Legally Speaking—Microsoft Antitrust Trial and Verdict

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Legally Speaking — Microsoft Antitrust Trial and Verdict

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One of the biggest stories of the past few months has been the Microsoft antitrust trial and verdict.¹ There is hardly anyone in North America who hasn’t heard something about this case. But what does it really mean, and how does this affect the library and publishing community? Antitrust opinions can be difficult to decipher, with terms such as “predatory pricing” thrown around casually. So I will try to shed some light on the murky depths of antitrust law. “Full disclosure: I am typing this on Microsoft Word, so don’t blame the spellcheck program for misspelling “Microsoft.”

So what was it that Microsoft actually did? There were three claims that the government made. The essence of the government’s case is that Microsoft attempted to form a cartel with Netscape to split up the market. When Netscape said no, Microsoft used illegal means to try and drive Netscape out of business. In the process, Microsoft also monopolized a second market, the market for Internet browser software. Finally, Microsoft tied their Internet Explorer product to the Windows operating system.

When the PC revolution began in 1978, there were a number of different computer platforms available. These included the IBM system (represented by Microsoft’s MS-DOS), Commodore 64, Amiga, Apple, and the Radio Shack TRS-80 (TRSDOS) system. The market soon shook out most of these platforms, leaving only the Apple Macintosh and the Microsoft operating system. Along the way, Microsoft converted from DOS to Windows, and achieved dominance in the market.

As any Mac user will tell you, there are significant differences between the Macintosh and Windows operating systems. As a result, it is very difficult for programmers to write a computer program that runs on both platforms. Microsoft became the system that most programs are written for. It was at this point that, according to the Microsoft opinion, the company “recognized middleware as the Trojan horse that, once having, in effect, infiltrated the applications barrier, could enable rival operating systems to enter the market for Intel-compatible PC operating systems unimpeded.”²

“Middleware” is the term that the court is using for programs that run on all platforms. The two most important incarnations of middleware are Netscape and Java. If you are searching a database on the Internet via Netscape, it doesn’t matter what type of operating system you are using. You can be using Windows, Macintosh, or some other kind of operating system. Similarly, Java runs on all kinds of different platforms. This means that if a new operating system was developed, programs could be written using Java or Internet technology. These programs would not be restricted to one system.

In June 1995, Microsoft requested that Netscape “abstain from releasing platform-level browsing software for 32-bit versions of Windows.”³ Had Netscape agreed, the two companies would have been guilty of violating section one of the Sherman Antitrust Act.⁴ Section one reads: “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 countries.”

¹ Against the Grain / June 2000 <http://www.against-the-grain.com> 79
eign nations, is hereby declared to be illegal.” Although Netscape rejected the offer, “Microsoft’s effort to convince Netscape to stop developing platform-level browser software for the 32-bit versions of Windows was made with full knowledge that Netscape’s acquiescence in this market allocation scheme would, without more, have left Internet Explorer with such a large share of browser usage as to endow Microsoft with de facto monopoly power in the browser market.” Therefore, Microsoft is guilty of attempted monopolization under Section one of the Sherman Antitrust Act.

At this point, Microsoft began tying their own Web browser, Internet Explorer (hereafter IE), to the Windows operating system, using both contracts and technology. By making IE part of the Windows operating system, Microsoft ensured the “presence of Internet Explorer on every Windows user’s PC system. Microsoft’s actions increased the likelihood that pre-installation of Navigator on Windows would cause user confusion and system degradation, and therefore lead to higher support costs and reduced sales.” Microsoft was using their dominance with the Windows operating system to attempt monopolization of the Browser market, in violation of Section 2 of the Sherman Antitrust Act.

Microsoft argued that restrictions on changing Windows were simply an attempt to uphold their copyright prerogatives. The argument was “that the restrictions ‘simply restate’ an expressive right to preserve the ‘integrity’ of its copyrighted software against ‘distortion,’ ‘truncation,’ or ‘alteration.’” However, the judge ruled that this was “a right nowhere mentioned among the Copyright Act’s list of exclusive rights, 17 U.S.C. §106, thus raising some doubt as to its existence.”

Once Netscape rejected Microsoft’s “offer,” the stage was set for the next part of the battle. Microsoft began working with Internet Access Providers (IAPs) to ensure that customers using IE rather than Netscape. This was done through promotions, rebates, “and in some cases made outright payments” to the providers. “Under the terms of the agreements, an IAP’s failure to keep Navigator shipments below the specified percentage primed Microsoft’s contractual right to dismiss the IAP from its own favored position in the Referral Server or the Online Services Folder. This was true even if the IAP had refrained from promoting Navigator in its client software included with Windows, had purged all mention of Navigator from any Website directly connected to the Referral Server, and had distributed no browser other than Internet Explorer to the new subscribers it gleaned from the Windows desktop.” Microsoft also was able to induce Apple to make changes “that significantly diminished the usage of Navigator on the Mac.”

Microsoft has asserted that they were simply trying to foster brand loyalty. However, the fact that IE is free and has never been charged makes this argument weak. In fact, Microsoft actually gave up the opportunity to make profits in order to ensure that Netscape was not used. Giving up profits in order to undercut an opponent is called “predatory pricing.” “As a general rule, a predatory pricing claim under Section 2 of the Sherman Act is established by proof that a defendant has set its prices below its marginal or total average costs, thereby leading to short-term losses in the sale of the product in the hope that competition will be suppressed and that a monopoly profit will be collected at a later time.”

An attempt to destroy the competition by means of unfair competition is analyzed by reference to a concept called the “Rule of Reason.” The “Rule of Reason” is a standard part of antitrust analysis. Under the “rule of reason” the legality of restraints on trade is determined by weighing factors such as the history of the restraint, the evil believed to exist, the reason for adopting the particular remedy and the purpose or end sought to be attained.

At the same time, Microsoft came up with a version of Java that was not compatible with any other platform. Many developers used Microsoft’s Java tools thinking that they were building a program that could be used on other platforms, only to discover that the software would not run on anything other than Windows.

Microsoft was also found to be guilty of tying IE to Windows. “Liability for tying under §1 exists where (1) two separate ‘products’ are involved; (2) the defendant affords its customers no choice but to take the tied product in order to obtain the tying product; (3) the arrangement affects a substantial volume of interstate commerce; and (4) the defendant has ‘market power’ in the tying product market.” Part of the analysis that is used in tying cases includes the “Rule of Reason.”

Cases of Note
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So What’s the Tally So Far?
(a) Almost no transformation. More copying than necessary to serve the claimed purpose.
(b) But hardly any revenue or profit. More public benefit than personal gain.
(a) outweighs (b). Which is to say the crux of the thing is “systematic ... multiplying [of] the available number of copies” and depriving Washington Post of revenue. See American Geophysical, supra, 60 F.3d at 924.

(2) Nature of Copyrighted Work
[The more creative a work, the more protection it should be accorded from copying; correlatively, the more informational or functional the plaintiff’s work, the broader should be the scope of the fair use defense.” Nimmer on Copyright, § 13.05[A][2][a].]

While newspapers employ some creativity in analyzing and selecting the news, mostly they’re reporting facts. A series of cases have found in favor of the copier on this element of fair use. See Los Angeles News Service v. Kcal-TV Channel 9, 108 F.3d 1119, 1122 (9th Cir. 1997) (copied news footage); Television Digest, Inc. v. United States Telephone Assoc., 841 F. Supp. 5, 10 (D.D.C.1993) (copied news stories from a newsletter).

So much for the creativity of all those working journalists. I’ve got a phone call in to the Pulitzer committee to tell them this.

(3) Amount and Substantiality
Republic said a few articles were a small thing in proportion to the larger newspaper. The Court held to the contrary. Republic copied an entire piece. Just as in Texaco, entire articles were copied from a compilation. Or Hustler Magazine, Inc. v. Moral Majority, Inc., 796 F.2d 1148, 1155 (9th Cir. 1986) where a one-page article was copied from a 154-page magazine.

(4) Effect of Use on Potential Market
Republic has 20,000 registered users, 100,000 hits a day; 25-50 million page views a month. While it’s not a substitute for the original work, it does permit all those folks to read for free. Republic says this is small potatoes next to the visitors to Washingtonpost.com. But de minimis arguments have been roundly rejected. Playboy Enterprises, Inc. v. Frena, 839 F. Supp. 1552, 1559 (M.D. Fla. 1993).


Of course when you violate copyright, your heart’s always in the right place. You’re thinking the Republic—but I’m helping you. Right? People who read this will now want to read the Washington Post in its entirety. And they’ll pay for it.

Which is what clients used to tell me. Handle my case for free and you’ll become famous. Then folks will come and pay you money.

Increasing someone else’s demand has been rejected as fair use. D.C. Comics Inc. v. Reel Fantasy, Inc., 698 F.2d 24, 28 (2d Cir. 1982),— and by the Supreme Court, no less. Harper & Row, supra, 471 U.S. at 569.

And so ... Washington Post won three of the four elements. And Republic lost on the Fair Use defense.
And They Were There

Reports of Meetings — ALCTS/AS Preconference

Column Editors: Sever Bordeianu (U. of New Mexico) <sbordeia@unm.edu> and Julia Gelfand (UC, Irvine) <jgelfand@orion.oac.uci.edu>

ALCTS/AS Preconference — Advancing Acquisitions: Services, Standards and Skills (June 24 and 25, 1999)

Report by Joyce L. Ogburn (Associate Director of Libraries, Resources and Collection Management Services, University of Washington, Box 352900, Seattle WA 98195-2900 phone: 206-685-2889; fax: 206-685-8727) <jologburn@u.washington.edu>

This institute was the most recent one sponsored by ALCTS on the business of acquisitions. It was structured to offer a choice of concurrent sessions to attendees, ranging from licensing, consortium work with vendors, being an acquisitions ambassador, outsourcing, and tracking staff costs. Additionally, there were three keynote speakers, on whose speeches I will report.

The business of acquisitions opened with Martha Whittaker of Blackwell's Book Services. She opened with comments on the nonsustainability of the current business models of vendors and posited that they need to reinvent themselves. Economies of scale and stretching margins are being achieved with a large vendor and a larger market share. Vendors are consolidating just as consortia are forming. Both limit choices, but clearly larger resources stretch further.

Big changes are needed still. Vendors sell books but give away value-added services (automation, reports, etc.) What are librarians willing to pay for? Blackwell spends $500,000 a year for paper on notification slips while seeing a low rate of return. If this is a valuable service, librarians need to put money into it. She asked, which services should be fast tracked and how should they be paid for? Should vendors supply e-books? Vendors will need to team up with these suppliers and take advantage of their infrastructure for approvals, publisher relations, library relations. Book vendors have to stay relevant, which may include full-text indexing and profiling with e-books. Also, they make preview easier and there are no returns. Blackwell's is talking with Powell's about some kind of service.

Mike Powell of Powell's books followed on the program. He noted that core values still exist in the book business, but customer behavior and expectations are changing. The pace of change is the hardest thing to cope with. Bookselling is the last of the cottage industries. Competition has been ferocious with Barnes and Noble, Borders, and Amazon.com—the casualty rate is high for the small bookstore and their share of the market is dwindling. 52% of books are now

Copyright Questions & Answers
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patron to make her own copy, but the library should not make the copy for the user.

QUESTION: There is a consortium of health facilities that pools its money to purchase videos selected by members of the consortium. Each member contributes a fee depending on bed size. The videos are actually purchased by the library and added to its collection. These videos are then loaned to the members for viewing at their facility at no charge. Is there a copyright problem with this consortial activity?

ANSWER: There are several issues here. First, when the library purchases the videos are they licensed only to one institution? If so, then the videos can be used only within that one facility. If not, then loaning the videos is no problem. Of course, the videos cannot be duplicated either.

There are also performance rights issues involved, however. If the videos are just used for individual patient viewing in their rooms, there is no problem. If, however, the videos are shown to groups or in public areas, it is a public performance, and the library must obtain the public performance rights for the consortium. When negotiating for the consortium, indicate that the video may be shown within any or all of the facilities of consortium members.

Endnotes

2 Case at 9.
3 Case at 10.
4 15 USCS § 1
5 15 USCS § 1
6 Case at 22.
7 Case at 22.
8 Case at 11.
9 15 USCS § 2
10 Case at 13.
11 Case at 13.
12 Case at 13.
13 Case at 15.
14 Case at 15.
15 Case at 17.
16 See Case at 15.
19 Sec, 37A Worlds and Phrases 239 Rule of Reason (Supp. 1992.).
20 Case at 18.
21 Case at 25.