

Book Review

Microsoft in Detail

William H. Page and John E. Lopatka

The Microsoft Case: Antitrust, High Technology, and Consumer Welfare

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Reviewed by Jeffrey Prisbrey

With regard to the *Microsoft* case, believe it or not, there are some points which reasonable people can agree on.¹ For example, it is clear that Microsoft invested heavily in developing and marketing its browser and related software in order to counter the competitive threat Netscape's browser and Sun's Java represented to the dominance of Windows.² Microsoft integrated its Internet Explorer (IE) into its Windows operating system, priced IE at zero, and paid Internet service providers (ISPs) and computer manufacturers (OEMs) for distribution. Microsoft also created a modified version of Sun's Java that was optimized for Windows and that would not interoperate with Sun's version. But, beyond these points consensus becomes more difficult and the discourse more animated.

One of the problems is that a complete understanding of the case and of its antitrust context requires a detailed knowledge of the underlying facts and events. It is difficult to get a complete understanding, however, because the volume of information is very large. For example, the government's interest in Microsoft dates back at least as far as the Federal Trade Commission's 1989 investigation into Microsoft's actions towards rival operating systems. The primary case, the one generally referred to as *Microsoft*, was initially filed by the Department of Justice and others in 1998. *Microsoft* was not finished until the court of appeals gave its final approval in 2004. In all there were more than 150 opinions issued in the antitrust cases against Microsoft.³ And that still did not settle everything. There was still private litigation to consider, and also proceedings by the European Commission and by other governments.

What the public discourse needs is a detailed and comprehensive source for the context, facts, and events that make up *Microsoft*. William H. Page and John E. Lopatka's recent book, *The Microsoft Case: Antitrust, High Technology, and Consumer Welfare*, is one such source. It carefully presents all the required detail, starting with the antitrust context that gave rise to the government's action and stepping through a careful description of the facts and events. The book is an extremely valuable compendium and worth reading for this information alone.

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Jeffrey Prisbrey is a
Principal at CRA
International specializing
in antitrust and
regulatory economics.

¹ United States v. Microsoft Corp., No. 98-1232 (D.D.C. May 18, 1998); New York v. Microsoft Corp., No. 98-1233 (D.D.C. May 18, 1998); United States v. Microsoft Corp., 253 F.3d 34, 47 (D.C. Cir. 2001); New York v. Microsoft Corp., 224 F. Supp. 2d 76, 87 (D.D.C. 2002).

² Benjamin Klein made this obvious but dramatic point. See Benjamin Klein, *The Microsoft Case: What Can a Dominant Firm Do to Defend Its Market Position?*, 15 J. ECON. PERSP., Spring 2001, at 2, 45-62.

³ See, e.g., WILLIAM H. PAGE & JOHN E. LOPATKA, *THE MICROSOFT CASE: ANTITRUST, HIGH TECHNOLOGY, AN CONSUMER WELFARE* 33 (2007).

But, in addition to the raw information, Page and Lopatka also provide extensive and pointed commentary about the arguments made in *Microsoft* and the conclusions reached by the courts. The authors are not shy about their pro-Microsoft opinions, and they effectively use *Microsoft* and the arguments surrounding it to advocate an “evolutionary” or market-oriented position towards monopolization cases. In fact, it would not be unreasonable to conclude that Page and Lopatka’s main motivation for the book was to advocate for this evolutionary position, and that *Microsoft* was simply the vehicle for their advocacy.

In any case, along with informing the reader with welcome detail, they challenge the reader at every step and provide a book that will surely be a focus for more discussions to come. Following the structure of their book, I have summarized the most prominent facts, arguments, and opinions addressed by Page and Lopatka. My summary is not exhaustive; more detail is available in the book itself. I conclude by offering some additional points that provide balance to Page and Lopatka’s presentation.

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Historical Overview

Page and Lopatka begin with a historical overview of monopolization cases in the United States. At a general level they argue that antitrust enforcement is influenced by two conflicting ideologies: the “evolutionary” camp that believes that free markets produce efficient outcomes without the help of government, and the “intentionalist” camp that believes that free markets produce “unfair outcomes” without government supervision.⁴ It is safe to say that Page and Lopatka fall into the evolutionary camp.

In their criticism of early decisions in such cases as *Standard Oil* and *Alcoa*, Page and Lopatka introduce two themes that they weave into later parts of the book. Their first theme is that market forces will generally act to counter anticompetitive monopoly conduct more effectively than the courts. Their second, and perhaps more important theme, is that the behavior of monopolists is not necessarily inefficient and that the courts may have difficulty telling inefficient behavior from efficient behavior. This second theme is the natural outgrowth of the Chicago School analysis. The Chicago School analysis concluded that practices like tying, exclusive dealing, and predatory pricing were not effective tools for maintaining a monopoly and that those practices were often efficient.

It was the development of post-Chicago School analysis that provided the underlying theoretical setting for *Microsoft*. Page and Lopatka write that the case “drew on a novel economic theory of network effects to support a claim of liability for product design decisions, tying arrangements, and exclusive dealing contracts, all practices long thought by Chicagoans to be efficient except in rare circumstances.”⁵

The Decisions

Next, Page and Lopatka provide a very welcome and very detailed description of the court decisions that flowed from *Microsoft*. In *Microsoft*, the government argued, among other things, that “Microsoft’s practice of bundling IE with both Windows 95 and Windows 98, along with various provisions in its contracts with Internet Service Providers (ISPs), Internet content providers (ICPs), and OEMs, violated the antitrust laws.”⁶ A shorter version of the allegations is that Microsoft had

⁴ *Id.* at 3.

⁵ *Id.* at 22.

⁶ *Id.* at 30.

crushed the competitive threats to its operating system that were posed by Netscape's Web browser and Sun's Java technologies.⁷

Page and Lopatka provide a guide through the watershed events.⁸ After hearing the case, Judge Thomas Penfield Jackson largely ruled against Microsoft and adopted a set of remedies (stayed pending appeal) which, among other things, would have broken Microsoft into two firms, with one firm limited to operating systems and the other limited to applications. In 2001, the court of appeals reversed many of Judge Jackson's decisions and remanded the case to Judge Colleen Kollar-Kotelly. After the remand, the United States and nine states settled with Microsoft on the terms of a consent decree. Then, after an additional hearing, Judge Kollar-Kotelly limited the non-settling states to essentially the same result as the settlement. The consent decree prohibited certain anticompetitive behavior, but did not contain any of Judge Jackson's structural remedies. Judge Kollar-Kotelly's decisions closely followed those of the court of appeals, and were upheld by the court of appeals in 2004.

Page and Lopatka describe each of the individual holdings made by Judge Jackson and whether or not these holdings were affirmed by the court of appeals (and by implication Judge Kollar-Kotelly) and why. They then turn to a more in-depth discussion of each of the key issues.

The Markets

The first key issue was how Microsoft, Netscape, Sun, and others interacted with each other and with consumers. What were the relevant antitrust markets? How did different software products compete with or complement each other? How would they compete with each other in the future? The answers to these questions provide the context needed to judge whether or not Microsoft's actions actually harmed consumers.

As Page and Lopatka explain, the district court and the court of appeals both found that the relevant market at issue was for Intel-compatible PC operating systems.⁹ Both courts found that Microsoft had monopoly power in that market and that Microsoft's monopoly was protected by network effects arising from the large set of applications written for Windows APIs.¹⁰ The open question, then, was whether or not Microsoft's actions towards Netscape and Sun maintained its monopoly to the detriment of consumers.

Both Netscape's browser and Sun's Java were applications that provided APIs to other applications developers. These types of applications are known as middleware. Because both types of software provide APIs, middleware and operating systems are both platforms for other applications. As such, middleware and operating systems can compete with each other for the attention of applications providers. Does that mean they are in the same relevant antitrust market, or that they might be in the same relevant antitrust market in the future? The answer to this question is related to the theory of network effects.

Page and Lopatka divide network effects into two types: "direct effects," where users benefit directly from the number of other users (as in a phone network where more users implies more potential calls) and "indirect effects" where users benefit because more complementary products are produced for larger numbers of users (as in an operating system where more users can pro-

⁷ *Id.* at ix.

⁸ *Id.* at 34–35.

⁹ *Id.* at 96.

¹⁰ *Id.*

vide increased incentives to applications developers). While they acknowledge the direct network effects from being able to share files with other users, Page and Lopatka conclude that, in the case of operating systems, indirect effects are more important than direct effects.¹¹

Page and Lopatka explain that network effects can lead to tipping if the networks do not inter-operate, and therefore to a single dominant firm. In the simplest case, if a larger network provides more value to users, then users will only want to join the largest network. Because of this, competition for the first users will be intense because whichever firm wins those first users will win all the others due to the benefits of the network effect. This phenomenon is called tipping. Furthermore, once a market is tipped to a single dominant firm, that firm's dominance may persist due to network effects even in the face of more efficient rivals.

As Page and Lopatka discuss, the network effects relevant in *Microsoft* are two-sided. All else equal, application developers have increased incentives to write applications for operating systems with more users. And, all else equal, users have increased incentives to use operating systems that support more applications. Together, these network effects are known as the applications barrier to entry.

Page and Lopatka criticize the courts' final decisions about market definition. They write:

[O]ne could imagine defining a relevant antitrust market narrowly to include only Windows, on the ground that its substantial advantage in the number of applications supported [the applications barrier to entry] renders every other operating system incapable of constraining Microsoft's power. Or one could imagine defining the market more broadly to include all platform software.¹²

The court chose to do neither. Instead, the court chose to include non-Windows Intel compatible operating systems like BeOS in the relevant market, but not to include non-Intel based systems like the Mac OS. The authors take issue with the failure to include the Mac OS, but acknowledge that the conclusions about market power would not have been much different had the Mac OS been included.¹³

More importantly, the court chose to exclude middleware from the market. The court "rejected Microsoft's contention that all platform software, particularly the very middleware products that were the subject of its allegedly anticompetitive conduct, should be included in the market."¹⁴ And yet, the court found that Netscape's browser and Sun's Java were nascent competitors.

The hair splitting here is very important. As Page and Lopatka point out, "[I]f middleware were in a completely separate market [that is, if they were not even nascent competitors], Microsoft's actions taken against it could not be anticompetitive, and thus would not violate the antitrust laws."¹⁵ A question that was left unanswered is what relevant antitrust market were Netscape's browser and Sun's Java actually in? Page and Lopatka explain that the failure to effectively address this question doomed the government's allegations of tying and monopoly maintenance.¹⁶

¹¹ *Id.* at 97. I am not convinced, however, that Page and Lopatka are correct in their conclusion. The direct network effects certainly include more than just the ability to share files. They also include the ability to collaborate and the ability to share operating systems and other software specific knowledge.

¹² *Id.* at 100.

¹³ *Id.* at 102.

¹⁴ *Id.* at 100.

¹⁵ *Id.* at 105.

¹⁶ *Id.* at 109.

Microsoft's Bundling and Integration of Software

According to Page and Lopatka, Microsoft's bundling and integration of IE and Windows constitute "the most important issue both for the case itself and for the future of antitrust in high technology markets."¹⁷ Judge Jackson initially found that many of Microsoft's bundling actions were anticompetitive, but the court of appeals overturned many of those findings. Page and Lopatka remind us that the key to understanding the final decisions is to recognize that "harm to competition should be measured by harm to consumers rather than harm to rivals."¹⁸

In particular, Judge Jackson found that the following categories of Microsoft actions had violated antitrust laws:¹⁹

- Licensing Windows and IE as a bundle at a single price;
- Contractually prohibiting OEMs from removing easy access to IE from the Windows desktop, and excluding IE from the Windows Add/Remove Programs utility, making the removal of easy access to IE more difficult;
- Overriding users' choices of a default browser in favor of IE in certain cases; and
- Comingling IE and Windows code in the same library files, making the removal of IE functionality more difficult.

Microsoft defended its actions by describing how they benefited consumers:

(1) Microsoft argued that the simple bundling of Windows and IE at a single price benefited consumers by reducing the cost of acquiring IE.²⁰ And, because the additional price for IE was zero, consumers were not forced to make a sunk investment in IE that hindered them from choosing a rival browser.²¹

(2) Microsoft argued that preventing the removal of easy access to IE and excluding IE from the Windows Add/Remove Program utility allowed it to maintain control over the integrity of its Windows desktop and prevent unnecessary user confusion.²² Furthermore, Page and Lopatka add that these actions prevented OEMs from removing easy access to IE and making a preemptive browser choice for consumers. Thus, paradoxically, they argue that these steps taken by Microsoft to limit what OEMs and consumers can do may actually have improved consumer choice.²³

(3) Microsoft argued that overriding a user's default browser was helpful in certain contexts—for example, when the user invoked Windows Help functions, or when the user tried to access the internet using a Windows specific utility. According to Microsoft, other browsers would not work properly in these contexts, so overriding the default was helpful to the consumer.²⁴

(4) Microsoft argued that comingling IE and Windows code in the same library files allowed it to offer a more complete set of APIs to applications programmers at little to no cost to consumers.²⁵

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¹⁷ *Id.* at 115.

¹⁸ *Id.* at 117.

¹⁹ *Id.* at 116.

²⁰ *Id.* at 138.

²¹ *Id.* at 136–37.

²² *Id.* at 142–43.

²³ *Id.* at 144.

²⁴ *Id.* at 145–46.

²⁵ *Id.* at 118, 124–25.

In the end, the final judgment as approved by the court of appeals only prohibited actions in category two, and partly prohibited actions in category three.²⁶ The court concluded that preventing the user from removing access to the browser or browser code was anticompetitive because it limited consumer choice (and thereby the number of Netscape users) without providing an obvious benefit to consumers.²⁷

Page and Lopatka take issue with these findings in general, however, because they do not consider the long-term effect of Microsoft's actions on consumer welfare. Given the way the court had defined the relevant market to be Intel-based PC operating systems, none of these actions affected an *actual* competitor. At best, the actions affected a *potential* competitor, and that, in Page and Lopatka's view, is not enough. They believe that the court should have required further proof of Netscape and Java's potential competitive significance, proof that they think would not have been forthcoming. They conclude that "because the browser could not have evolved into a platform that reduced network effects in the operating system market, Microsoft's actions to integrate the browser and the operating system did not cause a reduction in competition."²⁸

Market Division, Exclusive Contracts and Java

Page and Lopatka next describe Microsoft's proposal to Netscape to divide the browser market. Microsoft proposed to provide support for Netscape's products, to invest capital in Netscape, and to not compete for non-Windows 95 browsers if, in return, Netscape would not compete for Windows 95 browsers. If Netscape did not agree, Microsoft threatened to withhold competitively important technical information.

Microsoft's market division proposal was seen by some as an indication of Microsoft's anti-competitive intent. It was only after the proposal was rejected by Netscape that Microsoft integrated IE and Windows and contractually limited OEMs and others in ways that restricted their ability to distribute Netscape's browser. Although Judge Jackson found that Microsoft's proposal was an illegal attempt to monopolize the market for browsers, Page and Lopatka explain that the court of appeals did not examine the conduct because it found that the government had failed to define a relevant market for browsers.²⁹

Microsoft also entered into contracts with certain third parties to promote IE exclusively and to limit their distribution of Netscape's browser. And Microsoft entered into other contracts that had third parties promise to make IE the default browser for certain software and to use the Windows HTML help function. Page and Lopatka claim that these contracts all involve exclusivity of some sort, and that for exclusivity to be competitively harmful it must "appreciably increase competitors' distribution costs."³⁰ They characterize these contracts as having little effect on competition, but also as having no obvious efficiency justification.³¹

²⁶ *Id.* at 117.

²⁷ *Id.* at 148.

²⁸ *Id.* at 155.

²⁹ *Id.* at 177.

³⁰ *Id.* at 187.

³¹ *Id.* at 184.

Page and Lopatka next turn to a discussion of Java. They report Judge Jackson's finding that, in an effort to suppress Sun's Java, Microsoft had illegally

created an implementation of Java that was incompatible with Sun's cross-platform implementation; it tricked developers into unwittingly writing Java applications that used Windows-specific Java; it offered valuable consideration to developers for making Microsoft's JVM the default and in one case the exclusive JVM used and distributed by their Java applications; and it thwarted the creation of cross-platform Java interfaces by pressuring Intel to stop developing them.³²

Yet, Microsoft's modifications to Java had at least some clear consumer benefits. Because of this, the court of appeals did not find the modifications to be anticompetitive. Page and Lopatka write that "for the appellate court, the decisive fact was that Microsoft's implementation was better than Sun's along a relevant dimension—specifically, speed."³³

Page and Lopatka call the appellate court's reasoning on the Java issue "unprincipled" and argue that the court should have used a balancing test comparing the benefits of Microsoft's improvements to Java to any alleged harm to competition.³⁴ After all, a balancing test is what the courts used when judging the merits of improvements due to Microsoft's integration of IE and Windows.

Remedies

Page and Lopatka bring their discussion of *Microsoft* to a close with an examination of the different proposed remedies, from the structural remedies initially adopted by Judge Jackson but later reversed, to the conduct remedies eventually approved by the court of appeals. From the beginning of their examination, it is clear that Page and Lopatka are skeptics. They write that "neither structural nor conduct remedies in monopolization cases have done much to increase consumer welfare."³⁵ In any case, they argue that courts should focus on "interdicting specific offenses" when designing remedies.³⁶ Remedies should not seek to restore "some economic utopia but the market that would have existed had the defendant not engaged in anticompetitive behavior."³⁷

It does appear that some of the proposed structural remedies went beyond interdicting specific offenses and may have done more harm than good. According to Page and Lopatka, for example, a horizontal divestiture that created multiple operating system companies ("Baby Bills") would have destroyed the network effects that were so valuable to consumers.³⁸ Similarly, a vertical divestiture that created an operating system company and an applications company would have created double marginalization and potentially destroyed other production efficiencies.³⁹ And perhaps more to the point, Page and Lopatka argue that these proposed structural remedies had little relationship to the actions found to be anticompetitive.

³² *Id.* at 193.

³³ *Id.* at 195.

³⁴ *Id.* at 197–98.

³⁵ *Id.* at 204.

³⁶ *Id.* at 205.

³⁷ *Id.*

³⁸ *Id.* at 207.

³⁹ *Id.* at 209–10.

For the most part the court of appeals is in agreement with that argument. Thus, the remedies reflected in the final consent decree were limited, except in a few instances, to restrictions on conduct that the court of appeals held to be illegal. For example, Page and Lopatka list the following remedial restrictions from the final consent decree:⁴⁰

- Microsoft was prohibited from the sort of retaliation and threats used to induce firms to stop supporting or developing competing technologies.
- Microsoft must provide Windows to OEMs under uniform licenses, for a single published royalty, thus prohibiting discrimination against OEMs that deal with Microsoft's rivals.
- Microsoft cannot form contracts with Internet service providers, Internet access providers, or Internet content providers that require those firms to refrain from distributing competing software.
- Microsoft must permit OEMs to configure the Windows desktop and boot sequence in ways that promote competing software.
- Microsoft must permit OEMs and end-users to delete easy access to Microsoft middleware.
- Microsoft must provide the means to delete easy access to certain specific products, including IE and Microsoft Media Player.
- Microsoft must allow other middleware to be designated to launch in the place of Microsoft middleware (except when connecting to a Microsoft server or when a rival's product cannot technically provide the required functionality).

Significantly, Microsoft was not required to provide the means to remove middleware code that had been comingled with Windows operating system code.

Page and Lopatka conclude their section on remedies with a discussion of the damages awarded to competitors, OEMs, and consumers in the private follow-on litigation. In doing so, they delve briefly into the various damages theories and issues revolving around class certification.

Counterbalancing Comments

Page and Lopatka have written a valuable book about Microsoft. Not only does the book provide a comprehensive and valuable source for the context, facts, and events that make up *Microsoft*, but it also challenges the reader with its extensive and pointed commentary on the arguments made and the conclusions reached. I recommend it as part of the required reading for anyone interested in *Microsoft* and the discussions that surround it.

However, while Page and Lopatka's analysis of *Microsoft* is challenging and assured, it is fundamentally one-sided. In this section, I balance some of their analysis with basic counter-arguments made by the government. A fair interpretation of the issues is not possible without also understanding the government's analysis.⁴¹

Perhaps the key issue in *Microsoft* was how Microsoft, Netscape, Sun, and others interacted with each other and with consumers. In considering these interactions, Page and Lopatka focus on the courts' determination of relevant markets. As I noted above, Page and Lopatka criticize the courts' determination of a relevant market for Intel-compatible PC operating systems. Furthermore, they argue that if Netscape and Sun were in different relevant antitrust markets from Windows,

⁴⁰ *Id.* at 214–17.

⁴¹ For a summary of the government's analysis as of 2000, see, e.g., Franklin M. Fisher & Daniel L. Rubinfeld, United States v. Microsoft: *An Economic Analysis*, in DID MICROSOFT HARM CONSUMERS?: TWO OPPOSING VIEWS 1–44 (Robert W. Hahn & Robert E. Litan eds., 2000), and Franklin M. Fisher & Daniel L. Rubinfeld, *Misconceptions, Misdirections and Mistakes*, in DID MICROSOFT HARM CONSUMERS?: TWO OPPOSING VIEWS, *supra*, at 87–96.

then Microsoft's actions could not be anticompetitive. The main thrust of Page and Lopatka's analysis depends upon market definitions (or lack thereof) rather than a direct analysis of competitive effects.

An alternative view of the interactions is presented by Franklin M. Fisher and Daniel L. Rubinfeld, who were economic experts for the government.⁴² They argue that Netscape's browser and Sun's Java were clearly not in the same market as Intel-compatible operating systems. A user of an Intel-compatible computer could not substitute a browser for the operating system. Instead, Fisher and Rubinfeld argue that Netscape's browser and Sun's Java were complements to Windows.⁴³

However, when considering the competitive effect of Microsoft's actions, Fisher and Rubinfeld argue that even as complements (or because they were complements) Netscape's browser and Sun's Java were threats to Windows.⁴⁴ They were threats because the applications barrier to entry did not protect Windows from encroachment from complements. Fisher and Rubinfeld write:

If enough users acquired Navigator or Java, then applications writers might find it tempting to write for them. If that happened to a great enough extent, then it might not matter what operating system ran underneath them. In Microsoft's words, the operating system would become "commoditized," and the applications barrier to entry would be gone. Thus, Navigator and Java were facilitating devices that had the potential to aid the entry of competing operating systems. The competition that Microsoft feared would come from that entry and not directly from Navigator and Java.⁴⁵

Thus, Fisher and Rubinfeld argue that Microsoft's actions towards Netscape's browser and Sun's Java protected the applications barrier to entry and therefore contributed to the maintenance of Microsoft's monopoly. They claim their argument does not depend upon the exact definition of markets, but upon the direct analysis of competitive effects.⁴⁶

Furthermore, Fisher and Rubinfeld argue that evidence of intent should be considered when determining the nature of competitive effects, while Page and Lopatka caution against its use.⁴⁷ Fisher and Rubinfeld write that "where the defendant claims to have taken its actions for other, pro-competitive ends, clear contemporaneous statements about intent can assist in evaluating that claim."⁴⁸ They argue that "Microsoft's internal documents make clear that Microsoft undertook its browser development not to make money from browsers, but to prevent Netscape's browser from facilitating competition with Microsoft's monopoly operating system."⁴⁹ They conclude that the evidence shows that Microsoft's intent was anticompetitive.

⁴² Note that, while I was an economist in the Antitrust Division of the Department of Justice during part of these proceedings, I had no role on the *Microsoft* case.

⁴³ Fisher & Rubinfeld, *Misconceptions, Misdirections and Mistakes*, *supra* note 41, at 89.

⁴⁴ Fisher & Rubinfeld, *United States v. Microsoft: An Economic Analysis*, *supra* note 41, at 15.

⁴⁵ Fisher & Rubinfeld, *Misconceptions, Misdirections and Mistakes*, *supra* note 41, at 89. For another view of the market interactions that is similar to Fisher and Rubinfeld's, see Tim Brennan, *The Legacy of U.S. v. Microsoft*, REGULATION, Winter 2003–2004, at 22–28. Note that Page and Lopatka do discuss this theory and, in fact, mention Bill Gates's fear that Navigator would "commoditize the underlying operating system." PAGE & LOPATKA, *supra* note 3, at 64–66, 97.

⁴⁶ Fisher & Rubinfeld, *Misconceptions, Misdirections and Mistakes*, *supra* note 41, at 90.

⁴⁷ PAGE & LOPATKA, *supra* note 3, at 200.

⁴⁸ Fisher & Rubinfeld, *Misconceptions, Misdirections and Mistakes*, *supra* note 41, at 94.

⁴⁹ Fisher & Rubinfeld, *United States v. Microsoft: An Economic Analysis*, *supra* note 41, at 19.

The fact that there is an inherent potential harm to competition in certain markets with network effects is something that Page and Lopatka acknowledge in their discussion of tipping and path-dependence.⁵⁰ They acknowledge that network effects can cause barriers to entry which lock the market into an inefficient outcome. Does such a potential provide the grounds for government intervention regardless of the actions of the monopolist? One might think that the government has a duty to help markets avoid such inefficient outcomes.

In my opinion, when these network effects occur, actions on the part of the monopolist that reinforce the barrier to entry must be viewed with skepticism. It is not enough to simply point to immediate consumer benefits from the actions. In addition, the potential implications of the actions on the continuing presence of the barrier to entry must be accounted for.

Fisher and Rubinfeld make this point generally when they caution that any conclusion that focuses solely on present consumer harm misses the anticompetitive potential of every predatory act. They write:

Predatory campaigns can offer immediate consumer benefits. A firm that prices below cost to drive out rivals and earn or protect monopoly rents does so by offering consumers a deal that is, in effect, too good to be true. During such a campaign, consumers benefit from the low prices. If a showing of present consumer harm were required, no predator could be stopped until after the campaign was over, when it might well be too late to avoid substantial consumer harm.⁵¹

Page and Lopatka certainly believe that it is necessary to balance the different long run effects of an alleged anticompetitive act. But, in their opinion, the ability of Netscape's browser and Sun's Java to erode the applications barrier to entry was purely "speculative."⁵² ●

⁵⁰ PAGE & LOPATKA, *supra* note 3, at 94.

⁵¹ Fisher & Rubinfeld, *Misconceptions, Misdirections and Mistakes*, *supra* note 41, at 88.

⁵² PAGE & LOPATKA, *supra* note 3, at 150.