June 2000

Legally Speaking-Microsoft Antitrust Trial and Verdict

Bryan Carson

Western Kentucky University Libraries, bryan.m.carson@gmail.com

Jack G. Montgomery

Western Kentucky University Libraries, jack.montgomery@wkyu.edu

Bruce Strauch

The Citadel, struachb@earthlink.net

Follow this and additional works at: <https://docs.lib.purdue.edu/atg>

Part of the [Library and Information Science Commons](#)

Recommended Citation

Carson, Bryan; Montgomery, Jack G.; and Strauch, Bruce (2000) "Legally Speaking-Microsoft Antitrust Trial and Verdict," *Against the Grain*: Vol. 12: Iss. 3, Article 31.

DOI: <https://doi.org/10.7771/2380-176X.3386>

This document has been made available through Purdue e-Pubs, a service of the Purdue University Libraries. Please contact epubs@purdue.edu for additional information.

SINCE 1853

MARTINUS
NIJHOFF
INTERNATIONAL

Bookdealers
Subscription Agents

YOUR SPECIALIST FOR ALL PUBLICATIONS FROM
WESTERN EUROPE
(INCLUDING UNITED KINGDOM)

- Experienced, full service subscription agent & bookdealer based in The Netherlands with Liaison Offices all over the world, including North America
- Multilingual, highly educated, dedicated personnel
- Approval plans for material from The Netherlands, Belgium, Luxembourg, France, Scandinavia
- Consolidation services for journal subscriptions
- Automatic claiming, management reports, bibliographic update service
- Electronic access to online database
- Electronic invoicing and prepayment options
- Reduced service charge plans for journal subscriptions
- Monthly publications on new and forthcoming monographs, series, journals and other media

For more information visit our website: <http://www.nijhoff.nl>

Or contact us at:

HEADQUARTERS
P.O. Box 1853
2700 CZ Zoetermeer
The Netherlands
Phone: +31 79 3684400
Fax: +31 79 3615698
E-mail: csna@nijhoff.nl

LIAISON OFFICE
39 Joanna Drive
Foxboro, MA 02035
Phone: 800 346-3662
Fax: 508 698-0148
E-mail: middeldorp@nijhoff.nl

LIAISON OFFICE
New York
Phone: 800 664-1853
Fax: 518 226-0286
E-mail: endres@nijhoff.nl

Legally Speaking — Microsoft Antitrust Trial and Verdict

by **Bryan M. Carson, J.D., M.I.L.S.** (Coordinator of Reference and Instructional Services, Western Kentucky University Libraries) <bryan.carson@wku.edu>

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 spell-check 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**, **Amega**, **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 in. 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 for-

continued on page 80

Legally Speaking from page 79

eign nations, is hereby declared to be illegal.”⁵ Although **Netscape** rejected the offer, “**Microsoft**’s effort to convince **Netscape** to stop developing platform-level browsing 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.”⁶ Therefore, **Microsoft** is guilty of attempted monopolization under section one of the **Sherman Antitrust Act**.⁷

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** onto **Windows** would cause user confusion and system degradation, and therefore lead to higher support costs and reduced sales.”⁸ **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**.⁹

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 expansive right to preserve the ‘in-

tegrity’ of its copyrighted software against any ‘distortion,’ ‘truncation,’ or ‘alteration. . . .’”¹⁰ 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.”¹¹

Once **Netscape** rejected **Microsoft**’s “offer,” the stage was set for the next part of the battle. **Microsoft** began working with Internet Access Providers (IAP) to ensure that customers used **IE** rather than **Netscape**. This was done through promotions, rebates, “and in some cases made outright payments”¹² 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.”¹³ **Microsoft** also was able to induce **Apple** to make changes “that significantly diminished the usage of **Navigator** on the **Mac**. . . .”¹⁴

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.¹⁵ 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.”¹⁶

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.”¹⁷

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**.¹⁸

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.”¹⁹ Part of the analysis that is used in tying cases includes the “Rule of Reason.”

continued on page 82

Cases of Note from page 78

So What’s the Tally So Far?

(a) Almost no transformation. More copy 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

[T]he 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 great 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* argu-

ments have been roundly rejected. *Playboy Enterprises, Inc. v. Frena*, 839 F. Supp. 1552, 1559 (M.D.Fla. 1993).

Indeed, actual harm need not be shown. *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 451 (1984). This is the “what if everyone did it” analysis. *Harper & Row, supra*, 471 U.S. at 568.

Of course when you violate copyright, your heart’s always in the right place. You’re thinking like **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) <jlogburn@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 like consortia are forming. Both limit choices, but clearly larger resources stretch farther.

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 fulltext 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

continued on page 83

Legally Speaking from page 80

So what does the **Microsoft** decision mean for the worlds of publishing and librarianship? For many years **Windows** has been the *de facto* standard, with many strong adherents among the **Macintosh** world. Librarians more than anyone else realized the power of the Internet early on, and have invested heavily in Web technology. It is to our benefit to have more operating systems available that will run programs and databases. Although **Microsoft** claims that there are advantages to standardization, what this case really represents is an attempt to foster technology that will run on any platform. Once that happens, the price will come down.

As heavy technology users, it is to the benefit of publishers and librarians to be freed from dependence on a single operating system. The time investment necessary to make **Windows** databases run on the **Macintosh** is prohibitive, which keeps **Macs** from being competitive. Computer technology has become the single biggest expenditure in libraries, in some cases overshadowing book budgets. As serial and book prices continue to rise, a decline in the price of computer technology will provide more money for the hard-pressed libraries.

Of course the **Microsoft** decision is still subject to appeal, but the world of publishing and librarianship should celebrate this decision. Antitrust law is complicated, but ben-

efits consumers. The question is whether **Microsoft's** actions constitute competition, or suppression of competition. As a computer-savvy librarian, I hope that competition will spur price cuts in technology. Goodness knows librarians could use some good news for a change. 🐾

Endnotes

¹ United States of America v. Microsoft Corporation, C.A. 98-1232 and State of New York, ex rel. Eliot Spitzer, et al., v. Microsoft Corporation, C.A. 98-1233 at 9 (D. D.C. filed April 3, 2000) <http://usvms.gpo.gov/ms-conclusions.html> (Hereafter "Case").

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 15.

¹³ Case at 15.

¹⁴ Case at 17.

¹⁵ See Case at 15.

¹⁶ 54 Am. Jur. 2d §147 *Monopolies and Restraints of Trade* (1996).

¹⁷ U.S. V. National Society of Professional Engineers, 404 F.Supp. 457, 463 (D.C.D.C. 1975). See, 37A *Worlds and Phrases* 239 *Rule of Reason* (Supp. 1992.).

¹⁸ Case at 18.

¹⁹ Case at 25.

Copyright Questions & Answers from page 81

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. 🐾