exclusive agreements with IAPs and ISVs, and an exclusive deal with Apple, and, with respect to Java, exclusive agreements with ISVs, deception of Java developers, and threats to Intel.

It is noteworthy that the focus of Microsoft's actions was third, not first, party conduct—*i.e.*, Microsoft was concerned with impeding third parties' distribution of rivals' products rather than with improving its own products to benefit consumers. Microsoft's conduct was, for the

⁴ *Id.* at 53

⁵ *Id.*

⁶ *Id.*

⁷ *United States v. Microsoft Corp.*, 84 F.Supp.2d 9, 111(D.D.C. 1999) (Finding of Fact ¶409).

most part, so blatantly anticompetitive that it was unable to demonstrate or, in many cases, even proffer a pro-competitive justification.⁸

The unlawful conduct in which Microsoft engaged had two common characteristics: 1) it lacked a proper competitive purpose beneficial to consumers, but was intended instead only to preclude competition; and 2) its adverse impact on competition itself (not merely competitors) was “substantial.” For example, the Court found that license restrictions preventing OEMs from modifying the Windows boot sequence had “a substantial effect in protecting Microsoft’s market power...through a means other than competition on the merits.”⁹ Similarly, the Court found that aspects of Microsoft’s binding of IE to Windows did not constitute “competition on the merits” because it was not intended to make Microsoft’s products “more attractive to consumers” and that it had “the effect of significantly reducing usage of rivals’ products.”¹⁰

Microsoft also entered into exclusive agreements with IAPs, the other principal channel besides the OEM channel for distributing rival browsers. The Court concluded:

The IAPs constitute one of the two major channels by which browsers can be distributed. Microsoft has exclusive deals with “fourteen of the top fifteen access providers in North America[, which] account for a large majority of all Internet access subscriptions in this part of the world. . . . Microsoft’s deals with the IAPs clearly have a significant effect in preserving its monopoly; they help keep usage of Navigator below the critical level necessary for Navigator or any other rival to pose a real threat to Microsoft’s monopoly.”¹¹

By contrast, in the few instances where the D.C. Circuit rejected challenges to Microsoft’s conduct, it did so because the conduct was either intended to improve Microsoft’s products or had little adverse impact on competition. For example, it concluded that Microsoft’s development of the Internet Explorer Access Kit and Windows’ mandatory use of IE (rather than Netscape) for certain important functions were useful innovations, and thus lawful, stating that even “a monopolist does not violate the Sherman Act simply by developing an attractive product.”¹² It held, likewise, that Microsoft’s development and promotion of its own implementation of Java was a lawful innovation because “a monopolist does not violate the antitrust laws simply by developing a product that is incompatible with those of its rivals... Microsoft’s JVM is not only incompatible with Sun’s, it allows Java applications to run faster on Windows than does Sun’s JVM. . . . and does not itself have any anticompetitive effect.”¹³ Similarly, the Court upheld Microsoft’s restrictive agreements with Internet Content Providers because they did not have a “substantial deleterious” impact on competition.¹⁴

⁸ See, e.g., *id.* at 63 (Microsoft’s primary pro-competitive justification for OEM license restrictions “borders upon the frivolous”); 66 (“Microsoft proffers no justification for two of the three challenged actions it took in integrating IE into Windows”); and 77 (“Microsoft offers no procompetitive explanation for its campaign to deceive [Java] developers... nor does it offer any procompetitive justification for pressuring Intel not to support cross-platform Java.”)

⁹ *Id.* at 62.

¹⁰ *Id.* at 65.

¹¹ *Id.* at 70-71 (citations omitted).

¹² *Id.* at 68.

¹³ *Id.* at 75.

¹⁴ *Id.* at 71.

Google's rivals have complained that Google changed the design of its search engine to favor its own thematic search content over that of vertical search engines. Even if these allegations were true (and Google disputes them), companies are not barred from favoring their own products or obligated to promote rival products. And, of course, allegations like these are, for good reason, treated skeptically by the courts.¹⁵

In any event, Google's presentation of thematic search results is precisely the kind of innovative product design upheld in *Microsoft*. The swifter provision of search results is directly analogous to the swifter running of applications that led the D.C. Circuit to hold that Microsoft's development and distribution of an incompatible JVM was not anticompetitive. Furthermore, the fact that Yahoo and Bing display their own thematic search results in a similar fashion to Google is powerful evidence that Google acted pro-competitively to make its product more appealing to consumers and/or respond to rival practices, rather than engaging in exclusionary conduct that "could only be rational 'if the firm knew that it possessed monopoly power.'"¹⁶ Nothing in *Microsoft* remotely suggests that "favoring" one's own product is an antitrust violation. "Favoring" one's own products is, on the contrary, a common method of competition that has been repeatedly upheld as lawful.

Moreover, Google's rivals have not been foreclosed from even one channel of distribution. To the contrary, they continue to receive innumerable free referrals from Google's search engine itself—albeit not as many as they would like or feel they deserve. That is hardly the "substantial" adverse impact on the competitive process required by the D.C. Circuit in *Microsoft*. The mere fact that certain rivals might be injured by a monopolist's conduct is inconsequential since "harm to one or more *competitors* will not suffice" to demonstrate "harm [to] the competitive *process* and thereby harm [to] consumers."¹⁷

Microsoft's foreclosure of multiple avenues of distribution for an entire class of products (middleware) is fundamentally different from the conduct of which Google is accused. Indeed, it is highly doubtful that Google could foreclose competition in search even if it wanted to. Consumers who are dissatisfied with the quality of results returned by Google's search engine can readily switch to rival products—a vastly different situation from that in *Microsoft* where consumers were locked into Windows because of high switching costs and the applications barrier to entry.

A final important distinction is that Microsoft's conduct was motivated by a desire to protect its ability to continue charging monopoly prices for Windows, while Google's search engine is provided free to consumers. Indeed, while the consumer harm in *Microsoft* was obvious—higher prices and no choice—it is difficult to discern any harm to consumers caused by Google's conduct.

¹⁵ "As a general rule, courts are properly very skeptical about claims that competition has been harmed by a dominant firm's product design changes. In a competitive market, firms routinely innovate in the hope of appealing to consumers, sometimes in the process making their products incompatible with those of rivals; the imposition of liability when a monopolist does the same thing will inevitably deter a certain amount of innovation. This is all the more true in a market...in which the product itself is rapidly changing." *Id.* at 65 (citation omitted).

¹⁶ *Id.* at 58 (citation omitted).

¹⁷ *Id.* (emphasis in original).

III. MONOPOLY POWER

The ultimate objective of Microsoft's anticompetitive conduct was to maintain its monopoly power. The D.C. Circuit's holding that Microsoft had monopoly power was based on a) Microsoft's durable 95 percent share of the market and b) the existence of a barrier to entry which insulated it from competition without regard to the quality of its products. Neither of these circumstances is present under any reasonable market definition with regard to search.

Google's share of the search market has never been as high as Microsoft's at any time, much less over an extended period of time.¹⁸ Nor is any market in which Google competes insulated from market forces—a significant factor since, as the D.C. Circuit observed, “[a] firm cannot possess monopoly power in a market unless the market is also protected by significant barriers to entry.”¹⁹ The relatively short history of search is replete with companies that had what appeared to be a dominant share of the market only to fade or disappear altogether as superior products became available or consumers' preferences changed. AltaVista, Lycos, and Excite, for example, all had early success and then largely vanished. That history strongly implies the absence of any structural barrier to entry, much less a “significant” one like the applications barrier to entry in *Microsoft*.

Marketplace success is the just reward for the skill, foresight, and industry that the antitrust laws encourage. Inferring a barrier to entry in search from the advantages Google has earned because consumers prefer its products—advantages like superior scale, know-how, and efficiency—would be contrary not only to this fundamental antitrust principle, but to the teaching of *Microsoft* itself. As the D.C. Circuit was careful to explain: “Because the applications barrier to entry protects a dominant operating system irrespective of quality, it gives Microsoft power to stave off even superior new rivals. The barrier is thus a characteristic of the operating system market, not of Microsoft's popularity, or...the company's efficiency.”²⁰

Google's market position is not protected by a structural barrier to entry like the one that protected Microsoft. On the contrary, Google competes on the internet—the very environment Microsoft sought to avoid by predatory conduct intended to stifle the middleware threat posed by Netscape and Java—where it is easy and inexpensive to switch to another search engine or website.²¹ Consumers of search today, unlike those of PC operating systems in the 1990s, have a

¹⁸Even in a market narrowly defined as “general search” which would include only certain of Google's competitors like Bing and Yahoo, Google's share has never exceeded 70 percent. By contrast, the District Court found that Microsoft's share of the market was “dominant, persistent and increasing” because it had been greater than 90 percent for every year of the last decade, had been at least 95 percent for the last couple of years, and was projected by analysts to climb even higher over the next few years. *U.S. v. Microsoft Corp.*, 84 F. Supp. 2d 9, 19 (D.D.C. 1999).

¹⁹ *Microsoft* at 82.

²⁰ *Id.* at 56.

²¹ The relative ease of switching is a crucial difference in the markets for operating systems and search. In *Microsoft*, Apple operating systems were specifically excluded from the PC operating system market because of the “substantial” costs of switching between the two systems. Those costs included not just the price of acquiring new hardware and compatible applications, but “the effort involved in learning the new system” *Microsoft*, at 52. Switching from one search provider to another, by contrast, is simple. All search engines are free, and none requires any special training or knowledge to use.

variety of options. Indeed, new search providers, including multiple vertical search engines and social networks like Facebook and Twitter, continually emerge and often flourish on the internet.

Rapid, virtually unceasing change and innovation are perhaps the most prominent characteristics of competition on the internet. That is highly significant to any market power analysis because, as the D.C. Circuit observed, “[r]apid technological change leads to markets in which ‘firms compete through innovation for temporary market dominance, from which they may be displaced by the next wave of product advancements.’”²²

Another of the most striking characteristics of competition on the internet is its mutability: not only are products frequently modified and transformed, but the market participants themselves forge alliances with rivals and others to enter adjacent markets. In search alone, very recent examples of this phenomenon include Google’s Search+, the Microsoft/Facebook/Twitter alliances, and Apple’s Siri technology. The internet is free-form, fluid, open, and dynamic—attributes hardly conducive to the maintenance of durable monopoly power. There is no reason to believe, in the absence of a structural barrier to entry, that Google is or will be immune from competition in the foreseeable future should it cease to provide search results that consumers want.

Accordingly, however the market is defined, it is highly unlikely that a court applying the analytical framework utilized in *Microsoft* will find that Google possesses durable monopoly power. That is because, *inter alia*, the environment in which Google competes is characterized by rapid change in the products themselves and how they are offered, by the advent of new competitors and forms of competition, by competition based principally on innovation rather than price, and by the absence of structural barriers to entry. In contrast to the circumstances in *Microsoft*, where middleware was the only threat capable of overcoming a significant structural barrier to entry protecting Windows’ dominance, Google faces numerous forms of competition every day and Google’s current market share is vulnerable to competitors who can provide a search experience consumers prefer.

IV. CONCLUSION

The anticompetitive conduct at issue in *Microsoft* was a multi-faceted campaign consisting of a variety of exclusionary acts, with no consumer benefit, that were implemented over an extended period of time. Further, they caused significant harm to the competitive process by foreclosing multiple channels of distribution for an entire class of products that threatened to erode a structural barrier to entry protecting Microsoft’s market share, which had exceeded 95 percent for several years.

None of these factors is present with respect to Google’s alleged conduct or the market in which it competes. It seems highly likely, therefore, that a court applying the analytical framework used in *Microsoft* will conclude that Google’s conduct is the type of “competition on the merits” that the antitrust laws are supposed to foster, not proscribe. In the circumstances, a government §2 lawsuit against Google risks squandering scarce enforcement resources better employed elsewhere, creating precedents unfavorable to future government enforcement actions, and deterring innovation that benefits consumers.

²² *Id.* at 49 (citation omitted).