Legal and Ethical Analysis – U.S. Court of Appeals:

United States of America v. Microsoft Corporation

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This paper provides an ethical and legal analysis of the 2001 United States Court of Appeals case regarding violations of the Sherman Antitrust Act - Unites States of America v. Microsoft Corporation.

**Background**

This case wasn’t the first time Microsoft Corporation had run afoul of the Federal Trade Commission (FTC) and the U.S. Department of Justice (DoJ). The FTC first investigated Microsoft in 1990, regarding “possible collusion between Microsoft and IBM in the PC software market”. (Wired) In 1993, the Department of Justice investigated Microsoft’s business practices with respect to DOS. Antitrust charges regarding DOS were settled in 1994 with Microsoft’s signing of a “consent decree that forbids the company from using its operating system dominance to squelch competition”. (Wired) In 1995, the proposed merger of Microsoft and Inuit was blocked by the DoJ due to concerns over anticompetitive effects. In 1997, the DoJ investigated Microsoft’s funding of other computer companies, such as Apple, for possible anticompetitive effects. In 1997, the DoJ filed the suit that this appeal stemmed from. This case centers on the possible anticompetitive effects of tying Windows Explorer to Windows 95 licenses. (Wired)

**Legal and Ethical Facts**

* Microsoft Corporation tied its web browser, Internet Explorer, to installations of its Window 95 software. The licensing agreement for Windows 95 required PC manufacturers to not only install it, but not remove the Internet Explorer desktop icon nor the link to the program from the main menu onr pre-install rival software. (Wired & U.S. v. Microsoft Corporation)
* Prior to this appeal, the District Court found that Microsoft held a monopoly of the Personal Computer (PC) market and was utilizing that power and participating in anticompetitive practices in order to gain market share in the internet browser market. (U.S. v. Microsoft Corporation)
* The District Court ruled that the way to remedy the situation was the divide Microsoft into two businesses – one for operating systems and one for the internet browser. (U.S. v. Microsoft Corporation)
* The District Court did not fold an evidentiary hearing prior to ruling o the remedy. (U.S. v. Microsoft Corporation)
* The District Court judge participated in press conferences with reporters. (U.S. v. Microsoft Corporation)

**Key Legal Issues**

The key legal issues in this case are:

* Did Microsoft’s practice of tying its browser software to its operating system have an anticompetitive effect on the providers of other browsers?
* Did Microsoft violate Section 2 of the Sherman Anti-trust Act by attempting to create an internet browser monopoly?
* Did the remedy decided upon by the judge validly address the anticompetitive behavior?
* Did the District judge fail to maintain the appearance of impartiality?

**Applicable Legal Rules and Observations**

***Anticompetitive Effects and Sherman Anti-Trust Act Section 1***

Section 1 of the Sherman Antitrust Act is designed to prohibit partnerships of two or more business entities from engaging in practices designed to restrict competition. This section also requires four aspects of the tying agreement be proven: (1) there are two distinct products involved, (2) the purchase of one cannot be made without the purchase of the other, (3) the seller has sufficient market control to effectively engage in anticompetitive practices, and (4) the amount of commerce generated by the tying agreement is “not insubstantial” to what would have been generated without it. (Mallor)

Although there is evidence that Microsoft Corporation enjoyed monopoly-like power in the PC operating system market, insufficient evidence was provided to demonstrate all 4 aspects of a browser tying arrangement that is in violation of Section 1 of the Sherman Antitrust Act.

1. There was question as to whether the shared code between the browser and the operating system as well as the inability to buy Internet Explorer as a stand-alone application meant that Windows operating system and Internet Explorer were not two separate products but part of a larger software system. The appeals court found that this comingling was likely purposeful and not necessary. Therefore, the browser and the operating system were two separate products and anticompetitive measure had been instituted by Microsoft for the browser.
2. The browser and the operating system could not be bought separately - as demonstrated by the Microsoft licensing agreement.
3. Monopoly power was demonstrated through the finding that Microsoft had 95% of the PC operating system market share at the time.
4. No direct evidence was provided to demonstrate the amount of commerce generated by the tying agreement. Thus, the appeals court remanded this part of the case to the District Court for further review. (U.S. v. Microsoft Corporation)

There was evidence of anticompetitive behavior. Microsoft set up a licensing agreement with system providers that prohibited them from installing competing browser products. Microsoft encouraged software developers to use Internet Explorer by offering them free bundling agreements. Numerous communications were provided demonstrating that these and others were purposeful activities designed to restrict competition. (U.S. v. Microsoft Corporation)

***Internet Browser Monopoly and Sherman Anti-Trust Act Section2***

The Sherman Antitrust Act does not forbid a company from accidentally creating a monopoly through the production of a superior product, but it does forbid the maintenance of that monopoly through methods such as excluding competition, price fixing, and discriminatory pricing. (Mallor) Microsoft engaged in anticompetitive behavior by developing its own version of Java and threatening Intel into not supporting the development of a cross-platform Java language. These behaviors and numerous incriminating internal documents were intended to maintain Microsoft’s monopoly power for PC operating systems. (U.S. v. Microsoft Corporation)

***Validity of the District Court’s Remedy***

The standards for issuing remedies are set via precedent cases. *Sims v. Greene* (161 F.2d 87, 88, 3d Cir. 1947) established that an evidentiary hearing should be held for any disputed fact in the case. Other cases have also established that a hearing should be held prior to issuing an injunction - *United States v. McGee* (714 F.2d 607, 613, 6th Cir. 1983) and *Charlton v. Estate of Charlton*, 841 F.2d 988, 989 (9th Cir. 1988). (U.S. v. Microsoft Corporation)

There is no question that there were disputed facts in this case. Microsoft offered testimony from 23 witnesses regarding the effect of the planned remedy on the corporation and its shareholders. The District “court acknowledged that the parties were "sharply divided" and held "divergent opinions" on the likely results of its remedies decree”. (U.S. v. Microsoft Corporation) No hearing was held to review the disputed facts.

The remedy itself was also lacking. No explanation was provided as to how this remedy would both terminate the existing monopoly and ensure that it does not reconstitute itself in the future. Such an explanation is required by court precedents, such as United States v. United Shoe Mach. Corp. (391 U.S. 244, 250, 20 L. Ed. 2d 562, 88 S. Ct. 1496, 1968). (U.S. v. Microsoft Corporation) The splitting of the company into an operating system company and an internet browser company does nothing to terminate the operating system monopoly. The District court’s fact finding also did not find any evidence of the effect of the Microsoft operating system monopoly. "There is insufficient evidence to find that, absent Microsoft's actions, Navigator and Java already would have ignited genuine competition in the market for Intel compatible PC operating systems." (*Findings of Fact* P 411 – from U.S. v. Microsoft Corporation ). This remedy solution also did not provide sufficient flexibility should an appeals court modify the liability.

***Judicial Impartiality***

District court judges are bound by the Code of Conduct or United States judges. Portions of this code are devoted to maintaining integrity and avoiding even the appearance of partiality. “Canon 3A(6) of the Code of Conduct for United States Judges requires federal judges to "avoid public comment on the merits of [] pending or impending" cases”. (U.S. v. Microsoft Corporation) In addition, Canon 3A(4) forbids judges to issue comments regarding the merit of pending or present cases. Furthermore, “the Judicial Code requires judges to recuse themselves when their "impartiality might reasonably be questioned." 28 U.S.C. § 455(a)”. (U.S. v. Microsoft Corporation)

The District judge presiding over the case provided numerous interviews prior to the final judgment, and asked that they remain secret until the time the final judgment was issued. I n the interviews, he made disparaging remarks about Microsoft’s credibility and that he didn’t “owe the due process” when issuing the remedy. The appeals court found that this led to the appearance of partiality: “Members of the public may reasonably question whether the District Judge's desire for press coverage influenced his judgments, indeed whether a publicity-seeking judge might consciously or subconsciously seek the publicity-maximizing outcome.” (U.S. v. Microsoft Corporation) This partiality led the appeals court to vacate the remedy of splitting the company in two as well as to disqualify the District Judge from hearing the remanded portions of the case. (U.S. v. Microsoft Corporation)

**Legal Conclusion**

Microsoft was demonstrated to have monopoly power in the PC operating system market and to have engaged in anticompetitive behavior in the internet browser market. However, the case was remanded was further review at the District Court because there was no evidence regarding the harm those practices caused nor what the market share of Internet Explorer would have been without these practices.

Because Microsoft does not have two separate divisions working on the software that could easily be split apart and because no evidentiary hearing was held to assess the impact of the proposed remedy, the remedy was properly vacated by the appeals court.

The judge violated the judicial code of conduct, and was properly barred from participating in the remanded review of the Sherman Antitrust Act violations.

**Key Ethical Issues**

The key ethical issue is how far the government should go in regulating technological industries and how strictly to apply antitrust and anticompetitive principles.

**Support for Ethical Issues and Ethical Alternatives**

Under the Utilitarianism, a cost-benefit analysis must be performed to ensure the chosen course of action that provides the most benefit to all parties involved. (Velasquez) The application of the utilitarian ethic to this situation is two-fold.

***Utilitarianism and All-in-One Systems***

Microsoft was heavily pursued for anticompetitive behavior in the late 20th century and early 21st century; however, one of its chief competitors, Apple, was not pursued for anticompetitive behavior when it controlled what was installed on its systems. Apple has expended tremendous effort to create all-in-one solutions for the consumer. The iMac is still advertised as an all-in-one solution, with a number of pre-installed applications, including Apple’s own web browser, Safari, photo editing software, iPhoto, and movie editing software, iMovie. (Apple) This is not unlike Microsoft tying its web browser to its operating system in PC sales – the subtle legal difference being that Apple is the producer and retailer for the iMAC product line, including the hardware.

In areas of technological development and systems integration, it is difficult to integrate disparate contractors and providers. There are many interfaces and software protocols to manage, test, and verify. Exercising a level of control like Microsoft once did or as Apple does now, can benefit both consumers and third party software developers. For example, a comparison is provided below of Apple’s system and Google’s Android system from a third party developer perspective:

* “Apple controls every aspect of their world, and while this can limit what a developer can and cannot do, it at least gives them the advantage of knowing what these limitations will be for the foreseeable future.” (Moms with Apps)
* “Android has much more diversity in hardware, and development is getting both better and worse every week. There are multiple versions of the OS, multiple hardware platforms, multiple screen sizes, hardware limitations, different marketplaces and Google app size restrictions. Not all hardware manufacturers update their hardware to the latest version of Android, so there are always going to be older versions floating around. The addition of features in later releases, like Flash support, makes development easier.” (Moms with Apps)

There are consumers who are less technically savvy who benefit from a single all-in-one streamlined system. This sentiment is reflected in a comment posted by AppleProLeo under Shankland’s article. (Shankland) These consumers benefit from a company’s efforts to restrict the openness of their system and develop an end-to-end solution has societal benefit in producing a stable, easy to install system suitable for those who are not familiar with the technology or do not wish to spend time researching options. Such systems can save businesses money, since they achieve economic efficiencies by avoiding a custom system that requires more IT staff support. There are developers who also benefit from stable all-in-one systems. Keeping up with an aggressive code development environment requires more resources than developing custom software applications for a stable platform.

***Utilitarianism and All-in-One Systems***

The utilitarian ethic can be applied to increased competition. Society also benefits from rapid-paced development. This development provides a forum for new ideas, the best or most popular of which are frequently incorporated in future upgrades of the all-in-one systems. (Shankland)

During the period of time covered by this case, Microsoft’s Internet Explorer garnered 90% or more of the market share. (Janco) Microsoft Internet Explorer’s share of the internet browser market has steadily declined since, and was less than 50% at the end of 2011. (Olanoff) Some of that loss of market share may be the result of a slower development cycle. (Asay) Some of the loss is due to innovations by competitors. (Shankland)

**Ethical Conclusions**

The result of all this is the need for the application of “Rule of Reason” analysis. (Mallor) The FTC, DoJ, and court system have a delicate task of allowing sufficient anticompetitive practices to enable the production of the all-in-one systems some consumers and businesses need while ensuring that there is sufficient competition to promote technological development.

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