

The third ISRC event for the year 2000-2001, "Microsoft: The Breakup - Implications for the Management of IT" featured presentations by Ray Nimmer from the University of Houston Law Center and John C. Tsucalas from EDS. The presentations explored the legal, strategic and tactical implications of the findings and rulings in the DOJ case against Microsoft.

Introduction and Overview

Dr. Nimmer's presentation focused on "where the Microsoft case is, what is likely to happen, and what the effect would be on technology and practice," from a legal perspective. These issues are important due to two reasons: *one*, the possible market impacts of changes at Microsoft, and *two*, the potential impact of the points addressed by the trial court judge to business in general.

Mr. Tsucalas raised the question of how relevant the changes at Microsoft would be to businesses, and discussed what measures firms should take to prevent undue dependence on any one technology.

From Dr. Nimmer's presentation:

Microsoft and the Anti-trust World

Microsoft was involved in two cases: the prior case resulting from Microsoft requiring computer manufacturers to acquire multiple products along with the Microsoft Windows operating system, and the current case finding illegal monopolization and unfair competitive tactics. At issue is the bundling of Internet Explorer with Microsoft Windows operating system, and forcing Internet Service providers to choose Internet Explorer over Netscape. The remedy that was put forth by the court was to split Microsoft's operations into separate businesses.

While it is not a violation under anti-trust laws to be a monopoly, anti-competitive activities to acquire monopoly status are unlawful. "Tying" is the forced acquisition of other products because of control over another product, and can occur due to monopoly position or market power position. The market provides control to the customer by allowing competition; however, Microsoft used its monopolistic status to thwart potential competitors, thus hurting customers. The case also introduces the concept of network effects, which suggests that if you control major part of market, there is a burgeoning effect.

The Microsoft case raises some interesting issues from legal and business perspectives.

- If a firm is in the technology business and has a successful product, should the firm examine the law before integrating other products with the former? One major argument against Microsoft was that Internet Explorer was bundled with the highly popular Windows operating system to create a single system, and Microsoft then used its dominant position in one product market to push another product. The response from the Microsoft side was that there was only one product.

- Tying requires two products; the court relies on consumer demand for the separate products to decide in such cases. The question in the Microsoft case was whether there is a market for the Windows operating systems without Internet Explorer. Such a decision has to be based on technical judgments, and technical judgments are historically not a judicial issue. Microsoft was not charging separately for the products. The judge found that this had an adverse competitive effect, pushing people away from other firms' comparable products. The court considered whether the price of the operating system would decrease if Internet Explorer were not included.
- What is the role of the judiciary in technology innovation? The court typically depends on experts. In addition, in the area of technology, there is one appellate court with judges with special knowledge. The court is not the place to test technology. The issue is whether given market conditions, the actions of the firms are anti-competitive. Anti-trust law is reactive while it was proactive a couple of decades back. Anti-trust law was used then to reshape technology; this could reduce aggressiveness in the marketplace.

A monopolist's right to compete

A business is deemed to be a monopoly if it is able to control the volume/price in a definable market in a way that will produce profits for the business without substantial competition, on a product that is identical or substitutable. Dominance in a sector is equated to monopoly if consumers cannot move away from the product.

A monopolist does have the right to compete in an open market, but only by fair means. In the judge's findings, it was noted that Microsoft did not take a competitive hit, but fought using punitive measures. The history of the technology marketplace shows that there have always been one or two dominant technologies, and thus breaking up Microsoft may not be a solution.

Effects of the findings

On Microsoft:

The "monopoly" finding is usable in any other proceeding against Microsoft. There is also a potential for Microsoft to be sued and courts to become more involved, based on this fact-finding. The Microsoft distribution channel precludes unauthorized distributors, by asserting copyright against licensee of unauthorized source. However, this "monopoly" finding can cause the misuse defense to be rejected.

On Licensing:

If this case stands, change in licensing and anti-trust approaches are bound to happen. There is a potential for going back to practices that are more restrictive and intrusive. The anti-trust hostility of the sixties was replaced by contract and market dominance in the nineties. However, recently there has been an anti-intellectual property movement, based on the notion that copyrights should not prevent copying for personal use.

On the market:

Many issues were raised:

- Are two strong companies better than one?
- Will the market support several conflicting systems? Will the developers have assets enough to deal with several systems?
- Finally, is technology better off with competing systems?

Legal Projections:

The Supreme Court may take the appeal once the remand results are in from the lower court, and this may result in long and protracted litigation. Politics will have a role in the final decisions, since there is a strong anti-trust sentiment.

From Mr. Tsucalas' presentation:

Managing Dependency and Risk

Mr. Tsucalas' presentation focused on the causes of risk and how that risk could be mitigated; he emphasized the role of dependence in risk. Vendor dependence in different areas as application development, data, operating system, and hardware need to be managed to alleviate the risk.

Risk comes from dependence combined with change. While change is inevitable, dependence is not and usually results from buying habits. Mass purchase agreements are attractive to firms because these provide consistency of maintenance and reduce the skill sets required. Decreasing costs and increasing dependence produce proliferation of a technology. The art is to balance the advantage of mass purchase agreements against the need to keep the technology footprint diverse.

To reduce dependence on one technology:

- Encapsulate and hide: Embrace enterprise level components, not intra-system components. The advantage with this approach is that we need to concentrate only on managing the public interface.
- Focus on the interfaces between the data, business process, and presentation layers; apply architectural layering. Businesses unfortunately still do not focus on enterprise-level interfaces, but build interfaces for a specific object or application.
- Use standards. Standards provide the freedom to interface with many different systems. However, we negate the benefits obtainable from systems when we pick standards that do not work together.
- Use products conservatively. Consumers are feature-hungry, often acquiring features they do not need or use. These features often end up making systems incompatible.

Dependency areas:

Mr. Tsucalas discussed the trends in the potential dependency areas, and recommended actions to counter dependency.

In languages, we are very exposed to Microsoft. Visual Basic is the most widely known language, and is licensed out to everybody. However, the life span of Visual Basic code is very short; it is perceived as disposable code. C and C⁺⁺ are popular because of the portability. Java is open, does not cause much vendor dependence, and hence may replace C. In the area of IDEs,

use of class libraries increases vendor dependency. The worst scenario is use of platform specific code, which exposes us totally to vendors.

The risk is somewhat lesser in data management systems, where ODBC and JDBC have become the predominant vehicles for access. The protocols for handling data like HTTP and formats like XML are not platform-dependent.

In the area of hardware and operating systems, creating a uniform environment delivers the most cost benefit. This part of the information system is often treated as a black box, and thus is a high-risk area. Creating a diverse footprint for the hardware and operating systems is very challenging.

Relevance:

Mr. Tsucalas notes that the rate of technology change makes any single event inconsequential, and the Microsoft case may not be relevant by the time the decisions are handed out. Changes in the technology arena like centralization of applications, increased acceptance of standards and emergence of new technologies (for e.g., the wireless platforms) will decrease the impact of the findings and ruling in the Microsoft case.

In closing, Mr. Tsucalas stressed that it is important to buffer yourself against the constant changes. Do not couple yourself to other systems; the solution is to provide a good interface so that your systems can work with other systems. He also noted that Microsoft itself is moving towards other platforms.

During and after the presentations, audience members raised interesting issues. Some of the comments and questions are noted below:

- When there is an allegation of tying of products, would a market of separate product have to exist? Does the court have to make a judgment on customer demand?
The focus in the Microsoft case was that the Microsoft's market strength was used to force the other product.
- What is bundling a new feature will help sustain the price of the system?
This issue was not addressed in the MS case.
- If by the time the legal decision is taken on a case, the issue does not exist, how will it affect the handling of the case?
It will not affect the handling of the case, but may affect the remedy specified.

- What positive effects have come out of the Microsoft case?
The answer to this question depends on your perspective of the role of law in technology, the depth of intrusiveness that you consider necessary.
- There is concern that the legal system is not keeping abreast with the changes in technology. Awareness is increasing in the legal profession. The contract law is predominantly based on 1940 law, and it takes quite some time for uniform law to be adjusted. However, decisions may be made in technology arena, regardless of the law.