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**The *Microsoft* Case 10 Years Later:  
Antitrust and New Leading “New Economy” Firms**

*Chris Butts*



# The *Microsoft* Case 10 Years Later: Antitrust and New Leading “New Economy” Firms

By Chris Butts\*

## I. INTRODUCTION

¶1 As the end of the 20th century approached, commentators began to recognize that the dramatic technological advancements that occurred throughout the century gave rise to new market environments that were distinct from traditional industries in that they were built around information, networks, and knowledge.<sup>1</sup> The industries that drive the new market environments are anchored in the production of information goods such as software, content, or expertise.<sup>2</sup> Primary examples of such new industries are the manufacture of software, Internet-based businesses, as well as communications equipment and services designed to support them.<sup>3</sup>

¶2 While information goods, such as music and books, have existed for quite some time, the pervasiveness achieved by these goods towards the end of the 20<sup>th</sup> century was unprecedented.<sup>4</sup> More traditional industries are generally characterized by: multi-plant and multiform production, stable markets, heavy capital investment, modest rates of innovation, and slow and infrequent entry and exit.<sup>5</sup> Conversely, the new industries that evolved are characterized by: negligible marginal costs, value-based pricing, a focus on intellectual property protection, modest capital requirements, very high rates of innovation, quick and frequent entry and exit, consumer lock-in effects, and network effects providing for economies of scale in consumption.<sup>6</sup> More concisely, the principal output of new industries is intellectual property, whereas the principal output of traditional industries is physical goods.<sup>7</sup> Because of the marked difference between the economic characteristics that define the traditional industries and those that define the new industries, the new industries in the aggregate are often referred to as the “new economy.”<sup>8</sup>

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<sup>1</sup> Note, *Antitrust and the Information Age: Section 2 Monopolization Analyses in the New Economy*, 114 HARV. L. REV. 1623, 1627 (2001) [hereinafter *Antitrust and the Information Age*].

<sup>2</sup> *Id.* at 1628.

<sup>3</sup> See Richard A. Posner, *Antitrust in the New Economy*, 68 ANTITRUST L.J. 925 (2000).

<sup>4</sup> *Antitrust and the Information Age*, *supra* note 1, at 1628.

<sup>5</sup> Posner, *supra* note 3, at 2.

<sup>6</sup> *Id.*; see also *Antitrust and the Information Age*, *supra* note 1, at 1627-1633 (describing the “market realities of the new economy”).

<sup>7</sup> Posner, *supra* note 3, at 2.

<sup>8</sup> See *id.* at 1. Some specific characteristics of new economy industries are further discussed below in relation to antitrust considerations; however, a more thorough discussion of the economics of new economy

¶3 As the new economy became more pervasive, many questioned whether market regulations that evolved around the traditional economy made sense when applied to the new economy.<sup>9</sup> The Microsoft Antitrust case, which started in 1997 and eventually settled in 2000, brought this consideration to the attention of not only academics and legal professionals, but the public as a whole.<sup>10</sup> In the case, the government alleged that Microsoft had used its technology to maintain an illegal monopoly.<sup>11</sup> At the time, Microsoft was the largest and most pre-eminent of the new economy firms, and the antitrust case was the first to highlight the question of whether traditional antitrust regulation would promote the public good when applied to new economy firms. Now, ten years later, the Microsoft antitrust case remains an important consideration with respect to antitrust law in the new economy.

¶4 In the decade following the Microsoft Case, other new economy firms emerged and experienced rapid growth similar to the growth that characterized Microsoft's success. While many of the general characteristics of these firms are analogous to Microsoft, the new generation of firms is not surprisingly built around innovative technologies that give rise to even still unforeseen regulatory considerations.

¶5 The remainder of this paper will identify dominant theories of antitrust analysis in the new economy. This paper will also summarize the Microsoft case to highlight key take-aways that can be used to analyze concerns for new leading new economy firms (hereinafter "New Generation Firms"). Two New Generation Firms, Google and Facebook, will then be analyzed for similarities to and differences from Microsoft. A discussion of potential antitrust concerns for these two firms will be used as a springboard to discuss the state of antitrust regulation of the new economy as technology and the new economy continue to evolve. Such a discussion will make clear that much of the scholarship and commentary that was developed around the Microsoft case, though mindful of the unique characteristics of new economy firms, did not provide an exhaustive analysis of potential antitrust issues of continually evolving New Generation Firms.

¶6 In closing, this paper suggests that regulatory bodies and courts applying antitrust law to new economy firms should consciously look beyond the technologies underlying the antitrust concerns in order to effectively foster competition. The mere perspective that a definable new economy has evolved is insufficient to effectively regulate

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firms is outside the scope of this piece. For a more thorough discussion, see RICHARD L. GORDON, ANTITRUST ABUSE IN THE NEW ECONOMY 12-49 (Edward Elgar 2002).

<sup>9</sup> See, e.g., Posner, *supra* note 3, at 1 ("[C]oncern has been expressed recently that U.S. antitrust law may not be well suited to regulating the 'new economy.'"); see generally Nicholas Economides, United States v. Microsoft: A Failure of Antitrust in The New Economy, 32 UWLA L. REV. 3 (2001), available at <http://www.stern.nyu.edu/networks/UWLA.pdf>.

<sup>10</sup> Even the day-to-day of the case was covered extensively by the popular media. See GORDON, *supra* note 8, at 75-78 (noting that "[a]t least three book-length journalistic accounts appeared"). The *New York Times*, *Wired* and *The New Yorker* all published books based on their articles. See also Rajiv Chandrasekaran, *Microsoft Attacks Credibility of Intel Executive*, WASH. POST, Nov. 13, 1998, at B1, available at <http://www.washingtonpost.com/wp-srv/business/longterm/microsoft/stories/1998/microsoft111398.htm>; Joel Brinkley & Steve Lohr, *Pricing at Issue as U.S. Finishes Microsoft Case*, N.Y. TIMES, Jan. 6, 1999, at C1, available at <http://www.nytimes.com/1999/01/06/business/pricing-at-issue-as-us-finishes-microsoft-case.html>; Declan McCullagh, *Microsoft Judge Ripped in Court*, WIRED NEWS, Feb. 28, 2001, available at <http://www.wired.com/politics/law/news/2001/02/42071>.

<sup>11</sup> GORDON, *supra* note 8, at 1.

continually evolving high-technology firms. The lesson to learn is not that the economy has simply been changed by technology, but that the economy will continually change because of technology, especially with respect to the concerns that govern antitrust regulation.

## II. A DISCUSSION OF ANTITRUST IN THE NEW ECONOMY

¶7 The recognition that market regulation of new economy firms might be sub-optimal under traditional regulation approaches resulted in commentary on how the regulation of new economy firms should vary from the regulation of traditional firms. Much of this commentary focused on antitrust regulation in the new economy. In particular, two individuals directly involved in the Microsoft Antitrust case, Judge Richard Posner and Professor Lawrence Lessig, have been instrumental voices in the analysis of antitrust in the new economy.

### A. *Richard Posner and the New Economy*

¶8 U.S. District Court Judge Thomas Penfield Jackson, presiding over the Microsoft case, appointed Judge Richard Posner, currently a judge on the United States Court of Appeals for the Seventh Circuit, to act as a mediator in the Microsoft case.<sup>12</sup> Many recognize Judge Posner as having shaped antitrust policy in the second half of the twentieth century and acknowledge his “godlike stature on antitrust law.”<sup>13</sup> He has been harshly critical of the aggressive antitrust laws of the 1960s, and holds the view that breaking up monopolies is not always either necessary or appropriate.<sup>14</sup> His views on antitrust are indicative, if not representative, of the “Chicago school’s” view of antitrust, and accordingly represent a prevailing view on antitrust.<sup>15</sup> After his involvement with the Microsoft case, Judge Posner explicitly wrote his views of antitrust law in the new economy.<sup>16</sup>

¶9 Judge Posner is not primarily concerned that the application of traditional antitrust laws to new economy firms is insufficient in and of itself.<sup>17</sup> Instead, his concern is that the institutional structure of enforcement of traditional antitrust laws is incapable of handling the unusually difficult questions of fact that arise as a result of the technical complexity of the products and services produced in new economy industries.<sup>18</sup> Highly technical questions can be expected to be central in antitrust cases in the new economy, as new economy firms might exercise or achieve monopoly control by technical

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<sup>12</sup> Joel Brinkley, *Microsoft Case Gets US Judge as a Mediator*, N.Y. TIMES, Nov. 20, 1999, <http://www.nytimes.com/1999/11/20/business/microsoft-case-gets-us-judge-as-a-mediator.html>.

<sup>13</sup> Roger Parloff, *The Negotiator*, FORTUNE, Jan. 10, 2000, available at [http://money.cnn.com/magazines/fortune/fortune\\_archive/2000/01/10/271747/index.htm](http://money.cnn.com/magazines/fortune/fortune_archive/2000/01/10/271747/index.htm).

<sup>14</sup> Brinkley, *supra* note 12.

<sup>15</sup> Judge Posner points out that while the Chicago school is “skeptical . . . about the danger to competition that is posed by unilateral firm action,” the Chicago school emphasizes “the danger that heavy-handed antitrust enforcement [in the case of unilateral firm action] may suppress a practice that may seem anticompetitive but actually is efficient, or at least neutral, from the broader social standpoint.” Posner, *supra* note 3, at 8.

<sup>16</sup> See, e.g., Posner, *supra* note 3; RICHARD A. POSNER, ANTITRUST LAW 245-258 (2d ed. 2001).

<sup>17</sup> Posner, *supra* note 3, at 11.

<sup>18</sup> *Id.*

modifications to products.<sup>19</sup> Judge Posner also points to the institutional implication of rapid innovation in the new economy. The mismatch between “law time” (how long it takes to try a case) and “new-economy real time” is troubling because litigation of antitrust cases in the new economy might drag on for so long that the conditions of the industry might ultimately become irrelevant, and the litigation itself might have devastating effects on the companies involved by making investment riskier and complicating business planning.<sup>20</sup>

¶10 While Judge Posner does not claim to have a definitive solution for these problems, he emphasizes the importance of having competent, neutral experts involved.<sup>21</sup> This emphasis recognizes and attempts to account for the fact-intensive nature of new economy antitrust cases.<sup>22</sup> Much care must be taken with respect to both the technical inquiries and the less technical inquiries because the combination of intellectual property, network externalities, and rapid growth in consumer demand creates difficult questions involving the ascertainment and measurement of monopoly.<sup>23</sup>

### B. Lawrence Lessig and the New Economy

¶11 Professor Lawrence Lessig served as “special master” in the Microsoft Case and is a professor at Harvard Law School who has written extensively about regulation and policy with respect to technology issues.<sup>24</sup> Professor Lessig is the founder of Stanford’s Center for Internet and Society, leader of the Free Culture movement, and is widely recognized as the most original thinker in cyberlaw.<sup>25</sup> Like Judge Posner, he generally promotes open markets.<sup>26</sup> Notably, he is skeptical of the ability of companies in the new economy to use technology to stifle competition.<sup>27</sup> On one hand, Professor Lessig is wary of the Government’s involvement in many core new economy issues, such as extension of copyright.<sup>28</sup> On the other hand, contrary to Judge Posner, he believes that traditional antitrust law is insufficient to handle issues arising from the use of technology in the new economy and that the Government should have structured regulations in place to prevent companies from using technology to inhibit competition.<sup>29</sup> Professor Lessig’s

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<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 14.

<sup>21</sup> Posner, *supra* note 3, at 12, 15.

<sup>22</sup> *Id.* at 14 (“The peculiarities of new-economy markets . . . are apt to make the trial of a new-economy case a daunting challenge to the fact-finding capacity of the judiciary.”).

<sup>23</sup> Posner, *supra* note 3, at 12-13.

<sup>24</sup> Steven Levy, *Lawrence Lessig’s Supreme Court Showdown*, WIRED, Oct. 2002, available at [http://www.wired.com/wired/archive/10.10/lessig\\_pr.html](http://www.wired.com/wired/archive/10.10/lessig_pr.html). “As special master, Lessig was given the power to gather information independently, examine witnesses, and evaluate technical data, all with the authority of the court. Then he would produce his own report and recommendations, which theoretically would provide a blueprint for Judge Jackson’s eventual ruling and remedy.” *Id.*

<sup>25</sup> Timothy J. Mullaney, *The Paul Revere of the Web: Harvard’s Lessig warns of threats to speech and innovation*, BUSINESSWEEK, Mar. 6, 2000, available at [http://www.businessweek.com/2000/00\\_10/b3671138.htm](http://www.businessweek.com/2000/00_10/b3671138.htm); Levy, *supra* note 24.

<sup>26</sup> Mullaney, *supra* note 25.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> Brief of Lawrence Lessig as Amicus Curiae at the Court’s Request at 27, *United States v. Microsoft Corp.*, No. 98-1232 (D.D.C. Feb. 1 2000), available at <http://www.lessig.org/content/testimony/ab/ab.pdf> [hereinafter *Brief of Lawrence Lessig*].

extensive writings on technology law, including a brief he prepared as special master for the Microsoft case, illuminate this alternative view of antitrust in the new economy.<sup>30</sup>

¶12 Professor Lessig is particularly concerned with the potential for “tying,” the focus of most of his brief.<sup>31</sup> Professor Lessig notes that “[e]specially in a newly emerging market, it is sensible to hesitate before condemning a market practice, at least until it has been shown convincingly that that practice is anticompetitive.”<sup>32</sup> He also points out that, “the Supreme Court has indicated that it is ‘far too late in the history of our antitrust jurisprudence to question the proposition that certain tying arrangements pose an unacceptable risk of stifling competition and therefore are unreasonable per se.’”<sup>33</sup>

¶13 In performing antitrust analyses with respect to software, a primary new economy industry, Professor Lessig advocated that courts should focus on the software’s functionality and value to the customer in order to avoid evaluating code and understanding what it does.<sup>34</sup> This would presumably facilitate a more traditional antitrust analysis, given the more surface level analysis of the product. However, Professor Lessig did not go so far as to claim that new economy antitrust analysis should be treated traditionally; rather, he requested that the court “craft a standard that makes sense of the values in antitrust law and of the peculiar facts about software.”<sup>35</sup>

¶14 Ultimately, Professor Lessig believes antitrust law should be just as skeptical of tying via software as it is of tying using more traditional means, such as via contract; otherwise companies may simply be incentivized to achieve the tying through technology instead of contract.<sup>36</sup> With Professor Lessig’s attempt to keep the court’s focus “above the hood,” he advocates a “new product rationale” modified for the new economy, whereby a company will be found to not have engaged in illegal activity if two software products are combined together to operate in a new way.<sup>37</sup>

### III. THE MICROSOFT ANTITRUST CASE

¶15 The Microsoft Antitrust case provides for an illustrative demonstration of issues arising with antitrust analysis in the new economy, with such issues being the focus of most of the associated commentary and legal analysis. The following discussion provides a brief history of the Microsoft Corporation, a brief introduction to the case

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<sup>30</sup> See generally *id.*

<sup>31</sup> *Id.* For a discussion of the tying aspects of the Microsoft case, see *infra* Part III.C.2.

<sup>32</sup> *Brief of Lawrence Lessig, supra* note 29, at 6.

<sup>33</sup> *Id.* at 7.

<sup>34</sup> *Id.* at 22. It is interesting to note that, in this way, both Judge Posner and Professor Lessig recognize the burden that the heavily technical inquiries of new economy antitrust cases might place on the judiciary. While Professor Lessig suggests an end-run around the problem, Judge Posner suggests utilizing neutral experts. See *supra* Part II.A.

<sup>35</sup> *Brief of Lawrence Lessig, supra* note 29, at 26. Thus, whereas Professor Lessig urges the Court to adopt a new standard within antitrust doctrine for the new economy, Judge Posner emphasizes the sufficiency of antitrust doctrine to deal with problems that the new economy presents. See *supra* Part II.A.

<sup>36</sup> *Brief of Lawrence Lessig, supra* note 29, at 28 (“While antitrust law is generally encouraging of technology-based tying efficiencies, and skeptical of claims of contract-based tying efficiencies, the bolting achieved through software has no necessary relationship to efficiency . . . but if the law is especially forgiving of one method of bundling over another — if it, for example, scrutinizes bundles achieved through contract more strictly than it scrutinizes bundles achieved through code — then the effect of this rule may be to tilt the architecture of software towards software bundling rather than contract bundling.”).

<sup>37</sup> *Id.* at 39.

basics, a summary of the allegations against Microsoft, and a summary of the case's outcome.

### A. *The History of the Microsoft Corporation*

¶16 The Microsoft Corporation was founded in 1975 by Bill Gates and, with the aggressive marketing of MS-DOS, quickly became a major software vendor in the home computer industry.<sup>38</sup> In 1985, Microsoft released its first version of Microsoft Windows, and then quickly expanded its software offerings to include Microsoft Office in 1989, a business operating system with Windows NT 3.1 in 1993, and a web browser with Internet Explorer (hereinafter "IE") in 1995.<sup>39</sup> Microsoft has also expanded its product line into the World Wide Web with MSN (Microsoft Network) in 1995, and personal gaming with the Xbox in 2002.<sup>40</sup>

¶17 Major early releases of Windows for personal computing were Windows 3.0 in 1990, Windows 3.1 in 1992, and Windows 95.<sup>41</sup> When Windows 95 was first released, IE 1.0 was available in the *Plus! Add-on pack*, which was a separate product.<sup>42</sup> When Windows 95 OEM Service Release 1 was released, it included IE 2.0.<sup>43</sup>

### B. *Microsoft Case Basics*

¶18 The Federal Trade Commission (FTC) was investigating Microsoft as early as June of 1990 for possible collusion with IBM in the PC software market.<sup>44</sup> In July 1994, Microsoft signed a consent decree that forbade the company from using its operating system dominance to stifle competition.<sup>45</sup> Then, on May 18, 1998, the Justice Department filed an antitrust suit alleging that Microsoft had abused its market power to thwart competition, including Netscape.<sup>46</sup> After a complex series of events, the Justice Department ultimately settled the case with Microsoft in November of 2002.<sup>47</sup>

¶19 On June 7, 2000, district court Judge Jackson ordered the breakup of Microsoft, which was ultimately reversed on appeal.<sup>48</sup> The discussion of the Microsoft case that follows focuses on the legal analysis that resulted in the break up order and the appellate court's reversal.

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<sup>38</sup> Fast Facts About Microsoft, [http://www.microsoft.com/presspass/inside\\_ms.aspx](http://www.microsoft.com/presspass/inside_ms.aspx) (last visited Apr. 11, 2010).

<sup>39</sup> *Id.*; see also Sandy Hardmeier, *The History of Internet Explorer*, <http://www.microsoft.com/windows/ie/community/columns/historyofie.aspx> (last visited Apr. 11, 2010).

<sup>40</sup> Fast Facts About Microsoft, *supra* note 38.

<sup>41</sup> Microsoft, *The History of Computing Project*, [http://www.thocp.net/companies/microsoft/microsoft\\_company.htm](http://www.thocp.net/companies/microsoft/microsoft_company.htm) (last visited Apr. 11, 2010). More recent versions of Windows include 98, M.E., 2000, X.P., and Vista. *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *U.S. v. Microsoft: Timeline*, WIRED NEWS, Nov. 4, 2002, <http://www.wired.com/techbiz/it/news/2002/11/35212>.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

### C. Sherman Act Section 1 Allegations

¶20 Section 1 of the Sherman Act makes illegal “[e]very contract, combination in the form of a trust or otherwise, or conspiracy, in restraint of trade or commerce.”<sup>49</sup> The government’s allegations under section 1 of the Sherman Act alleged Microsoft had entered into exclusive contracts with various parties and had tied IE to Windows.<sup>50</sup> The government abandoned its claims under section 1 after unfavorable review at the appellate level.<sup>51</sup>

#### 1. Exclusive Contracts

¶21 The focus of the government’s exclusive contracts allegations was that Microsoft had prevented the distribution of Netscape’s competing Web browser.<sup>52</sup> This argument was unsuccessful at the district court level because of Netscape’s continued expansion throughout the late 90s. Netscape was therefore not foreclosed from a “substantial share” of the market.<sup>53</sup>

#### 2. Tying

¶22 Tying is essentially a contract conditioning the purchase of one product (the tying product) on the purchase of another (the tied product).<sup>54</sup> Tying violations are found where (1) two separate products are involved; (2) the defendant forces its customers to take the tied product 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.<sup>55</sup> The government argued that Microsoft was guilty of tying because IE and Windows were perceived as two distinct products by consumers, Netscape had experienced a drop in revenues resulting in a substantial effect on commerce, and Microsoft had market power in Windows.<sup>56</sup> Ultimately, however, the appeals court required that the government also show that the harm to competition in the Web browser market outweighed the benefit of integrating a browser into the operating system.<sup>57</sup> The government itself noted many benefits of inclusion of a Web browser with an operating

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<sup>49</sup> Sherman Antitrust Act, 15 U.S.C. § 1 (2006).

<sup>50</sup> David S. Evans, *Introduction, in* MICROSOFT, ANTITRUST AND THE NEW ECONOMY: SELECTED ESSAYS 1, 4 (David S. Evans ed., 2002).

<sup>51</sup> The exclusive contracts claim was rejected by the district court and the government did not seek reversal on appeal. *Id.* at 5. The appeals court remanded the tying claims for analysis under a much more difficult “rule of reason” analysis and the government decided not to retry. *Id.* at 5-6.

<sup>52</sup> *Id.* at 4.

<sup>53</sup> *Id.*; see also Mark Geier, *United States v. Microsoft Corp.*, 16 BERKELEY TECH. L.J. 297, 312 (2001).

<sup>54</sup> Geier, *supra* note 53, at 308.

<sup>55</sup> *Id.*

<sup>56</sup> Evans, *supra* note 50, at 5. Under a *Jefferson Parish* analysis, a tie is illegal on its face if (a) there are two distinct products; (b) the defendant requires customers to take the tied product as a condition of obtaining the tying product; (c) the arrangement affects a significant volume of commerce; and (d) the defendant has market power in the tying product. Geier, *supra* note 53, at 308, 311.

<sup>57</sup> Evans, *supra* note 50, at 5. In the district court, the government argued that Microsoft violated the antitrust law according to the *Jefferson Parish* Test. However, the appeals court applied the “rule of reason” which additionally requires a showing of net harm. *Id.*

system, and dropped the claim when faced with the significant hurdle of demonstrating that the tying caused more harm than good.<sup>58</sup>

#### D. Sherman Act Section 2 Allegations

¶23 Section 2 of the Sherman Act makes it illegal for “[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations.”<sup>59</sup> To establish a section 2 violation, the government must prove: (1) the possession of monopoly power and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.<sup>60</sup> Defining the relevant market and then assessing the defendant’s power to control prices or exclude competition from that market is central to a court’s analysis.<sup>61</sup> Generally, the relevant market will include all possible substitutes for the defendant’s product as perceived by the buyer.<sup>62</sup>

¶24 The government did not claim that Microsoft obtained a monopoly of operating systems unlawfully, but that Microsoft attempted to illegally maintain its operating system monopoly and to obtain a monopoly in Web browsers.<sup>63</sup> The government’s case comprised a variety of allegations meant to demonstrate a series of anticompetitive behavior, summarized below.<sup>64</sup>

##### 1. The Relevant Market

¶25 In arguing that Microsoft enjoyed monopoly power, the government adopted a “malleable definition of the relevant market.”<sup>65</sup> During the liability phase of the trial, the government argued that the relevant market was operating systems for Intel-compatible personal computers.<sup>66</sup> However, during the liability phase of the trial, the government argued that the relevant market was centered more broadly on platforms including, for example, applications running on servers.<sup>67</sup> Microsoft argued that the relevant market more closely tracked the latter, pointing out that Microsoft’s interests were in being the preferred platform for applications generally, and that anything that would attract developers away from Windows is competition.<sup>68</sup> Given that the court adopted the narrower market definition, and because Windows clearly was run on more than ninety

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<sup>58</sup> *Id.* at 6. For example, other software developers can depend on the presence of a web browser when it is integrated with an operating system and develop accordingly. *Id.*

<sup>59</sup> Sherman Antitrust Act, 15 U.S.C. § 1 (2006).

<sup>60</sup> Geier, *supra* note 53, at 305.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> Evans, *supra* note 50, at 6.

<sup>64</sup> *Id.* at 9. Other allegations, for example, monopoly leveraging and attempted monopolization of web browsers, failed. *See* Geier, *supra* note 53, at 307; Evans, *supra* note 50, at 7.

<sup>65</sup> Kenneth D. Elzinga, David S. Evans & Albert L. Nichols, U.S. v. Microsoft Corp.: *Remedy or Malady*, in MICROSOFT, ANTITRUST AND THE NEW ECONOMY: SELECTED ESSAYS 127, 157 (David S. Evans ed., 2002).

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

percent of all PCs, it is unsurprising that the district court also concluded that “Microsoft enjoys monopoly power in the relevant market.”<sup>69</sup>

¶26 It is worth noting, however, that there has been considerable commentary asserting that this conclusion is erroneous.<sup>70</sup> In particular, there is much evidence that Microsoft did not price Windows at monopoly prices and otherwise behaved as though it was in a competitive market.<sup>71</sup> Such facts support the conclusion that the relevant market was actually broader.<sup>72</sup> At the very least, the distinction makes clear that traditional market definitions in high technology industries may be difficult to define.<sup>73</sup>

## 2. Suppression of Netscape Distribution

¶27 The district court agreed with the government’s charge that distribution and installation agreements Microsoft made with internet access providers (IAPs), independent software vendors (ISVs), and internet content providers (ICPs) were exclusionary.<sup>74</sup> However, the appeals court only affirmed a few of those findings including that Microsoft had imposed restrictions that made it less likely that Netscape would be distributed through the OEMs and IAPs.<sup>75</sup> Although it is likely that these agreements had little actual effect on the browser wars, or the operating system market, there was little efficiency justification for them.<sup>76</sup>

## 3. Tying/Bundling

¶28 The appeals court accepted the district court’s findings that Microsoft had taken actions that made it difficult for OEMs and end users to hide access to the IE integrated with Windows.<sup>77</sup> Specifically, the appeals court accepted the findings that (1) comingling of code specific to Web browsing with code that supplies operating system functions, (2) failing to include IE in the Add/Remove Programs utility in Windows, and (3) prohibiting OEMs from deleting certain items from the desktop and Start menu did make it harder for consumers to choose Netscape Navigator.<sup>78</sup> In other words, the allegations were not so much focused on the bundling aspect as they were on Microsoft preventing unbundling.<sup>79</sup> In the end, the courts recognized that Microsoft’s prevention of unbundling caused little harm because users could still install other browsers. Nonetheless, Microsoft’s behavior was deemed anticompetitive because it was reasonable

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<sup>69</sup> *Id.*

<sup>70</sup> David S. Evans, Albert L. Nichols & Rischard Schmalensee, *An Analysis of the Government’s Economic Case in U.S. v. Microsoft Corp.*, in *MICROSOFT, ANTITRUST AND THE NEW ECONOMY: SELECTED ESSAYS* 23, 45 (David S. Evans ed., 2002).

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *See infra* Part IV.A.

<sup>74</sup> Evans, *supra* note 50, at 9; WILLIAM HEPBURN PAGE & JOHN E. LOPATKA, *THE MICROSOFT CASE: ANTITRUST, HIGH TECHNOLOGY, AND CONSUMER WELFARE* 167 (2007).

<sup>75</sup> Evans, *supra* note 50, at 9.

<sup>76</sup> PAGE & LOPATKA, *supra* note 74, at 184.

<sup>77</sup> Evans, *supra* note 50, at 10.

<sup>78</sup> *Id.* at 10; PAGE & LOPATKA, *supra* note 74, at 141, 146.

<sup>79</sup> PAGE & LOPATKA, *supra* note 74, at 141.

to conclude that Netscape's usage share had been limited without providing benefits to consumers.<sup>80</sup>

#### 4. Predatory Pricing and Investment

¶29 The government claimed that Microsoft gave up profits for the purpose of maintaining its monopoly in Windows.<sup>81</sup> Not only did Microsoft not charge consumers for IE directly, but it also did not charge Internet service provider (ISP) and IAP firms who distributed IE separately from Windows. Microsoft also provided other IE related services to ISPs, free of charge.<sup>82</sup> In this way, Microsoft was arguably adhering to a traditional form of predation by selling (or in this case giving away) IE at a price point below incremental or avoidable cost in an attempt to drive competitors out of business and then benefit from its maintained monopoly.<sup>83</sup> However, the core of such a predation charge relied on a novel argument that by pricing IE below cost, Microsoft was able to simultaneously preserve its stream of monopoly profits on Windows, and thereby more than recoup its investment in below-cost pricing of IE.<sup>84</sup>

¶30 The appeals court did not uphold any findings of predatory pricing, noting that they had “no warrant to condemn Microsoft for offering either IE . . . free of charge or even at a negative price . . . a monopolist does not violate the Sherman Act simply by developing an attractive product.”<sup>85</sup> However, it is important to recognize the predatory pricing allegations because they greatly informed the appeals court's analysis of the Netscape distribution suppression claims.<sup>86</sup>

#### E. Case Outcome

¶31 On June 7, 2000, the district court essentially adopted the government's proposal that Microsoft be divided into two firms, one limited to operating systems and one limited to applications.<sup>87</sup> A variety of conduct orders were also a part of the judgment.<sup>88</sup> However, the district court's order was reversed and remanded by the appeals court, largely due to procedural failures, lack of explanation of how the order would restore competition, and the need to reconsider remedies in light of the reversal of some of the liability holdings.<sup>89</sup>

¶32 By November of 2001, the Justice Department and Microsoft reached a settlement agreement.<sup>90</sup> The agreement included conduct-based remedies directed to the practices

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<sup>80</sup> *Id.* at 148.

<sup>81</sup> Evans, *supra* note 50, at 10.

<sup>82</sup> PAGE & LOPATKA, *supra* note 74, at 49. Microsoft gave ISPs a valuable set of software tools for installing and maintaining IE on their Web servers. *See* Evans, *supra* note 50, at 10-11.

<sup>83</sup> Economides, *supra* note 9, at 26.

<sup>84</sup> PAGE & LOPATKA, *supra* note 74, at 49; Economides, *supra* note 9, at 26; Evans, *supra* note 50, at 10.

<sup>85</sup> Evans, *supra* note 50, at 11; *see also* PAGE & LOPATKA, *supra* note 60, at 50.

<sup>86</sup> PAGE & LOPATKA, *supra* note 74, at 48. Page and Lopatka point out that the Court considered that free software could be offered “in an effort to build usage share and thus preserve the applications barrier.” *Id.* at n.119. The suppression of Netscape distribution allegation is discussed *infra* Part III.D.1.

<sup>87</sup> PAGE & LOPATKA, *supra* note 74, at 70.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 71.

<sup>90</sup> *Id.* at 72.

held unlawful by the appeals court and limited Microsoft's ability to counter rivals' competing products.<sup>91</sup> For example, the agreement prevented Microsoft from entering into exclusive distribution contracts, offering selective price cuts to individual computer manufacturers, restricting computer manufacturers from modifying the appearance of the Windows desktop in prescribed ways, and requiring Microsoft to disclose information about its operating system products to help competitors design their own products.<sup>92</sup>

#### IV. ANTITRUST ANALYSIS OF NEW LEADING NEW ECONOMY FIRMS

¶33 The behaviors under scrutiny in the Microsoft case and the terms of the settlement deal provide some practical insight into antitrust considerations for modern new economy firms. However, just 10 years after the Microsoft case, new generation firms are built around technologies that are unique in many ways from the software that was at issue in the Microsoft Case.

¶34 As the internet has continued to expand and become more pervasive, more and more companies have looked to it as a foundation for building computing platforms, as Microsoft used the PC as a foundation for Windows.<sup>93</sup> Currently, two of the most popular companies taking such an approach to the internet are Google and Facebook.

##### A. Google

¶35 Google was founded on September 8, 1998 by Larry Page and Sergey Brin while graduate students at Stanford University.<sup>94</sup> The search engine quickly grew in popularity and by the time the company went public in August of 2004, Google had over 800 employees and had over 6 billion items indexed for searching, including 4.28 billion web pages and 880 million images.<sup>95</sup> Google.com is visited by about 40% of global internet users daily and is the most visited site on the internet.<sup>96</sup> YouTube.com, Google's popular video sharing website, is visited by about 20% of global internet users daily and is the third most visited site on the internet.<sup>97</sup>

¶36 Today Google is much more than a search engine, offering a wide variety of computer and web-based applications and services including Gmail, a popular email service; Google Chrome, a popular web browser; and YouTube.<sup>98</sup> Google does not sell

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<sup>91</sup> *Id.*; see also Evans, *supra* note 50, at 14.

<sup>92</sup> Evans, *supra* note 50, at 14.

<sup>93</sup> See, e.g., Willy Chui, *Platform Internet: The Promise of Grid Computing*, TECHNEWSWORLD, Aug. 29, 2003, <http://www.technewsworld.com/story/31456.html> ("The resources we desire will be at our fingertips, but they will reside on the Internet rather than in single computers or on local servers.").

<sup>94</sup> Corporate Information – Google Milestones, <http://www.google.com/corporate/history.html> (last visited Apr. 11, 2010).

<sup>95</sup> *Id.*

<sup>96</sup> Google.com – Traffic Details from Alexa, [http://www.alexa.com/data/details/traffic\\_details/google.com](http://www.alexa.com/data/details/traffic_details/google.com) (last visited Apr. 11, 2010).

<sup>97</sup> YouTube.com – Traffic Details from Alexa, [http://www.alexa.com/data/details/traffic\\_details/youtube.com](http://www.alexa.com/data/details/traffic_details/youtube.com) (last visited Apr. 11, 2010).

<sup>98</sup> For a full list of Google products, see More Google Products, <http://www.google.com/intl/en/options/> (last visited Apr. 11, 2010).

<sup>98</sup> For a full list of Google products, see *id.*

any of these products, but rather generates revenue by including advertisements in the pages of many its web applications.<sup>99</sup>

## 1. Google: Antitrust Landscape

¶37 Given Google's extreme popularity on the Internet it is, perhaps, unsurprising that the Department of Justice has its eyes on it.<sup>100</sup> In June of 2008, Google signed an "ad search pact" with another internet giant, Yahoo, in which Google would supply Yahoo with search ads.<sup>101</sup> The deal would have provided increased revenue for Yahoo and would have also given Google more power in the online advertisement market; however, in November of 2008, the deal fell apart.<sup>102</sup> Because the deal was between two technology giants that are otherwise direct competitors, the government stated they were concerned with the deal's "competitive and privacy implications."<sup>103</sup> Ultimately, the Department of Justice threatened action against Google under Sherman Act section 2, which led to Google abandoning the deal rather than engaging in a "protracted legal battle."<sup>104</sup>

¶38 Aside from the veto of the Google-Yahoo deal, the Department of Justice may be considering going after Google as a general monopolist.<sup>105</sup> In fact, Department of Justice lawyers involved with stopping the Yahoo deal have commented that Google's current position may already constitute a monopoly, even without Yahoo.<sup>106</sup> Google's aggressive expansion has led many to question whether Google is the next Microsoft.<sup>107</sup> A number of corollaries might be drawn to the Microsoft case to evaluate Google's antitrust situation. Specifically, Google has carved out a new product in online search advertising, and it will be difficult to determine what market is relevant to a determination of Google's market power with respect to that product.

## 2. Definition of the Relevant Market

¶39 When the Department of Justice stepped in to prevent the Google-Yahoo deal, the main motivation was that the deal would create a lock on a large percentage of the search

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<sup>99</sup> Google Corporate Information – Company Overview, <http://www.google.com/corporate/index.html> (last visited Apr. 11, 2010).

<sup>100</sup> Charles Cooper, *Trustbusters Divided on Next Move on Google*, CNET, Sept. 11, 2008, [http://news.cnet.com/8301-10787\\_3-10038613-60.html](http://news.cnet.com/8301-10787_3-10038613-60.html).

<sup>101</sup> *Id.* Yahoo is also one of the most visited sites on the internet. Yahoo.com – Traffic Details from Alexa, [http://www.alexa.com/data/details/traffic\\_details/yahoo.com](http://www.alexa.com/data/details/traffic_details/yahoo.com) (last visited Apr. 11, 2010).

<sup>102</sup> Jessica E. Vascellaro & Nick Wingfield, *Google Ditches Ad Pact With Yahoo*, WALL ST. J., Nov. 6, 2008, at B1, available at <http://online.wsj.com/article/SB122589788640401601.html>.

<sup>103</sup> Peter Whoriskey, *Google-Yahoo Deal Raises Antitrust Fears*, WASH. POST, June 14, 2008, at D01, available at <http://www.washingtonpost.com/wp-dyn/content/article/2008/06/13/AR2008061303494.html>.

<sup>104</sup> Fred Vogelstein, *Why is Obama's Top Antitrust Cop Gunning for Google?*, WIRED, July 20, 2009, [http://www.wired.com/techbiz/it/magazine/17-08/mf\\_googlopoly](http://www.wired.com/techbiz/it/magazine/17-08/mf_googlopoly); Robert J. Samuelson, *The Plot to Kill Google*, WIRED, Jan. 19, 2009, [http://www.wired.com/techbiz/it/magazine/17-02/ff\\_killgoogle](http://www.wired.com/techbiz/it/magazine/17-02/ff_killgoogle).

<sup>105</sup> Cooper, *supra* note 100.

<sup>106</sup> Samuelson, *supra* note 104. See also John Packowski, *Tired: Microsoft Antitrust*, *Wired: Google Antitrust*, DIGITAL DAILY, Feb. 18, 2009, <http://digitaldaily.allthingsd.com/20090218/tired-microsoft-antitrust-wired-google-antitrust/>.

<sup>107</sup> Declan McCullagh, *On Antitrust, is Google the Next Microsoft?*, ZDNET, July 23, 2007, [http://news.zdnet.com/2100-9588\\_22-152610.html](http://news.zdnet.com/2100-9588_22-152610.html).

advertising business.<sup>108</sup> It has been estimated that Google had 70% of the search advertising market, while Yahoo had 20% of the search advertising market.<sup>109</sup> Interestingly, Microsoft itself led a campaign to convince the government, the advertising community, and the public generally that "important competition issues [were] raised by this transaction."<sup>110</sup> Ultimately, the Department of Justice feared that the deal would give advertisers less leverage to negotiate ad rates, and that the advertisers would end up paying more.<sup>111</sup>

¶40 For the Department of Justice to arrive at that conclusion, however, it first had to decide that the relevant market was indeed search advertising (advertising directed to placing online advertisements on Web Pages that show results from search engine queries). Arguably, this is a relatively narrow definition compared to other plausible market definitions such as online advertising as a whole or the advertising industry generally.<sup>112</sup> At the very least, it is clear that "[w]hether paid search constitutes a product in a larger advertising market or a market of its own remains a difficult question to answer."<sup>113</sup>

¶41 It is pertinent to consider that merely including within the market definition other forms of *online* advertising would dramatically reduce Google's market share.<sup>114</sup> For example, display advertising (advertising directed to the display of images or interactive media on standard web pages) is comparably as pervasive as search advertising, and Google only has about a 1.5% share of the display advertising market.<sup>115</sup> It is important to pause and consider the reality that often, online forms of advertisement serve as substitutes for more traditional forms of advertisement such as print and TV.<sup>116</sup> That is, advertisers often choose between different advertising media depending on their advertising goals.<sup>117</sup> The substitutability of such advertising supports the proposition that the relevant market—the market Google truly competes with in online search advertising—is much broader than the online search advertising market itself. Google's recent foray into print advertising would also seem to support that proposition.<sup>118</sup>

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<sup>108</sup> Samuelson, *supra* note 104.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> Joseph Weisenthal, *Yahoo-Google: Antitrust Outcome Hinges on Market Definition: Is it Search Ads? Online Ads?*, PAIDCONTENT.ORG, June 17, 2008, <http://www.paidcontent.org/entry/419-yahoo-google-anti-trust-outcome-hinges-on-market-definition-search-ads/>.

<sup>113</sup> NORMAN HAWKER, THE AM. ANTITRUST INST., THE PROPOSED GOOGLE-YAHOO ALLIANCE 6 (2008), available at [http://www.antitrustinstitute.org/archives/files/AAI%20White%20Paper%20Google-Yahoo.9.23.08\\_092320080913.pdf](http://www.antitrustinstitute.org/archives/files/AAI%20White%20Paper%20Google-Yahoo.9.23.08_092320080913.pdf).

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> See Scott Karp, *Advertising Trend Ratio: A New Metric for Publishers*, PUBLISHING 2.0, May 29, 2007, <http://publishing2.com/2007/05/29/advertising-trend-ratio-a-new-metric-for-publishers/> (suggesting that online and traditional advertisement are substitutes, and that an increase in expenditures in one form of advertisement leads to a decrease in expenditures in the other).

<sup>117</sup> *Id.*

<sup>118</sup> Saul Hansell, *Newspapers to Test Plan to Sell Ads on Google*, N.Y. TIMES, Nov. 6, 2006, at C1, available at <http://www.nytimes.com/2006/11/06/business/media/06google.html>.

### 3. Microsoft, Google-Yahoo, and how to Define the Relevant Market

¶42 Narrow market definitions were ultimately outcome determinative in both the Microsoft case and the demise of the Google-Yahoo deal. In both cases, the relevant markets were defined in very close relation to the underlying technology. In the Microsoft case, the court defined the market as operating systems for Intel-compatible personal computers where the underlying technology was Microsoft's extremely successful Windows operating system.<sup>119</sup> In the Google-Yahoo deal, the Department of Justice defined the market as online search advertising where the underlying technology was Google's extremely successful search-advertising technology.<sup>120</sup>

¶43 In both situations, it is clear that broader definitions of the markets were not only extremely plausible but likely correct.<sup>121</sup> The narrow market definition in each case, at the very least, may imply that the underlying technology influenced the determined definition of the market size. Because market definitions are hard to determine, especially when analyzing new and evolving industries, courts and regulating bodies must be aware of this potential dependency on the underlying technology when analyzing new economy firms and be careful to define the market according to the true competitive landscape.<sup>122</sup> Such an emphasis would have likely led to the markets being more broadly defined in each case, and therefore a more just and efficient result would have followed.<sup>123</sup>

#### B. Facebook

¶44 Facebook was founded in February of 2004 by Mark Zuckerberg while a student at Harvard University.<sup>124</sup> Like Google, the social networking website has grown quickly and currently has over 100 million registered users.<sup>125</sup> Facebook.com is the fifth most visited site on the internet and visited by about 12% of global internet users daily.<sup>126</sup>

¶45 At its core, Facebook is a social networking website. However, with its introduction of Facebook Apps, it has become more of a platform for third parties to develop applications to run on Facebook, not dissimilar from the way that third parties develop software to run on Windows.<sup>127</sup> Facebook has even expanded to include applications for use on users' desktop and other websites, making its platform an ever

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<sup>119</sup> See *supra* Part III.D.1.

<sup>120</sup> See *supra* Part IV.A.2.

<sup>121</sup> See *supra* Part III.D.1.

<sup>122</sup> This concept may be thought of as an extension of Judge Posner's argument that traditional antitrust laws are generally sufficient to deal with new economy firms, so long as they are applied in a manner reflective of new economy market realities. See *supra* Part II.A.

<sup>123</sup> See *supra* Part II.A. Such an approach would be consistent with Judge Posner's deferential approach to antitrust enforcement. *Id.*

<sup>124</sup> Sarah Phillips, *A Brief History of Facebook*, GUARDIAN UNLIMITED, July 25, 2007, <http://www.guardian.co.uk/technology/2007/jul/25/media.newmedia>.

<sup>125</sup> Marshall Kirkpatrick, *Facebook Hits 100 Million Users*, READWRITEWEB, Aug. 25, 2008, [http://www.readwriteweb.com/archives/facebook\\_hits\\_100\\_million\\_user.php](http://www.readwriteweb.com/archives/facebook_hits_100_million_user.php).

<sup>126</sup> Facebook.com – Traffic Details from Alexa, [http://www.alexa.com/data/details/traffic\\_details/facebook.com](http://www.alexa.com/data/details/traffic_details/facebook.com) (last visited Apr. 11, 2010).

<sup>127</sup> Facebook Application Directory, <http://www.facebook.com/apps/> (last visited Apr. 11, 2010).

increasing part of the personal computing experience.<sup>128</sup> Zuckerberg has expressed a desire to dominate in the United States, with the goal of eclipsing Google in total amount of traffic.<sup>129</sup>

## 1. Facebook: Antitrust Landscape

¶46 As Facebook becomes more popular, Facebook itself becomes more and more like Windows with third parties developing applications to be used on the Facebook platform. Third parties were and are inclined to develop products for Windows due to Windows' pervasiveness and, in the same way, third party software developers are and will continue to be inclined to develop for Facebook in an effort to capture the greatest number of potential users. This puts Facebook in a similar situation with potential to face the same sort of scrutiny as Microsoft.

¶47 Facebook's potential as a pervasive platform in and of itself does not raise potential antitrust concerns for Facebook. Even Microsoft, at the time of its litigation, was not under fire simply for being the dominant platform. However, being a dominant platform could give rise to situations where Facebook would arguably be using its monopoly power in the social networking platform to dominate other areas, similar to how Windows did with IE.

¶48 Like Windows, Facebook is interested in protecting its platform as the preferred development platform. However, unlike Microsoft, Facebook is not interested in doing so in an attempt to sell more copies of its platform. After all, Facebook is free to use. Instead, Facebook is driven at least in-part by a desire to ensure the value of its user base, or proprietary information about that user base, for advertisers. Although at the surface level, both Microsoft and Facebook are interested in protecting their vast user base, the subtle difference in motivation may give rise to different antitrust concerns.

## 2. Data Portability and the Availability of Information From New Generation Firms

¶49 Part of Microsoft's settlement agreement called for Microsoft to make available to developers essential information about Windows so that they could more freely develop applications for Windows.<sup>130</sup> This part of the consent decree was driven by the allegations that Microsoft was abusing its control over the platform to influence the development that was being done for it, and ultimately to sustain its monopoly.<sup>131</sup> However, contrary to such a strategy, Facebook has affirmatively made helpful information available to developers including tools to make development more convenient.<sup>132</sup> In fact, Facebook invites anyone interested to "join the development community."<sup>133</sup>

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<sup>128</sup> Facebook Application Directory, For your Desktop, <http://www.facebook.com/apps/index.php?type=1&sort=2> (last visited Apr. 11, 2010).

<sup>129</sup> Scott Karp, *Facebook Beacon: A Cautionary Tale*, PUBLISHING 2.0, Dec. 1, 2007, <http://publishing2.com/2007/12/01/facebook-beacon-a-cautionary-tale-about-new-media-monopolies/>.

<sup>130</sup> See *supra* Part III.D.

<sup>131</sup> See *supra* Part III.D. The allegations against Microsoft under Sherman Act II were generally directed to Microsoft's alleged attempt to maintain its monopoly in the computer operating system market.

<sup>132</sup> Facebook Developers, <http://developers.facebook.com/>.

<sup>133</sup> *Id.* ("The web is social. Developers just like you have built applications on Facebook Platform that

¶50 The divergence of these two opposing strategies is illustrative of a core difference between the economics of Microsoft and Facebook. Microsoft had a strong interest in controlling the nature of the products that became popular for use on its platform because, at least in-part, (1) the control enabled them to ensure Windows' position as the dominant platform and (2) Microsoft could profit from the development and sale of such applications itself. Facebook, however, is not incentivized to exert such control over application development because, among other reasons, (1) development of third party applications is a less significant aspect of ensuring Facebook's position as a dominant platform,<sup>134</sup> and (2) the dominant business model of web applications is that they are made available for free.

¶51 Therefore, Facebook is generally indifferent as to who developed a particular application. Because the applications are free, Facebook essentially captures all the value of a successful application that it is interested in (the traffic it drives to the site) whether it was developed by Facebook or not. Although there is less interest in controlling the path of development of applications, Facebook may be more concerned with other significant elements of ensuring its position as a dominant platform.

¶52 In the social networking space, the network effect manifests itself in a similar way to the operating system space in that the more users of the platform there are, the higher the switching costs, the greater the network externalities, and the more benefit to using the platform for users. Thus, users of a particular social networking platform will be exponentially disincentivized from using an alternative as the social networking platform gains more users. However, Facebook's true customers are advertisers. This represents a marked difference from Microsoft's business model. In that sense, the true product Facebook brings to the "market" is not its technology, but the social information about, and access to, its vast user base. Information about and access to users is what makes Facebook valuable to advertisers. As one might expect, Facebook has already demonstrated an unwillingness to make this information freely available.<sup>135</sup>

### 3. Microsoft, Facebook, and the Availability of Essential Information

¶53 An identification of user information as a core asset of Facebook, and potentially of many other new generation firms, highlights an additional way that antitrust analysis of high technology firms should be adapted. In the Microsoft case, the government likely got it right by forcing Microsoft to make important elements of their technology open for developers. However, to that end, future regulators must be willing to look beyond the underlying technology to identify ways in which a dominant high-technology firm may maintain monopoly control. Specifically, as Facebook begins to accumulate more and more information about how users behave, they will be able to develop the platform in

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millions of people use every day. Join our developer community and help make the web even more social.”).

<sup>134</sup> Although the functionality of Windows itself is important, users also choose Windows for what it enables them to do with other software. In contrast, and in addition to the platform itself, users like Facebook, at least in significant part, because it enables social networking. In short, the network effect is actively sought by Facebook users and easily recognized as a primary and direct benefit.

<sup>135</sup> Scott Gilbertson, *Google and Facebook Join the Data Portability Debate*, Jan. 9, 2008, [http://www.webmonkey.com/2008/01/google\\_and\\_facebook\\_to\\_join\\_the\\_data\\_portability\\_debate/](http://www.webmonkey.com/2008/01/google_and_facebook_to_join_the_data_portability_debate/) (last visited Apr. 11, 2010).

such a way to take advantage of that knowledge, and that knowledge will create a larger and larger barrier to entry for potential competitors. It is noteworthy that the barrier is not necessarily the result of technological blocking but more the result of informational blocking.

¶54 Regulators must be especially aware of this potentially new form of barrier to entry given the apparently “open” nature of the Facebook platform in that Facebook is making code freely available and inviting everyone to develop. At the surface level Facebook is avoiding Microsoft’s great sin of shutting out competitors from their underlying technology.<sup>136</sup> At the same time, however, there is great potential that Facebook could achieve effectively the same barrier to entry that Microsoft was found liable of upholding by preventing access to the additional information that is needed by developers if they are to compete in any reasonable fashion. To truly enable competition regulators will have to ensure that the relevant tools, information regarding the vast user base, are available to potential competitors.

#### V. DOES MICROSOFT MAKE SENSE TODAY?

¶55 A retrospective evaluation of the Microsoft antitrust case reveals that much value was gained from the awareness raised regarding the difficulties of antitrust regulation in the new economy. However, it also makes clear that the Microsoft case did not provide a structure for antitrust regulation that can be rigidly or faithfully applied to antitrust analyses of all high-technology companies. As one example, it is likely that the government got some things wrong such as narrowly defining the market with respect to the underlying technology. It is clear how this could pose problems in future analyses as it may have with the Google-Yahoo deal. It is clear that the Microsoft case did not even address all the potential antitrust considerations that will arise with relation to New Generation Firms. This is clear given the potential antitrust concerns related to data portability with Facebook. In conclusion, courts and regulators must be willing to recognize the way that technology can influence antitrust analyses, without losing sight of the ultimate goal: fostering competition.

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<sup>136</sup> Beyond Facebook’s presumed desire to maintain control over user information, privacy concerns may also result in a significant barrier to making user information freely available. *See id.* This concept may be thought of as an extension of Professor Lessig’s concern that anticompetitive behavior may be more easily accomplished with respect to software (in this case, software related information), than it would be by traditional contracts or business means. *See supra* Part II.B.