
Platform Accountability and Contemporary Competition Law: Practical Considerations

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Introduction and Conclusion

“ *As you know, many people think it is a very antitrust situation, the three of them. But I just, I won’t comment on that.”*

President Donald Trump with respect to Google, Facebook, and Amazon, interview with Bloomberg News, August 30, 2018.

Digital platforms that enable two-sided markets—Google, Facebook, Amazon, and Twitter, among others—are, to understate the case, the object of significant and growing critical attention. Their economic, social, political, and cultural power has become a source of disquiet.¹ A concern that is only heightened by the certainty that some of the companies’ activities have been exploited by hostile intelligence and security services.

The discussion about how to deal with the power of digital companies is growing in volume and intensity. Competition law has been employed by officials in Europe and recommended by advocates in the United States as a device to control or ameliorate digital

¹ In an effort to address the deep societal and public policy implications of the power of digital platforms, the Platform Accountability Project at the Shorenstein Center on Media, Politics, and Public Policy at Harvard Kennedy School is publishing white papers and policy briefs on the topics of regulation, digital privacy, algorithmic bias, and online misinformation. The team of fellows includes Tom Wheeler, former Chairman of the Federal Communications Commission; Dipayan Ghosh, PhD, former advisor on privacy and technology policy at Facebook and the White House; and the author. Read other papers published by the team [here](#).

platform company power. Are competition laws in fact better than potential alternatives, a first or a last resort?

At its most fundamental level, antitrust law as presently construed is concerned with two evils: the possibility that buyers are paying too much and receiving too little, and the possibility that industry dynamism or progressiveness is being impaired. Antitrust law does not deal in a direct way with other concerns, for example, with privacy, political or cultural influence, national security, or income distribution.

What are the practical realities confronting the Assistant Attorney General for Antitrust and the Chairman of the Federal Trade Commission if they contemplate using their antitrust authority to address these concerns? What should they consider as they contemplate the possibility of bringing the kind of government monopolization case that has become a once in a generation occurrence?

This essay focuses on competition law as presently understood and practiced and its applicability to the current digital marketplace. It does not address the other controversies surrounding the major platforms. It is limited to a description of the laws available to the antitrust agencies and the other relevant considerations facing the heads of the federal antitrust agencies if they were to consider a major action—a monopolization case—against a major platform. Collectively, they constitute formidable, though not insurmountable, obstacles to successfully concluding a lawsuit seeking to diminish or dismantle the power, economic or otherwise, of any of the major platforms.

Its present custodians insist that the antitrust laws are sufficiently flexible to address high technology platforms,² that the laws as presently construed would reach the status and activities of major platforms. Accepting that view provides a starting point in this consideration of platform accountability.

But it is just the beginning. Any exercise of the law's monopolization provisions necessarily confronts a range of practical considerations,³ including

² See, e.g., Makan Delrahim, "All Roads Lead to Rome: Enforcing the Consumer Welfare Standard in Digital Media Markets," Rome, May 22, 2018; "Don't Stop Believin': Antitrust Enforcement in the Digital Age," Chicago, May 19, 2018.

³ The leading antitrust scholar Herbert Hovenkamp provides a useful summary of the practical concerns a government decision maker would confront: Antitrust is a form of government intervention in the market, and our capitalistic system places a great deal of faith in markets. Perhaps unfortunately, nothing in the monopolization statute defines precisely, or even generally, when government intervention is necessary. Given this lack of a statutory definition and our underlying commitment to markets, one must conclude that antitrust intervention is appropriate only when we can have some confidence that intervention will make a particular market work better. Further, the improvements have to be sufficient to justify the expenses and uncertainty costs that accompany intervention, and these can be substantial. Finally,

the unavoidable uncertainties surrounding litigated outcomes; the time to resolution; the changes in technology, business models, and consumer preferences that will occur inside the time envelope; the opportunity costs to a prosecuting agency; and the difficulty in conceiving remedies that are sure to bring net benefits. The last two significant government monopolization prosecutions, both involving technology companies, provide illustrations. Among the practical considerations, they afford a reflection on what may be the most important one of all: the uncertainty of what would eventuate from a successful prosecution.

Taken together, the state of the relevant jurisprudence and numerous associated practical considerations cast a shadow over the efficacy of existing competition laws as a major—let alone the principal—legal mechanism securing society’s interests in the operations of major platforms. Describing the considerations involved in deploying the antitrust laws against internet platform power raises the question—a very significant question—of whether it would be better to look elsewhere for such assurances.

monopolistic conduct comes in unlimited varieties, many of which cannot even be anticipated until the technology that makes them possible has been developed. This gives the judge the unusually difficult task of applying extremely open-ended statutory language to an exceptionally open-ended set of circumstances. As a result, about the best we can do is define monopolization at a high level of generality and hope that our federal tribunals are both undaunted and circumspect. Herbert Hovenkamp, *The Monopolization Offense*, 61 *Ohio State L. J.* 1035, 1049 (2000).

The Antitrust Enforcer's Checklist

Are there practical remedies that do more good than harm?

A government decision to engage an economic actor or practice begins, of course, with the question, is there sufficient cause to be concerned as an apparent factual matter? Does it appear that there is market power in a properly defined economic market? Does it appear that there are business practices that seek to exclude rather than to compete on the merits? This essay does not address the threshold issue of whether an investigation should be undertaken or of whether, if it were, there would be sufficient grounds to proceed against any particular platform. Instead, it assumes that these conditions precedent have been met. Following a finding of probable cause to be concerned, what are the threshold legal and other considerations that affect a decision?

Those considerations principally include:

- What jurisprudence is available? Is it favorable or unfavorable? What has been the agency's experience in proving antitrust liability in roughly analogous circumstances?
- What degree of confidence can an official have at the threshold that there are available, practical remedies that would do more good than harm? There are well established antitrust remedies, but the efficacy of one or more of them in any given factual circumstance has to be carefully considered.
- Whether, in light of resource constraints, a major platform investigation and potential enforcement should constitute an institutional priority? Asked differently, what are the opportunity costs associated with proceeding? Major government antitrust actions are time consuming and resource intensive, something that is particularly so with respect to actions that address single firm conduct.

Assuming the existence of market power, there are three provisions of antitrust law relevant to a major two-sided platform: Section 2 of the Sherman Antitrust Act⁴; Section 5 of the Federal Trade Commission Act⁵; and Section 7 of the Clayton Act⁶. Each of these provisions is stated in very general terms, but as construed by the courts, especially the Supreme Court, intervention against suspected unilateral misuse of market power is a challenging proposition.

4 15 USC 2.

5 15 USC 45(a).

6 15 USC 18.

1. The Jurisprudential Context

Before looking at the specific competition provisions potentially relevant to major platforms, a brief reflection on the larger jurisprudential context is required. It is the milieu in which pragmatic government policymakers work. It informs them as they assess what is practically rather than merely theoretically possible.

There is one contextual or atmospheric consideration that is especially important. The platform issue arises in the context of a larger ongoing debate about the proper nature of the antitrust laws, a debate recently energized by reflections on the platforms themselves.

For nearly five decades, antitrust jurisprudence and policy have been dominated by insights that by convention are described as the “Chicago School.” To simplify more numerous and specific points of doctrine, the Chicago School insists that antitrust law should be exclusively about economic considerations, not other societal values, and that the primary economic consideration should be efficiency, essentially maximizing output. This view was promulgated with the aid of relatively simple neoclassical economic models, most famously summarized in Robert Bork’s *The Antitrust Paradox*.⁷

The antitrust application of these insights is embedded in a larger law and economics movement that contributed decisively to the economic deregulatory policies—the preference for competition over regulation—that gained force in the 1970s and remains conventional policy wisdom today.

The Supreme Court has been prominent among the governing institutions that subscribe to the Chicago School’s non-interventionist doctrine—instantiated in the view that a false positive, an incorrect finding of a violation, is much worse than a false negative, a failure to recognize a violation.⁸ From the General

⁷ Robert Bork, *The Antitrust Paradox, A Policy at War with Itself* (New York, Basic Books, 1978).

⁸ “[J]udicial errors that tolerate baleful practices are self-correcting while erroneous condemnations are not.” Frank H. Easterbrook, *The Limits of Antitrust*, 63 *Tex. L. Rev.* 1 (1984). Judge Easterbrook’s article remains one of the most influential statements of the Chicago perspective more than three decades after it was published. For a later, equally unvarnished view of the superiority of marketplace results over government-induced or -influenced results (including those produced by judges), see

The Court has progressively narrowed the substantive understanding of what constitutes a violation of the antitrust laws and raised the procedural threshold for sustaining an antitrust claim that survives an early motion to dismiss.

Dynamics case⁹ in 1974 to the American Express case¹⁰ at the end of the last term, the Court has progressively narrowed the substantive understanding of what constitutes a violation of the antitrust laws and raised the procedural threshold for sustaining an antitrust claim that survives an early motion to dismiss.¹¹

For reasons related at least in part to institutional capacity, the understanding of the antitrust laws adopted by the courts has not moved particularly far from the original Chicago School perspectives.

Which is not to say that the debate hasn't been joined elsewhere, both in the formal academy and in the mostly Washington-based think tanks that regularly address matters of the regulation of business. The discussion has been going on for decades. At various times it has been styled as the Chicago School versus the Harvard School and the Chicago School versus the Post-Chicago School.¹² As a crude generality, the Chicago School is more prepared to rely upon theoretical priors while the Harvard School takes the theories as a very important, but not determinative, starting point. As a practical matter, the "conservative Chicago School" and the "moderate Harvard School" tend very strongly to come to similar conclusions with respect to individual cases. To critics, these technical discussions over fine points by antitrust economists and lawyers reflect relative Low Church and High Church preferences rather than material doctrinal differences.

The assertion that new approaches are required has been energetically advanced and has found new labels—"Hipster Antitrust" or (for those with more refined tastes) "Brandeisian." The discussion is expansive in terms of subject

Frank H. Easterbrook, *The Chicago School and Exclusionary Conduct*, 31 *Harvard J. L. & Public Policy* 439 (2008).

9 *United States v. General Dynamics Corp.*, 414 U.S. 486 (1974).

10 *Ohio v. American Express Co.*, 625 U.S. ____ (2018).

11 See, e.g., Daniel A. Crane, *Chicago, Post-Chicago, and Neo-Chicago*, 76 *U. Chi. L. Rev.* 1911, 1912-1913 (2009):

As the antitrust agencies turned rightward, the Supreme Court also continued its antitrust retrenchment. As the 1980s became the 1990s, the Court jettisoned a wide swath of Warren Court precedents. Predatory pricing became a disfavored legal theory; maximum resale price maintenance became subject to the rule of reason and hence *de facto* legal; vertical resale price maintenance became difficult to prove; and summary judgment became a favored procedural device in antitrust cases. Still, more work remained to be done in the 2000s, and the Chicago School continued to wreak its vengeance. Away went the presumption of market power in patent tie-ins, the duty of a monopolist to deal with competitors, liberal pleading rules for cartel cases, and, most recently, the ninety-six-year-old rule of *per se* illegality for resale price maintenance. (citations omitted).

12 See Einer Elhauge, *Harvard, Not Chicago: Which Antitrust School Drives Recent U.S. Supreme Court Decisions?*, 3 *Competition Policy International* 59 (2007). See also, Crane, *supra* note 11, at 199. "Whereas the Chicago School tends to argue for the robustness of markets and hence for minimal need for regulatory interventions, the Harvard School tends to focus on the institutional limitations of governmental actors—regulators, judges, and juries—to correct even real market failures. Conjunctively, the two schools often tend toward similar noninterventionist results."

and participants.¹³ The criticism put forth by the insurgents in this debate is fundamental. The exclusive orientation on economics, particularly economics focused exclusively on consumer welfare as technically defined, over the last four-plus decades has produced excessive concentration and with it entirely unsatisfactory results. And the best place to see the unfortunate consequences is in the major platform companies.¹⁴ Even acknowledging the broad benefits the platforms have produced, the social costs have been excessive. Loss of privacy, corporate censorship, foreign influence, uneven wealth distribution, and the loss of dynamism caused by high levels of industrial concentration are only some of the complaints.

Whether the forty year trajectory will change in the foreseeable future inevitably is a matter of speculation. Notwithstanding Brandeisian criticisms, both the most recent Supreme Court decision in *American Express* and the philosophical commitments of the newest justices argue against it.¹⁵ In deciding whether to initiate an antitrust action vis-à-vis a platform company, the government's antitrust officials have to factor in the decidedly conservative trajectory of antitrust jurisprudence.

¹³ Daniel A. Crane, *Antitrust's Unconventional Politics*, *Law and Economics* (2018) *Law and Economics Working Papers* 153. Available at https://repository.law.umich.edu/law_econ_current/153.

¹⁴ For the most prominent example, see Lina Khan, *Amazon's Antitrust Paradox*, 126 *Yale L. Rev.* 710 (2017). See also, Barry C. Lynn, *Cornered: The New Monopoly Capitalism and the Economics of Destruction* (Hoboken, John Wiley & Sons, 2010). For a critique, see Herbert J. Hovenkamp, *Is Antitrust's Consumer Welfare Principle Imperiled?* *Penn Law: Faculty Scholarship* (June 21, 2018). For another characteristically thoughtful and measured contribution to the discussion, see Carl Shapiro, *Antitrust in a Time of Populism*, *Int'l J. of Industrial Organization* (forthcoming).

¹⁵ Kim Hart, *Axios*, "FTC Takes First Steps to Police Big Tech," September 12, 2018:

The debate over the past year has focused on using antitrust measures to, for example, clamp down on the treasure troves of data controlled by Google, Facebook and Amazon — and to prevent them from getting any bigger with new acquisitions. But antitrust law can only go so far in curbing anticompetitive behavior. And under the current administration — and an increasingly conservative Supreme Court — a broader reading of today's antitrust rules is highly unlikely.

2. The Jurisprudence

In the last five decades, there have been only two government monopolization cases against major companies that have resulted in significant relief: AT&T¹⁶ and Microsoft.¹⁷ Both were prosecuted by the Antitrust Division of the Justice Department pursuant to Section 2. The use of Section 2 by the Justice Department or of Section 5 (incorporating Section 2) by the Federal Trade Commission would be the most traditional, straightforward approach to addressing platform monopoly and competition issues. But existing jurisprudence might also allow less traditional approaches employing Section 5 and Section 7.

Section 2

Section 2 of the Sherman Act makes it illegal to “monopolize, or attempt to monopolize, or combine or conspire ... to monopolize any part of ... trade or commerce.”

Section 2 does not make the holding of a monopoly illegal, nor does it make certain exercises of monopoly power illegal. In this regard, it is considerably narrower than its European counterpart, which makes abuse of a dominant position (essentially, monopoly leveraging in U.S. jurisprudence) actionable. What Section 2 does make illegal is the acquisition or maintenance of monopoly through impermissible means. The principal judicial elaboration on the statutory text does not provide a high degree of clarity:

The offense of monopoly under Section 2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market 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.¹⁸

The indeterminate aspect of this important legal standard has been commented upon regularly for more than a century, quite often with a high degree of

¹⁶ United States v. American Tel. & Tel. Co., 552 F. Supp. 131 (D.D.C. 1982), aff’d sub nom Maryland v. United States, 460 U.S. 1001 (1983). (approving settlement)

¹⁷ Microsoft Corp. v. United States, 253 F.3d 34 (D.C. Cir. 2001) (en banc), cert denied, 534 U.S. 952 (2001) (often referred to as “Microsoft III”).

¹⁸ United States v. Grinnell Corp., 384 U.S. 563, 570-71 (1966).

Among many consequences of divestiture, the most important was the rapid development and introduction of new products and services.

asperity.¹⁹ Nevertheless, useful lessons—both jurisprudential and practical—are available from the AT&T and Microsoft prosecutions.²⁰ In addition to indicating the types of conduct establishing liability, the respective histories surface other important considerations related to the cost of conducting the prosecutions and the consequences of winning them. They include significant antecedent engagements between the antitrust authorities and the companies; the existence and importance of litigants allied with the federal government; the extended time frames notwithstanding strong case management by the trial judges; the deployment of significant agency resources; and the very different outcomes in terms of both forms and consequences of the relief obtained.

United States v. American Telephone & Telegraph Co.

The American Telephone and Telegraph Company, the assembly of its various parts known as “the Bell System,” presided over the telecommunications sector in the United States for the first three quarters of the 20th century without equal and virtually without challenge. The Bell System consisted of three tightly vertically integrated monopolies: local telephone service (that represented about 85 percent of local telephone lines in the United States); long distance telephone service (that carried virtually all of the long distance telephone service in the United States); and provision of the equipment used by the operating companies and the Long Lines division.²¹ The monopolies served to protect and reinforce one another. For example, the local operating companies would not interconnect with entities competing with Long Lines. The local operating companies and Long Lines bought equipment exclusively from Western Electric, which in turn would not sell equipment to other entities.

United States v. American Telephone & Telegraph Co. took more than ten years from beginning to conclusion: over seven years of litigation (November 20, 1974-January 8, 1982) as well as more than a year of preliminary investigation and

¹⁹ See, e.g., Einer Elhauge, *Defining Better Monopolization Standards*, 56 *Stanford L. Rev.* 253, 255 (2003):

Vague standards might be uncertain around the edges as applied to tough facts, but at least offer genuinely guiding normative principles. ... Vacuous standards, in contrast, are utterly conclusory, failing to identify a coherent norm that provides any real help in distinguishing bad behavior from good or even in knowing which way certain factual conclusions cut. That is the sad state in which current monopolization doctrine finds itself, employing conclusory labels that offer little insight into which forms of conduct should or should not be deemed undesirable or illegal.

²⁰ See F.M. Scherer, *Technological Innovation and Monopolization*, Faculty Research Working Paper Series, John F. Kennedy School of Government-Harvard University (October 2007). Professor Scherer, one of the United States’ leading antitrust economists, provides an informative perspective on the AT&T and Microsoft cases, at 13-24, 37-47.

²¹ Western Electric, the equipment manufacturer, was supported by Bell Telephone Laboratory, the largest and most important industrial laboratory in the world. See Jon Gertner, *The Idea Factory: Bell Labs and the Great Age of American Innovation*, (New York, Penguin Books, 2013).

two years to implement “the most far-reaching structural remedy in history.”²²

The case followed on a prior government antitrust prosecution as well as antitrust reviews that were abandoned without action by the Justice Department. These antecedents were very important both because they reinforced the view that there were competitive issues that, having been ineffectually handled, had to be readdressed (stated differently, they were a provocation) and because, inadvertently, a settlement provision along the way produced significant leverage in the government’s favor.

In 1949, the Justice Department sued Western Electric Company, the Bell System’s manufacturing arm, for monopoly activity—essentially monopolizing all of the equipment sales to the local Bell operating companies and AT&T’s Long Lines division.²³

The 1949 case lingered without any significant judicial progress, in part because of claims that prosecuting the case during the Korean conflict would compromise the war effort. These claims were predicated upon the Bell System’s national security contributions as a defense contractor,²⁴ claims that were more plausible then than they would become in subsequent years.

In 1956, the case was settled by consent decree.²⁵ The settlement was consequential for two reasons. First, it appeared to be so lenient as to constitute a political scandal. And it was investigated by Chairman Emmanuel Celler’s Judiciary Committee with remarkable thoroughness.²⁶ Second, the terms that both the Bell System and the Justice Department thought were lenient turned out to be very significant. They included a requirement and a restriction. The requirement was that the Bell System open its very substantial patent portfolio to anyone wishing to secure licenses upon payment of appropriate royalties.²⁷ The restriction limited the Bell System to the business of common carrier communications services and the equipment used to produce the services. The restriction, as it turned out, largely prevented the Bell Companies from

22 Crane, *supra* note 11, at 1918.

23 United States v. Western Electric Co., CA No. 17-49 (D.N.J., Complaint, January 14, 1949).

24 John Brooks, *Telephone, The First Hundred Years*, (New York, Harper & Row, 1975), 252-253.

25 United States v. Western Electric Co., 1956 Trade Cas. 68,246 (D.N.J. 1956).

26 See generally 86th Cong., 1st sess., U.S. House of Representatives, Committee on the Judiciary, Antitrust Subcommittee, Report of Antitrust Subcommittee on Consent Decree Program of the Department of Justice (Celler Report), January 30, 1959. In 1958 (85th Cong., 2nd sess.) the same subcommittee issued three volumes of hearings and documents relating to its investigation. Among other things that attracted the subcommittee’s attention was the venue of a private discussion involving the case between the U.S. Attorney General and AT&T’s General Counsel. It occurred at the Greenbrier Resort. The 1982 District Court opinion approving the breakup of AT&T includes a description of the 1949 complaint and 1956 decree. 552 F. Supp. at 135-38.

27 In the event, the Bell System typically demanded cross-licenses rather than money in return.

There were obstacles, apart from politics, that had to be overcome before a complaint could be filed in the U.S. District Court in Washington.

participating in the computer business and, as they developed, communications services that were not labelled “common carrier.” As time passed, this limitation became extremely consequential.

The 1949 complaint and 1956 decree coincided with the beginnings of a Federal Communications Commission-led (sometimes with significant impetus from the U.S. Court of Appeals for the D.C. Circuit)²⁸ program of permitting limited competition to the Bell System monopolies. This took the form of knocking down restrictions to the connection of non-Bell telephones and other terminal equipment to the telephone network.²⁹ It also took the form of licensing non-Bell entities to operate private (i.e., non-common carrier) long distance lines via microwave technology.³⁰

The Bell Companies met these competitive initiatives with resistance remarkable for its thoroughness and zeal. The resistance principally took the form of refusals to interconnect, both telephones (“foreign attachments” to the Bell Companies) and private, and eventually competing carrier, long distance circuits. As it lost individual battles in court and at the FCC, the Bell System would fall back to new positions that had similar preclusive effects. For example, it required that customer provided telephone equipment be attached to the network only through costly and inconvenient-to-acquire protective coupling devices.

Ultimately, in 1973, the controversies surrounding telephony that had been gathering for more than fifteen years invoked the interest of the Office of Telecommunications Policy at the White House and communications policy experts at the Commerce Department, and by mid-1973, at the Antitrust Division of the Justice Department.

Justice’s ensuing investigation led to two conclusions: (1) the Bell System had violated the law by its actions in maintaining its monopolies; and (2) the consequence of the Bell System’s structure and its action was a reduction in the dynamism, or progressiveness, of the telecommunications sector.

There were obstacles, apart from politics, that had to be overcome before a complaint could be filed in the U.S. District Court in Washington. For present purposes, the most important one was that Justice had to be convinced that its proposed remedy, disintegration of the tightly integrated entity, would do more good than harm; to put a fine point on it, that it would not destroy telephone

²⁸ See, e.g., *Hush-A-Phone v. United States* (D.C. Cir. 1956).

²⁹ *Carterfone*, 13 F.C.C. 2d 420 (1968).

³⁰ See, e.g., *Above 890*, 27 F.C.C. 359 (1959), *Reconsideration* 29 F.C.C. 825 (1960); *Specialized Common Carriers*, 29 F.C.C. 2d 870 (1972), *aff’d* *Washington Utilities & Transportation Comm’n v. FCC*, 513 F.2d 1142 (9th Cir. 1975).

service or deprive the country and the world of the discoveries, inventions, and other important Bell Labs outputs, including defense-related products and services in the midst of the Cold War.

Overcoming this and other obstacles began the seven-plus year process of discovery, motion practice, and trial that eventuated in the consent decree—formally, the Modification of Final Judgment (MFJ) of the 1956 Western Electric decree—that broke up the Bell System.

There are three factors to consider against the seven year timeframe that carry serious implications for judgments about undertaking similar prosecutions. First, there was never any serious question about the fact of the defendants' conduct. It occurred almost entirely in public; the question was whether it was justified by regulatory actions or as necessary to provide telephone service. Second, the Justice Department closely coordinated with private litigants, most notably MCI, that had similar antitrust cases against the Bell System.³¹ This lowered the costs and, to some extent, reduced the time required for discovery. Third, the very strong case management of District Judge Harold Greene, who took over the case in 1978, was critical. It accelerated the pace of the prosecution, something especially important at a time when doubts were raised about the capacity of the judicial branch to preside over something so significant.

The MFJ called for the divestiture of the local operating companies, the most important part of the three monopolies in terms of preventing competition (by refusing to deal with non-Bell long distance transmission companies and with non-Western Electric equipment suppliers). It removed the 1956 consent decree's common carrier communications restriction from AT&T, permitting it to enter new markets—computers and computer services in particular.³² But very importantly, it imposed—actually, maintained—line of business restrictions on the Bell operating companies, limiting them essentially to local communications services.

Among many consequences of the divestiture and the other MFJ requirements, two stand out. First, the government economists who proposed the case had predicted that divestiture would enable increases in dynamism. The proved to be the case, probably beyond anyone's expectation. But a very instructive related reality also quickly manifest itself. The post-divestiture developments differed from what had been anticipated. The most specific expectation was that multiple

³¹ MCI Communications Corp. v. American Tel. & Tel. Co., 708 F.2d 1081 (7th Cir. 1983).

³² In what might be seen as a precursor to later net neutrality controversies, the District Court imposed a seven-year restriction on AT&T from engaging in electronic publishing. The bases for the prohibition included concerns that also have emerged with respect to net neutrality, including the possibility that AT&T would provide its proprietary content priority transmission; that it would misappropriate signaling information generated by competitors' services; that it would manipulate

long distance transmission companies would compete for business linking different local operating company pairs—in other words, that there would be competition on a wholesale level. Instead, in the event, it was retail long distance competition between and among AT&T, MCI, Sprint, and others. But what was more important was the rapid development and introduction of new products and services such as fax machines, and overwhelmingly significantly, mobile phones and data transmission services.

The second consequence: the divestiture had barely occurred on January 1, 1984 when the Bell operating companies began to seek relief from the line of business restrictions.³³

From the perspective of policymakers, those consequences contain very important lessons. First, it is impossible to predict in any detail the result of a successful major antitrust intervention in a significant sector of the economy. Second, if the intervention requires any ongoing construction and enforcement of restrictive terms, the battle is not over; rather it is just beginning.³⁴

What does the AT&T litigation contribute to the understanding of Section 2’s prohibition of monopoly maintenance? Because the case was settled short of a litigated verdict, there inevitably remains some room for dispute about the extent of its authority. Nevertheless, the District Court delivered an extensive opinion denying the defendants’ motion to dismiss, finding that “the evidence adduced by the government demonstrate[s] that the Bell System has violated the antitrust laws in a number of ways over a lengthy period of time.”³⁵

The basis for that determination rested on actions that included the previously mentioned refusals by the monopoly local telephone companies to permit the interconnection of competing terminal equipment by outright refusals, followed by interposing requirements that interconnection be performed only through costly, inconvenient, overengineered, and, as eventually shown, unnecessary protective coupling arrangements. They also included the refusals to interconnect with competing long distance companies through flat refusals in some cases and onerous restrictions on locations at which interconnections would be permitted in other cases.³⁶

United States v. Microsoft Corp.

The *Microsoft* case had a life span that by some measures exceeded U.S.

technical interconnections; and that it would engage in discriminatory pricing. 552 F. Supp., at 180-86.

33 Joseph Kearney, *From the Fall of the Bell System to the Telecommunications Act: Regulation of Telecommunications under Judge Greene*, 50 *Hastings L. J.* 1395, 1425 (1999).

34 *Id.*

35 524 F. Supp. 1336, 1381 (D.D.C. 1981).

36 552 F. Supp., at 160-63.

v. AT&T's. It started, by some accounts, in 1990, when the Federal Trade Commission initiated an investigation.³⁷ And it ended with a settlement in 2002 that was approved by the appellate court in 2004.³⁸

The case was dissimilar from *AT&T* in two important ways. First, there was some room—though perhaps not a lot—to debate whether Microsoft had power in a relevant market. In *AT&T*, there wasn't any room to doubt the either the presence of a relevant market or the presence of market power. Second, *AT&T* did not involve an especially dynamic sector of the economy. In fact, the case was largely about *AT&T*'s successful efforts to control every meaningful thing occurring in the sector, including innovation. That decidedly was not so in the Microsoft case. The sector in which Microsoft operated was evolving at a very rapid pace, driven by changes in technology, business models, and consumer preference. The Microsoft case was about an ongoing effort to control its market position in “Intel-compatible personal computer operating systems” at a time largely devoid of stasis.

As noted, just as with *AT&T*, the *Microsoft* prosecution had antecedents.³⁹ The Federal Trade Commission initiated an investigation into the company's practices in 1990. Three years later, a 2-2 vote among participating commissioners left the FTC unable to proceed. At that point, the matter was taken up by the Antitrust Division. The Division brought a case against Microsoft, alleging that the company maintained a monopoly in the operating system market through anticompetitive terms in its licensing practices and its software development agreements. The matter was settled by consent decree in 1995 that, among other things, prohibited Microsoft from tying the licensing of one product to the licensing of another, but also expressly did not prohibit Microsoft from developing integrated products.⁴⁰

Shortly after the decree became effective, Microsoft began requiring computer manufacturers that sought to license its Windows operating system to install its Internet Explorer browser as well. Microsoft argued that the browser was part of the operating system; the government arguing that it was not, commenced a

37 Richard J. Gilbert and Michael L. Katz, *An Economist's Guide to U.S. v. Microsoft*, 15 J. of Econ. Perspectives 25, 26 (2001).

38 *Massachusetts v. Microsoft Corp.*, 373 F.3d 1199 (D.C. Cir. 2004). The end could be moved to an even later date using the resolution with respect to certain non-settling state plaintiffs

39 For an instructive summary of the antecedents, the trial, and appeal, see Timothy J. Brennan, *Do Easy Cases Make Bad Law? Antitrust Innovations or Missed Opportunities in United States v. Microsoft*, 69 George Washington L. Rev. 1042, 1056-67 (2001). (Although the publication date was 2001, the volume actually appeared in 2003.) For an extensive review of the case through an explicitly political lens, see Harry First and Andrew I. Gavil, *Re-framing Windows: The Durable Meaning of the Microsoft Antitrust Litigation*, 2006 Utah L. Rev. 641 (2006).

40 *United States v. Microsoft Corp.*, 56 F.3d 1448 (D.C. Cir. 1995) (often referred to as “Microsoft I”).

The Windows monopoly was protected by an alleged “applications barrier to entry,” an instance of the power of network effects.

contempt proceeding. Although the District Court agreed with Justice, the Court of Appeals overturned the requirement to offer the products on separate terms, explicitly basing its decision on technical aspects of the consent decree rather than an assessment of the Sherman Act’s requirements.⁴¹

Just as with the *AT&T* prosecution, these antecedent engagements constituted a provocation, making it easier for Justice to conclude the existence of systemic competitive problems that should not be overlooked.

Even before it lost the contempt case, in May, 1998, the Justice Department brought its concerns forward in a new case alleging violations of the Sherman Act.⁴² The Department’s case centered on the assertion that Microsoft had targeted Netscape Navigator, a prominent competing browser, in anticompetitive ways. The Department theorized that Microsoft did this to protect its asserted monopoly position in its Windows operating system rather than to secure a monopoly in browsers. The Windows monopoly was protected by an alleged “applications barrier to entry,” an instance of the power of network effects. Application developers would strongly prefer compatibility with the dominant Windows operating system over its smaller rivals. However, in theory, the barrier could be assaulted if “middleware” software⁴³ such as the Netscape Navigator came to host Application Programming Interfaces (APIs) that enabled software developers to “write once, run anywhere.”⁴⁴ In other words, the Justice Department alleged that Microsoft was attempting to prevent the development and deployment of technical solutions that would enable applications to operate universally out of concern that they would diminish the “applications barrier to

41 *United States v. Microsoft Corp.*, 147 F.3d 935, 950 n. 14 (D.C. Cir. 1998) (often referred to as “Microsoft II”).

42 The trial, presided over by Judge Thomas Penfield Jackson, received public attention for reasons that went beyond its obvious industrial and jurisprudential significance—it featured combat between celebrities: David Boies, one of the country’s most prominent litigators, hired by the Justice Department to represent the United States, and Bill Gates, founder and CEO of Microsoft, one of the world’s richest men. As one analyst put it, one reason the case received so much attention was “the flamboyant and brilliant David Boies skillfully seduced the media into playing the story as a gladiatorial battle between good (him) and evil (Gates).” Irwin M. Stelzer, *Microsoft and the Antitrust Laws: Old Fashioned Problems and a New Economy Company* (AEI-Brookings Joint Center for Regulatory Studies Policy Matters 01-09, 2001). The media aspects of the case eventually got the better of Judge Jackson, who was disqualified by the Court of Appeals because of his “evident efforts to please the press.” *Microsoft III*, at 117. By the time the case finally ended, it also had attracted the participation of many of the country’s most prominent lawyers and industrial organization economists.

43 That is, software riding on top of the operating system, but hosting applications that also were compatible with operating systems competitive with Windows.

44 The “write once, run anywhere” was a marketing slogan employed in connection with Sun Microsystems’s Java software, which the Justice Department alleged was another target of Microsoft’s campaign.

entry” into the personal computer operating system market.⁴⁵ This amounted to Microsoft’s illegal “efforts to maintain its position through means other than competition on the merits.”⁴⁶

Through the trial stage, the [Justice Department’s] legal strategy [was] a home run, with the district court both making a strong finding of antitrust liability and ordering the remedy the plaintiffs sought. The U.S. Court of Appeals ... upheld the judgment that Microsoft illegally abused its monopoly position. While it rejected the plaintiff’s proposed remedy, it did so on largely procedural grounds.⁴⁷

The Court of Appeals rejected some of the District Court’s findings on liability, but it agreed that Microsoft violated Section 2 in certain of its technical and contracting practices designed to bar its rivals from cost-efficient means of distribution.

Microsoft licensed its Windows operating system with conditions that strongly inhibited computer manufacturers (OEMs) from pre-installing Netscape Navigator as a second browser.⁴⁸ The Windows license also prohibited the manufacturers from altering the initial boot sequence, precluding them from making available the opportunity for customers to select from among alternative Internet Access Providers (i.e., Internet Service Providers and online services such as AOL) when they first used their computers. Since some of the online companies supported the Netscape Navigator, this further diminished it as a competitive threat.⁴⁹ And the license restricted the manufacturers from making any changes to the appearance of the Windows desktop, preventing any non-Windows programs from launching automatically.⁵⁰

Microsoft also engaged in technical design initiatives that had the purpose of more tightly binding Windows and Internet Explorer. It removed Internet Explorer from the Windows Add/Remove Programs utility. And it commingled code providing browsing functionality with code providing operating system functionality, causing any attempt to delete Internet Explorer to cripple the Windows operating system.⁵¹

Microsoft also concluded Internet Explorer contracts with Internet Access Providers, offering free browser licenses to hundreds of IAPs, and promotional

45 Microsoft III, at 53-55.

46 *Id.*, at 56.

47 Brennan, *supra* note 39, at 1043.

48 Microsoft III, at 60-61.

49 Microsoft III, at 61-62.

50 Microsoft III, at 62.

51 Microsoft III, at 64-65.

consideration to the ten largest IAPs in exchange for commitments to promote and distribute Internet Explorer exclusively. It eventually secured exclusive deals with fourteen of the fifteen largest access providers in North America.⁵²

Having foreclosed the two most efficient browser distribution channels—pre-installation and Internet access providers—Microsoft sought to inhibit independent software vendors from incorporating Netscape Navigator into their products. It did this by providing preferential access to new Windows versions in development, to technical information, and to the ability to use Microsoft seals of approval. In return, the developers committed to use Internet Explorer as the default browsing software for any products with a hypertext-based user interface.⁵³

The Court of Appeals also agreed with the District Court’s finding that Microsoft effectively compelled Apple to abandon Netscape Navigator and make Internet Explorer its default browser by threatening to shut down the Mac Office suite of applications on which Apple’s survival in 1997 appeared to hinge.⁵⁴ Similar strong arm tactics caused Intel to discontinue a project to create a Windows-compatible cross-platform interface based on Sun’s Java language, eliminating another potential avenue for breaching the applications barrier to entry.⁵⁵

Finally, the Court also found that Microsoft had undertaken an extensive effort to reduce the possibility that Sun Microsystem’s Java middleware, by enabling cross-platform porting of applications, would threaten its Windows monopoly. The effort began with Microsoft designing its own Java Virtual Machine (JVM) for use with Windows, a development that admittedly caused Java applications to run faster on the Windows system than Sun’s pre-existing JVM. However, Microsoft then took two additional steps that the Court found to be impermissible. It offered technical support and other inducements to dozens of important software developers in return for their commitment to make their Java applications reliant on the Microsoft JVM version and to refrain from distributing Sun-standard JVMs to Windows users. Microsoft also provided a set of software development tools to assist independent software vendors in designing Java applications. However, it engaged in deception, causing developers to believe that their applications would be portable whereas in fact they would run only on Windows.⁵⁶

As noted, the Court of Appeals overturned the District Court’s remedial

52 Microsoft III, at 67-72.

53 Microsoft III, at 71.

54 Microsoft III, at 72-74.

55 Microsoft III, at 77-79.

56 Microsoft III, at 74-76.

order requiring Microsoft’s restructuring into an operating systems company and an applications company. Instead, following remand,⁵⁷ the Court of Appeals eventually approved a consent decree that contained an elaborate set of requirements aimed at the specific conduct found impermissible at trial.⁵⁸ The requirements included prohibitions on limitations on Windows licenses to OEMs and affirmative API disclosure obligations. The Second Modified Final Judgment⁵⁹ also appointed a Technical Committee to oversee certain Microsoft initiatives and to issue reports on its findings every six months.⁶⁰

What does the *Microsoft* litigation contribute to the understanding of Section 2’s prohibition of maintenance of monopoly? Microsoft was found liable for actions against potential, not actual, competition. It illustrates the flexibility of Section 2 jurisprudence in finding liability in an indirect rather than a direct attack. The limitations in its software licensing agreements effectively prevented third parties—OEMs and content portals—from serving as efficient distribution channels for a product that in theory could facilitate lowering monopoly market entry barriers. And Microsoft did the same thing with technical design, essentially reinforcing the contractual restrictions. It engineered technical incompatibilities into some of its software to make independent developers’ dealings with other operating systems more expensive. Further, it strong armed a customer, Apple, and a vendor, Intel, to discontinue activities facilitating the feared indirect threat.

In sum, Microsoft took every measure it could to insure that Microsoft Windows would remain incompatible with other operating platforms. From that point the Microsoft story is rather old fashioned. Not a single allegation in the government’s complaint is a challenge to Microsoft’s innovation practices. Rather the challenged practices included such things as tying or exclusive dealing or contractual terms requiring others to disfavor the systems of rivals. The legal elements of these claims are rather orthodox.⁶¹

Section 5

Section 5 of the Federal Trade Commission Act bans “unfair methods of competition.”⁶² The ambiguous nature of the jurisdictional grant was intentional:

57 *New York v. Microsoft Corp.*, 224 F.Supp.2d 76 (D.D.C. 2002).

58 *Massachusetts v. Microsoft Corp.*, 373 F.3d 1199 (D.C. Cir. 2004).

59 Civil Action No. 98-1232 (D.D.C. Originally entered Nov. 12, 2002; *Modified* Sept. 7, 2006; *Further Modified* Apr. 22, 2009).

60 As a general matter, the *Microsoft* decree has played to bad reviews. See, e.g., Carl Shapiro, *Microsoft: A Remedial Failure*, 75 *Antitrust L. J.* 739 (2009) and First and Gavil, *supra* note 39.

61 Hovenkamp, *supra* note 3, at 1049.

62 15 USC 45(a).

Section 5 provides a basis for a monopoly leveraging case.” And strike the “Commission is entitled to consider.

The [Interstate Commerce] committee gave careful consideration to the question as to whether it would attempt to define the many and variable unfair practices which prevail in commerce and to forbid their continuance or whether it would, by general declaration condemning unfair practices, leave it to the commission to determine what practices were unfair. . . . [T]here were too many unfair practices to define, and after writing 20 of them into the law it would be quite possible to invent others.⁶³

As construed over the intervening century, the provision affords the FTC jurisdiction to enforce Section 2 of the Sherman Act, but more interestingly, its substantive sweep extends beyond Section 2 by some indeterminate amount.⁶⁴ That becomes important should the FTC decide to prosecute a case involving a monopoly platform’s conduct in an adjacent market, even if entry were *de novo*.

The 1972 Sperry & Hutchinson (S&H) decision,⁶⁵ the strongest statement of Section 5’s breadth, occurred at an antitrust enforcement high water mark, just prior to the Chicago School’s insights finding their way to the Supreme Court. It is difficult to find subsequent enthusiasm for the Supreme Court’s S&H ruling “that the Federal Trade Commission does not arrogate excessive power to itself if, in measuring a practice against the elusive, but congressionally mandated standard of fairness, it, like a court of equity, considers public values beyond simply those enshrined in the letter or encompassed in the spirit of the antitrust laws.”⁶⁶ The lack of enthusiasm is notable, and has been noted, in three court of appeals decisions in the 1980s turning back FTC efforts to employ its larger Section 5 jurisdiction.⁶⁷

While the prevailing competition law atmosphere argues against the success of an expansive application of Section 5, there are factors that argue against ignoring it as completely impracticable in the context of social control of major platforms. Those factors include the U.S. law with respect to monopoly leveraging; European law with respect to monopoly leveraging; and the recurrence in important quarters of the statement that extended Section 5 could be deployed against undesirable platform conduct.

63 S. Rep. No. 597, 63^d Cong., 2^d Sess., at 13 (1914).

64 Federal Trade Comm’n v. R.F. Keppel & Bro., Inc., 291 U.S. 304 (1934).

65 Federal Trade Comm’n v. Sperry & Hutchinson Co., 405 U.S. 233 (1972).

66 405 U.S., at 244 (footnote omitted).

67 The appellate decisions are *Boise Cascade Corp. v. FTC*, 637 F.2d 573 (9th Cir. 1980); *Official Airlines Guides v. FTC*, 630 F.2d 920 (2d Cir. 1980); and *E.I. du Pont de Nemours & Co. v. FTC*, 729 F.2d 128 (2d Cir. 1984) (*Ethyl*). See Amy Marshak, *The Federal Trade Commission on the Frontier: Suggestions for the Use of Section 5*, 86 N.Y.U. L. Rev. 1121, 1133-34; William Kovacic and Marc Winerman, *Competition Policy and the Application of Section 5 of the Federal Trade Commission Act*, 76 Antitrust L. Rev. 929, 942 (2010).

In the United States the legal right of a monopolist to exercise its power does not face many legal constraints. It can price at whatever level the market will bear; it can, in general, determine with whom to deal and on what terms; it can enter adjacent markets at will so long as it does not pose a dangerous probability that it will monopolize the new market. This was made plain in a unanimous Supreme Court decision emphasizing that only conduct threatening a dangerous probability that a new monopoly would be created is actionable under Section 2:

The purpose of the Act is not to protect businesses from the working of the market; it is to protect the public from the failure of the market. The law directs itself not against conduct which is competitive, even severely so, but against conduct which unfairly tends to destroy competition itself. It does so not out of solicitude for private concerns but out of concern for the public interest. Thus, this Court and other courts have been careful to avoid constructions of § 2 which might chill competition, rather than foster it. It is sometimes difficult to distinguish robust competition from conduct with long-term anticompetitive effects; moreover, single-firm activity is unlike concerted activity covered by § 1, which “inherently is fraught with anticompetitive risk.” For these reasons, § 2 makes the conduct of a single firm unlawful only when it actually monopolizes or dangerously threatens to do so. The concern that § 2 might be applied so as to further anticompetitive ends is plainly not met by inquiring only whether the defendant has engaged in “unfair” or “predatory” tactics. Such conduct may be sufficient to prove the necessary intent to monopolize, which is something more than an intent to compete vigorously, but demonstrating the dangerous probability of monopolization in an attempt case also requires inquiry into the relevant product and geographic market and the defendant’s economic power in that market.⁶⁸

This and other judicial holdings essentially remove Section 2 from any consideration in a controversy involving conduct by a firm with market power in other markets. The underlying policies resonate with Chicago School concerns—a fear that monopoly holders could become circumspect rather than vigorous in their marketplace conduct and that intruding courts could err in the form of a false positive. It also resonates with one of the Chicago School’s

68 *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 458-59 (1993) (citations omitted). The rigor of the monopolization requirement was repeated later in the same term in *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 224-25 (1993):

That below-cost pricing may impose painful losses on its target is of no moment to the antitrust laws if competition is not injured: It is axiomatic that the antitrust laws were passed for “the protection of *competition*, not *competitors*.” Earlier this Term, we held in the Sherman Act § 2 context that it was not enough to inquire “whether the defendant has engaged in ‘unfair’ or ‘predatory’ tactics”; rather,

strongest, and most strongly defended, theoretical claims, that a monopolist will exercise its power in the economic market where it enjoys it rather than seeking to secure its benefits in other markets, and the corollary, that antitrust's principal focus should not be on unilateral action in any event.⁶⁹

The European perspective on the limits of a monopolist's permissible conduct is very different. Article 102 of the Treaty on the Functioning of the European Union prohibits abusive conduct by companies that have a dominant market position. Just as with U.S. law, European Union law does not make the holding of a dominant position illegal, but it does invest the status with special responsibilities that make instances of monopoly leveraging illegal. Suspect conduct by a dominant firm includes excessively high or low prices, forcing requirements contracts on buyers, and "refusing to supply input indispensable for competition in an ancillary market."⁷⁰

Two recent decisions against Google illustrate the European Commission's deployment of Article 102. In 2017, the Commission found a violation in Google's offering of its comparison shopping service.⁷¹ According to the Commission, Google used its dominant position in search to favor its own comparison shopping service while demoting competing comparison services. It did so by placing its service at or near the top of search results and relegating competitors to inferior positions. "Evidence shows that even the most highly ranked rival service appears on average only on page 4 of Google's search results, and others appear even further down."⁷² In consequence, Google was ordered to treat rival comparison shopping services and its own equally and to apply the same processes and methods to the position and display of all services, rivals and its own.⁷³

Noting that "dominant companies have a special responsibility not to abuse their powerful market position by restricting competition, either in the market where they are dominant or in separate markets," the Commission in 2018

we insisted that the plaintiff prove "a dangerous probability that [the defendant] would monopolize a particular market." Even an act of pure malice by one business competitor against another does not, without more, state a claim under the federal antitrust laws; those laws do not create a federal law of unfair competition or "purport to afford remedies for all torts committed by or against persons engaged in interstate commerce." (citations omitted, emphasis in original.)

⁶⁹ See, e.g., Richard Posner, *The Chicago School of Antitrust Analysis*, 127 U. Pa. L. Rev. 925, 926-29 (1978).

⁷⁰ European Commission-Competition, "Antitrust procedures in abuse of dominance," http://ec.europa.eu/competition/antitrust/procedures_102_en.html

⁷¹ European Commission-Press release, "Antitrust: Commission fines Google 2.42 billion Euros for abusing dominance as search engine by giving illegal advantage to own comparison shopping service." 27 June 2017.

⁷² *Id.*

⁷³ *Id.*

found that Google had engaged in three illegal practices aimed at cementing its dominant position in general Internet search.⁷⁴ According to the Commission, Google effectively required the pre-installation of its search engine and the Chrome browser on all devices employing the Android operating system. In addition, it provided significant financial incentives to terminal device manufacturers and mobile network operators on condition that they exclusively pre-install Google Search across their entire portfolio of Android devices. And it prevented device manufacturers that used Google’s proprietary version of Android from offering any modified (“forked”) version of the operating system.⁷⁵

While these allegations might have been brought forward under a U.S. Section 2 regime as instances of maintenance of monopoly, the abuse of dominance legal threshold existing in the European Union made it easier to prosecute the matters. These instances as well as others, including a pending European investigation of Google’s AdSense practices, raise the question of whether Section 5 of the FTC Act, unlike Section 2 of the Sherman Act, might support a monopoly leveraging prosecution. In other words, whether the FTC could prosecute a major platform for activities in a new market into which it had expanded.

Professor Hovenkamp as the “sole custodian” of the comprehensive treatise describing and analyzing the antitrust laws⁷⁶ is one of the most influential commentators on the current state of, and possibilities residing in, U.S. competition law.⁷⁷ Professor Hovenkamp has pointed out the possibility that “the open ended ‘unfair methods of competition’ language of the FTC Act would permit recognition of an action akin to ‘abuse of dominance’ under European law.”⁷⁸ Using as a point of comparison a 2007 European Commission case involving Microsoft’s entry into the server market, Professor Hovenkamp notes that the abuse of dominance “formulation clearly contemplates conduct by which a monopolist takes unreasonable advantage of its position in one market in order to cause harm in a second market. Such rules can be particularly important in dominated networks, which are markets that have stringent compatibility, or interoperability, requirements but also have dominant firms.”⁷⁹

Professor Hovenkamp makes clear that the jurisprudential possibility

⁷⁴ European Commission-Press release, “Antitrust: Commission fines Google 4.34 billion Euros for illegal practices regarding Android mobile devices to strengthen dominance of Google’s search engine.” 18 July 2018.

⁷⁵ *Id.*

⁷⁶ Philip E. Areeda and Herbert Hovenkamp, *Antitrust Law* (4th ed. 2018).

⁷⁷ See Rebecca Haw Allensworth, *The Influence of the Areeda-Hovenkamp Treatise in the Lower Courts and What It Means for Institutional Reform of Antitrust*, 100 Iowa L. Rev. 1919, 1925 (2015).

⁷⁸ Herbert E. Hovenkamp, *The Federal Trade Commission and the Sherman Act*, 62 Fla. L. Rev. 871, 874-75 (2010).

⁷⁹ *Id.*, at 874.

residing in Section 5 doesn't automatically equate with good policy. "Conduct in a secondary market that falls short of threatening monopoly there can be competitively harmful, but the harm to competition must be apparent."⁸⁰ But he also points out advantages to pursuing these kinds of claims under the FTC Act rather than the Sherman Act; the FTC Act does not enable private plaintiff actions and treble damages.

Permitting private plaintiff actions against networks [where "spillovers into collateral markets are very common and some injury is inevitable"] could greatly increase the cost of operating such networks. The prosecutorial discretion of an agency rather than private incentives seems better suited to confine enforcement to truly serious situations, and the remedial limitation to a cease and desist order will limit the cost of false positives.⁸¹

Professor Hovenkamp repeats the assertion about Section 5 in the Antitrust Treatise, stating flatly that Section 5's "prohibition of 'unfair methods of competition' can reach instances of 'leveraging' activity, relating monopolized and nonmonopolized markets in circumstances where Section 2 of the Sherman Act cannot."⁸²

The potential practical import of this possibility has been illustrated in two high profile matters involving major platforms. Following a two-year investigation, the FTC's Bureau of Competition advanced Professor Hovenkamp's views in support of its recommendation—ultimately rejected by the Commissioners—to bring a maintenance of monopoly action against Google with respect to online search and advertising markets.⁸³

The other significant statement of the broader uses of Section 5 is found in the Federal Communications Commission's 2018 net neutrality order. In arguing that most violations of net neutrality by Internet Service Providers could have been prosecuted under the antitrust laws rather than the Communications Act, the FCC majority asserted that "we note that FTC enforcement of Section 5 is broader [than Section 2] and would apply in the absence of market power."⁸⁴

⁸⁰ *Id.*, at 875.

⁸¹ *Id.*

⁸² Areeda & Hovenkamp, *supra* note 76, para. 772h, citing the Florida Law Review article. See *supra* note 78.

⁸³ Federal Trade Commission, "Google Agrees to Change Its Business Practices to Resolve FTC Competition Concerns in the Markets for Devices Like Smartphones, Games and Tablets, and in Online Search," January 3, 2013. In an unusual occurrence, every other page of the Bureau of Competition's August 8, 2012 recommendation was leaked to the Wall Street Journal, which published the partial memorandum in 2015. The staff reference to Professor Hovenkamp's perspective on Section 5 is at n. 484.

⁸⁴ Restoring Internet Freedom, WC Docket 17-108, 33 FCC Rcd 311, ____, n. 523 (2018). For jurisdictional

Authority to address monopoly leveraging thus appears to exist. However in addition to the noninterventionist atmosphere noted in Section 1 above, there are further obstacles to its use.

The resolution of unfairness claims depends upon how the FTC and the courts interpret Section 5(n) of the FTC Act.⁸⁵ It conditions the FTC's ability to declare an act or practice unfair on three factors. First, that it causes or is likely to cause substantial injury to consumers. Second, that it is not reasonably avoidable by consumers themselves. And third, it is not outweighed by countervailing benefits to consumers or competition. The Commission is entitled to consider established public policies in reaching a determination about whether an act or practice is unfair, but not allowed to let these established policies constitute the primary basis for the determination. The FTC has made use of its unfairness jurisdiction in cases that do not obviously also invoke antitrust liability, but certainly not cases of a magnitude involving major platforms.

The interpretive challenge is further affected by the FTC's August 13, 2015, "Statement of Enforcement Principles Regarding 'Unfair Methods of Competition' Under Section 5 of the FTC Act." The Statement is normative rather than binding, but is likely to be brought into any assertion of platform monopoly leveraging. It essentially states that in deciding to challenge an act or practice as unfair on a standalone basis (i.e., separate from an antitrust violation), the Commission would consider values that have emerged from the antitrust jurisprudence over the last several decades. These most prominently include, first, the promotion of consumer welfare rather than other concerns as paramount and, second, harm to competition or the competitive process rather than harm to particular competitors as the appropriate objects of government intervention. The Statement also indicates a disinclination to use standalone authority if antitrust enforcement is sufficient to address the competitive harm emanating from the challenged activity.

Section 7

Section 7 of the Clayton Act,⁸⁶ the principal merger control provision in U.S. law, forbids acquisitions "the effect of [which] may be substantially to lessen competition, or to tend to create a monopoly." The provision, which in one form or another has been around since 1914, was significantly strengthened by an amendment in 1950 and by the passage of the Hart-Scott-Rodino Antitrust Improvements Act in 1976.⁸⁷ The latter provision subjects any merger or

purposes, the Restoring Internet Freedom order had the effect of reposing responsibility for most Internet-related matters with the Federal Trade Commission.

85 15 USC 45(n).

86 15 USC 18.

87 15 USC 18a.

Section 7 provides a basis for post-consummation divestitures.

acquisition of significant size to pre-merger review by the Antitrust Division or the Federal Trade Commission. While not literally requiring merging firms to obtain prior government approval, the effect of the process is not dissimilar. The antitrust agencies, while retaining the burden of proof that a merger may substantially lessen competition, have the opportunity to seek an injunction against the consummation of any suspect transaction.

In certain important instances, major platforms cleared acquisitions through the Hart-Scott process that later appeared to be very important to their marketplace strength. For example, Google acquired DoubleClick on a 4-1 vote of the FTC in 2007 and AdMob on a 5-0 vote of the FTC in 2010. Both acquisitions have proved highly significant, probably critical, to Google's adtech business. Similarly, Facebook acquired Instagram on a 5-0 vote of the FTC in 2012, an acquisition that has proved to be very important to the company's overall business and one that some argue eliminated a very important potential competitor in the social network space.⁸⁸ In 2014, the FTC permitted Facebook's acquisition of WhatsApp without challenge.

The conventional use of Section 7, then, involves challenging questionable acquisitions before they can be consummated. Given that the desirability of more aggressive merger enforcement appears to be a point of some agreement among contemporary expert commentators,⁸⁹ one would expect Section 7 to be employed more readily than in the past. Although it is not commonly employed, Section 7 also enables litigants to seek to undo mergers after they have been consummated. The leading case is a 1957 Supreme Court decision upholding a requirement that the DuPont company divest a 23 percent interest in General Motors stock acquired in 1917 to 1919.⁹⁰ That case occurred in the pre-Hart-Scott-Rodino era, when the lack of notice of impending mergers meant it was typical for enforcement actions to be brought after mergers had been consummated. The DuPont-GM case and others that followed it generally allow the submission of post-acquisition evidence to establish liability or innocence.⁹¹

In the forty-plus years since the passage of the Hart-Scott law, Clayton Act actions against consummated mergers have become much less common. But they do occur, and they have resulted in divestitures.⁹²

88 Tim Wu, "The Case for Breaking Up Facebook and Instagram," *The Washington Post*, September 28, 2018.

89 See, e.g., Shapiro, *supra* note 14.

90 *United States v. E. I. du Pont de Nemours & Co.*, 353 U.S. 586, 597-98 (1957).

91 See, e.g., Scott Sher, *Closed but Not Forgotten: Government Review of Consummated Mergers Under Section 7 of the Clayton Act*, 45 Santa Clara L. Rev. 41 (2004) for analysis of the difficulties inherent in assessing post-acquisition evidence.

92 See, e.g., *Chicago Bridge & Iron Co. v. Federal Trade Commission*, 534 F.3d 410 (5th Cir. 2008); *Steves & Sons, Inc. v. JELD-WEN*, (E.D. Va., Civ. Action No. 3: 16cv545, October 5, 2018).

3. Available Remedies

The AT&T and Microsoft experiences provide some insight into the possibilities available to the government. The AT&T case sought divestiture from the beginning... The Microsoft case represents a more complicated picture.

The state of the law on liability—has there been a violation or not—is one major consideration. A second is whether there is a remedy or remedies, assuming liability, that would produce more good than harm. In the circumstance of major platforms, the starting point necessarily is the basis for the assumed liability. From the perspective of the antitrust laws, it would have to be activities that harmed competition and, in the process, damaged dynamic efficiency.

The antitrust jurisprudence has produced a significant array of remedies that have been applied, often in combination. It is important to appreciate both the overarching significance of circumstance in their use and also the extent of controversy over their efficacy in particular cases. The most significant remedies in major Section 2 cases have been:

- divestiture
- prohibition of engaging in identified lines of business
- duties to deal/injunctions against exclusive dealing
- compulsory licenses
- prohibitions on discrimination

At least from the perspective of today's Antitrust Division, the range of available remedies is affected by the very strong preference of Makan Delrahim, the incumbent Assistant Attorney General. Mr. Delrahim has indicated an absolute preference for structural rather than behavioral remedies, at least with respect to mergers. By contrast, Joseph Simons, his counterpart as Chairman of the Federal Trade Commission, has not taken as categorical position on remedies and in fact has participated in ordering conduct limitations.

The *AT&T* and *Microsoft* experiences provide some insight into the possibilities available to the government. The AT&T case sought divestiture from the beginning. Although there was occasional wavering during the years of litigation, the Justice Department ultimately held to its original position and settled the case with the largest antitrust restructuring in history. The restructuring in fact changed important incentives facing the divested elements of the old Bell System and opened space for a material expansion of the relevant

The very fact of a prosecution may significantly affect the marketplace.

ecosystem and considerable dynamism in the sector.⁹³

It would be a serious mistake, however, to underestimate the complex nature of the *AT&T* divestiture. It took two years to accomplish and required, among other things, significant changes to business arrangements and regulatory institutions. Without the existence and participation of the Federal Communications Commission and the state regulatory agencies in facilitating the adjustments, it is unlikely that the divestiture would have been undertaken, let alone succeeded. It also would be a serious mistake to overlook the fact that many of the divestiture-related complications involved contending with decades-old arrangements and equities that were a product of regulation.⁹⁴ In that sense, unregulated industries likely would pose fewer complications.

The MFJ also included line of business restrictions applicable to the divested local telephone companies and, to a lesser extent, to the divested AT&T long distance operation. Those behavioral restrictions were the subject of continuing contention from 1984 until 1996, when they were superseded by major amendments to the Communications Act.⁹⁵ In that sense, they constitute an example of some of the concerns that Mr. Delrahim has raised about reposing in the judiciary and the Antitrust Division the kinds of responsibilities more commonly placed with specialized regulatory agencies.

The *Microsoft* case represents a more complicated picture. The complaint did not seek divestiture. Following its finding of liability and an extended but ultimately unsuccessful effort to reach a mediated judgment—the effort presided over by the formidable Judge Richard Posner—the Court ordered a restructuring of Microsoft into an operating systems company and an applications company, with the former subject to line of business limitations. The Court of Appeals overturned the remedial aspects of the order on the procedural ground that the District Court failed to conduct a hearing before imposing the remedy. However, it also made it clear that it was not convinced that, in the circumstances, restructuring was appropriate:

Indeed, it is noteworthy that a case of this magnitude and complexity has proceeded from the filing of complaints through trial to appellate decision in a mere three years.

⁹³ See, e.g., Anne K. Bingaman, *Antitrust Policy for the Twenty-first Century*, 48 *SMU L. Rev.* 1669, 1670-1672 (1995).

⁹⁴ By way of example, the Bell System and its regulators had allocated the common costs of producing telephone service in a manner that resulted in lower local service prices and higher long distance prices. How to maintain the direction and size of these benefit flows was a material question.

⁹⁵ See, e.g., Kearney, n. 33, *supra*.

What is somewhat problematic, however, is that just over six years have passed since Microsoft engaged in the first conduct plaintiffs allege to be anticompetitive. As the record in this case indicates, six years seems like an eternity in the computer industry. By the time a court can assess liability, firms, products, and the marketplace are likely to have changed dramatically. This, in turn, threatens enormous practical difficulties for courts considering the appropriate measure of relief in equitable enforcement actions, both in crafting injunctive remedies in the first instance and reviewing those remedies in the second. Conduct remedies may be unavailing in such cases, because innovation to a large degree has already rendered the anticompetitive conduct obsolete (although by no means harmless). And broader structural remedies present their own set of problems, including how a court goes about restoring competition to a dramatically changed, and constantly changing, marketplace.⁹⁶

By the time that a final remedial order was entered, the formal, judicial consequences of the multiyear effort were relatively minor. There were time-limited conduct and monitoring impositions, preventing Microsoft from interfering with the distribution of middleware to OEMs and from limiting consumers to install non-Microsoft middleware. But the conventional assessment is that they had little practical effect on the salient industrial realities.⁹⁷ Microsoft's Windows operating system continued to be the marketplace leader in desktop computers, just as it was when the case was filed.

After reviewing several significant antitrust prosecutions, including *AT&T* and *Microsoft*, Professor Scherer concluded:

In a majority of the cases, it took far too long, and in some instances several attempts, to come to grips with the problems. By the time the courts were ready for judgment, technological and economic changes had radically altered the environment in which the remedies originally sought would apply. This holds true for the unusually expeditious Microsoft litigation, which, at least in the United States, achieved little or nothing in the end. The most rapid solutions were achieved through negotiated consent decrees, which require a belief on the part of the respondents that they will not be seriously disadvantaged. In ... *AT&T* (1982), the corporate settler [was] too optimistic—the decree[] did open up avenues for substantially enhanced technological competition. ... In *Microsoft*, Judge Jackson struggled admirably to weigh the benefits of browser integration against competitive harm, but his efforts were insufficient to

⁹⁶ *Microsoft III*, at 48-49. (citations omitted, emphasis in original).

⁹⁷ See, e.g., Carl Shapiro, *Microsoft: A Remedial Failure*, 75 *Antitrust L. J.* 739 (2009).

convince a skeptical Court of Appeals fearful of impeding technological progress and reluctant to undertake the job on its own.⁹⁸

There may, however, be more to the story. Gary Reback, a private lawyer representing Silicon Valley firms aggrieved by Microsoft, occupies a famous place in encouraging the Justice Department and state attorneys general to investigate and prosecute the antitrust case.⁹⁹ Reback asserts that the fact of the investigation and litigation rather than the formal outcome of the case created an atmosphere that enabled Microsoft's present-day rivals—Google preeminent among them—to emerge as genuine, formidable competitors. In essence, his claim is that the experience caused Microsoft to become more circumspect in the marketplace, appropriately so.¹⁰⁰ Accepting that view, the effect of the prosecution can be seen as enabling (by removing obstacles to) innovation and thus achieving one of the major objectives of the antitrust laws.

The existence of a major antitrust investigation or ongoing prosecution is an important fact among others for any company's competitive exertions, but it also is observable that Google continued to engage in most of the conduct the European Commission was investigating during the course of the investigations.

⁹⁸ See Scherer, *supra* note 20, at 47-48.

⁹⁹ See, e.g., John Heilemann, "The Truth, The Whole Truth, and Nothing but the Truth," *Wired* 8.11 (January 26, 2001) and innumerable other accounts of the *Microsoft* case. (Heilemann has gone on to become a leading analyst of American electoral politics. For example, Mark Halperin and John Heilemann, *Game Change: Obama and the Clintons, McCain and Palin, and the Race of a Lifetime* (New York, Harper, 2010).)

¹⁰⁰ Victor Luckerson, "Crush Them," *The Ringer*, May 18, 2018. Professor Tim Wu agrees with Reback's assessment, ascribing importance to the "policeman at the elbow," the idea that Microsoft was being watched, or "on parole," in preventing anticompetitive activities. FTC Hearings on Competition and Consumer Protection in the 21st Century, Hearing #3, Session 3, October 16, 2018. For a summary of the proceeding and an evaluation of its significance, see Sharon Pian Chan, "Long Antitrust Saga Ends for Microsoft," *SeattleTimes.com* (May 12, 2011).

4. Resource Considerations

Neither the Antitrust Division nor the Federal Trade Commission is a large agency. In this fiscal year, the Antitrust Division staff of approximately 700 includes 335 attorneys as well as somewhat under 100 economists and other analysts.¹⁰¹ The Federal Trade Commission has approximately 1,100 employees spread across the Bureaus of Consumer Protection, Competition, and Economics. Somewhat fewer than half of them, including both attorneys and economists, are devoted to competitive issues.¹⁰²

Because both agencies have responsibilities for Hart-Scott merger review, discretion with respect to deployment of professional resources is constrained. The agencies' leaders cannot predict the waxing and waning of reportable mergers in any given time frame, but they are aware that the numbers can spike and recede without a great deal of warning.¹⁰³ And while the flexibility afforded by prosecutorial discretion permits adjustments in marginal cases, there inevitably will be some unknown number that require extensive review and the associated commitment of professional staff. The consequence is that the resources available for non-merger enforcement is a fraction of the whole (and further subdivided in the case of the Antitrust Division between criminal and civil non-merger enforcement).

Every major investigation and enforcement action, of course, is unique. In the case of the *AT&T* litigation, admittedly an outlier, the Justice Department staff increased steadily, eventually reaching over sixty attorneys and economists in the run up to the trial.¹⁰⁴

101 Antitrust Division, FY 2019 Budget Request.

102 Federal Trade Commission, FY 2019 Budget Request.

103 "In the most recent fiscal year, the antitrust agencies received more than 2,000 HSR filings. The FTC work to challenge anticompetitive mergers has placed a considerable strain on the Commission's resources that were already limited." "Oversight of the Enforcement of the Antitrust Laws," Federal Trade Commission testimony before the Senate Committee on the Judiciary, Subcommittee on Antitrust, Competition Policy, and Consumer Rights, 2-3 (October 3, 2018).

104 Kearney, *supra* note 33, at 1407, n. 35.

5. Temporal Considerations

Major antitrust actions typically take a significant amount of time to resolution. In the case of AT&T, more than eight years from the issuance of Civil Investigative Demands to the settlement agreement. In the case of *Microsoft*, where the starting point and the ending point are susceptible to varying readings, as little as five years and as many as sixteen.

In both cases, the passage of time saw changes in presidential administrations and in the Assistant Attorney General for Antitrust. An agency head contemplating initiation of a major action is aware that he or she almost certainly will not be around to see it concluded, and also is aware that the official who will see it concluded may have a distinctly different perspective on sound competition policy.

More important, as the *Microsoft* Court of Appeals noted, the passage of time is likely to bring major changes in “firms, products, and the marketplace.” In trying to dissuade the District Court of the strength and enduring nature of the Windows operating system, Microsoft put forward a list of potential challengers. The list included “server operating systems,” “handheld computers,” “‘smart’ wireless telephones,” “thin clients,” and “network computer systems.” The District Court conceded that one or another of these technologies might one day challenge Windows’ supremacy, but the “day has not yet arrived, nor does it appear imminent.” These developments would not have any material effect “for the next few years.”¹⁰⁵ A similar judgment applied to the Mac operating system, where “consumer demand for Apple PC systems suffers on account of the relative dearth of applications written to run on the Mac OS.”¹⁰⁶

From the perspective of a government official considering a monopolization case against a major technology company, two very stark realities emerge from this aspect of the *Microsoft* case. Every one of the predicted challenges to Windows materialized. Smartphones, cloud computing, and iOS have had transforming effects on the digital marketplace. And, notwithstanding that, Judge Jackson’s decision to fully discount the challenges was absolutely correct, completely consistent with prevailing law in 1999 and today.¹⁰⁷ Antitrust law quite reasonably discounts developments predicted to occur beyond a very short time horizon.

¹⁰⁵ United States v. Microsoft Corp., 65 F.Supp.2d 1, 5-8 (1999).

¹⁰⁶ *Id.*, at 6.

¹⁰⁷ See U.S. Department of Justice and Federal Trade Commission, Horizontal Merger Guidelines, Section 9, (August, 19, 2010). The 1997 Merger Guidelines, in effect when *Microsoft* was decided,

Epilogue

The enumerated practical considerations taken together discourage the use of the antitrust laws against major platforms.

The enumerated practical considerations taken together discourage the use of the antitrust laws against major platforms. They necessarily would receive explicit consideration by antitrust officials as they weigh whether to proceed against a (presidentially or otherwise) posited “very antitrust situation.” In the end, the policymakers could decide to proceed. They are likely to do so only if they are convinced that they confront a case or cases of enduring market power being exercised to preclude or impair efficient competition, and that they can specify effective remedies.

The *AT&T* and *Microsoft* monopolization cases provide a sense of what a major platform case would be like—in the kinds of proof the government would need to adduce, in the inherent uncertainty stemming from a successful prosecution, and in the opportunity costs associated with the agency resources committed to the prosecution.

These only two major Section 2 cases of the last 45 years grounded liability on conduct that, viewed abstractly, was quite similar. Viewed as a whole, the conduct plainly disclosed an effort to maintain monopolies based on precluding competitors rather than competing with them. The cases involved engagement in aggressive business practices by vertically integrated monopolies concerned about rather attenuated threats of competition from non-integrated competitors. *AT&T* targeted direct competitors. *Microsoft* targeted third parties to blunt potential competition. *AT&T* took unilateral action to blockade entry. *Microsoft* took unilateral action to further raise preexisting barriers to entry.

The defendants engaged in conduct that included outright refusals to deal; creating technical arrangements that were either actually or assertedly incompatible with rivals’ products with the purpose or effect of raising their rivals’ costs; and engaging in exclusive contracts that increased rivals’ distribution and other costs.

Although the formal remedies were dramatically different, at base both cases were about innovation, about making space for improvements in degree and in kind that otherwise would not occur or would occur more slowly. In that sense,

explicitly used a two year time horizon in assessing whether new entry would affect competition. Section 3.2. As the Court of Appeals indicated, it was appropriate for the “District Court to consider only substitutes that constrain pricing in the reasonably foreseeable future, and only products that can enter the market in a relatively short time can perform this function,” citing *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 218 (D.C. Cir. 1986) (Bork, J). *Microsoft III*, at 54.

And so, the question with which we began. Would it be better to look elsewhere for assurances that the major platforms are performing in a manner consistent with—are accountable to—the broader public interest?

they both represented acts of faith in economic theory. As one of the Justice Department’s principal officials prosecuting the *Microsoft* case recently recalled, the case involved “the immeasurable and the unobservable,”¹⁰⁸ a conviction that something good would happen if opportunities were opened up. As it happened, the *Microsoft* case’s “unknown beneficiaries” turned out to be Google, Facebook, and Amazon.¹⁰⁹ William Baxter, the Assistant Attorney General who secured the AT&T settlement, made essentially the same point, describing it as a “wager.”¹¹⁰

Both cases took very long times to resolution, notwithstanding strong case management by the presiding trial judges.

Both cases consumed very material amounts of the agency’s resources.

Apart from pursuing a full Section 2 prosecution, there is at least a theoretical opportunity for the FTC to pursue a leveraging case using Section 5 or for it or the Justice Department to seek to undo an acquisition pursuant to Section 7. Although not literally novel, either type of effort would be quite unusual, with concomitant increased litigation risks confronting the antitrust agencies.

And so, the question with which we began. Would it be better to look elsewhere for assurances that the major platforms are performing in a manner consistent with—are accountable to—the broader public interest?

A tentative answer: with respect to most of the issues, including competition issues, invoked by the position and practices of major platforms, alternatives to a maintenance of monopoly suit are likely to be, by comparison, attractive. The exception arises if there is a clear, aggravated case of material harm to innovation and a promising approach to alleviating the problem, most likely through some form of forced corporate restructuring. If the objective is to open wider opportunities for competition-driven innovation, an antitrust prosecution becomes more plausible, but with these qualifications: litigation risk is inevitable and the consequences of a successful prosecution are unforeseeable. An antitrust case seeking structural relief against a major platform inevitably would entail a “wager” similar to AT&T and an act of faith that a successful prosecution would bring about benefits in the form of innovations that presently are “unobservable” similar to *Microsoft*.

108 A. Douglas Melamed, FTC Hearing #3, *supra* note 100.

109 Tim Wu, FTC Hearing #3, *supra* note 100.

110 Quoted in *After the Breakup*, Barry Cole (ed.), (New York, Columbia University Press, 1991), 30: The decree implicitly made a wager that the regulatory distortions of those portions of the economy, which could have been workably competitive, yielded social losses in excess of the economies of scope that would be sacrificed It was a wager, a guess. It would be absurd to pretend it was made on the basis of detailed econometric data. It was not; we didn’t have the data.