The Mistrial: *Novell v. Microsoft* and Cross-Market Theories of Causation

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There was a lot of speculation in this but-for world, and we had some evidence. But it's hard to draw inferences to a but-for world with only so much evidence.

—Corbyn Alvey, holdout juror

On December 16, 2011, after nearly seven years of litigation and following a two-month trial, the federal judge in *Novell v. Microsoft* declared a mistrial after a panel of jurors failed to reach a unanimous verdict. The jurors' inability to reach agreement is not surprising in light of the complexity of Novell's cross-market theories of injury and the uncertain standards that apply to evaluating causation.

Plaintiff Novell, Inc. sold office productivity application software during the period relevant to the issues at trial. Microsoft sold Windows, one of the PC operating systems on which Novell's office productivity applications ran, and also sold its own office productivity software. Novell alleged that Microsoft took steps to delay the launch of Windows 95 versions of Novell's products—but did not claim that Microsoft thereby caused direct injury to competition in the market for business productivity applications. That claim was barred by the statute of limitations. Instead, Novell claimed that the delay of its business productivity applications injured competition in the market for PC operating systems, a cross-market injury. The limitations period for that claim had been tolled by the U.S. Department of Justice's litigation against Microsoft for monopolization of the PC operating systems market.

The jury apparently struggled with the attenuated chain of causation on which Novell based its cross-market theories. Moreover, the court struggled with ambiguous case law regarding what Novell had to prove regarding the causation of its injuries: Was Novell required to prove that Microsoft's conduct "contributed significantly" to maintenance of its monopoly in PC operating systems, or that the conduct was "reasonably capable" of doing so? The court ultimately provided dueling jury instructions on the standard of causation, presumably to give the jury two options and pave the way for an appellate court to resolve the ambiguity without the need for another trial. Instead, the jury appears to have simply found the dueling instructions confusing.

During deliberations, the jurors faced three questions relating to causation: Whether Microsoft engaged in anticompetitive conduct, whether that conduct injured Novell, and whether the conduct that allegedly injured Novell also injured the PC operating systems market in which Novell did not participate. The first and second of these questions are questions of fact for a jury to decide, but the third is a thorny question that could prove confusing for the next jury as well. Clearer direction regarding the standard for proof of causation could address that confusion.

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Background

Novell's claims against Microsoft originate from Novell's brief ownership of WordPerfect, a word processing application, and Quattro Pro, a spreadsheet program, from 1994 to 1996. Novell

acquired WordPerfect and Quattro Pro in June 1994. Novell marketed these programs together as "PerfectOffice."

In the early 1990s, as Microsoft developed Windows 95, a new operating system building off Microsoft's previous successes with Windows, Microsoft initiated a marketing program designed to encourage independent software vendors (ISVs) to support the new operating system. Through this program, Microsoft offered the ISVs access to the "beta" version of Windows 95 as well as technical and marketing assistance. In exchange, Microsoft sought commitments that the ISVs would release a Windows 95-compatible product within ninety days of its launch. WordPerfect (and later Novell) participated in Microsoft's program, intending to release a new version at or shortly after the Windows 95 launch.

As part of its efforts to enroll ISVs in the pre-launch program, Microsoft promoted certain features that would be included in Windows 95, including certain namespace extension application programming interfaces (APIs). These namespace extension APIs allowed developers to integrate namespace objects into the Windows 95 shell namespace and provide rich, custom views of data. Microsoft released the Windows 95 beta in June 1994, providing sufficient documentation on the namespace extension APIs to allow WordPerfect/Novell and other ISVs to begin writing code for their respective applications. However, Microsoft later withdrew support for the namespace extension APIs in October 1994, citing robustness and compatibility concerns. Novell began to re-engineer its program to address Microsoft's API changes.

The jury apparently struggled with the attenuated chain of causation on which Novell based its cross-market theories.

Meanwhile, Novell also experienced programming delays and integration difficulties stemming from its 1994 acquisition of WordPerfect. When Microsoft released Windows 95 in August 1995, Novell was not prepared to release a new version of PerfectOffice. Novell later sold both WordPerfect and Quattro Pro to Corel Corporation in March 1996. Corel released PerfectOffice for Windows 95 in May 1996.

Summary of the Proceedings

Novell's Claim. Novell instituted suit against Microsoft on November 12, 2004, seeking damages in excess of $1 billion.[1] Novell claimed, among other things, that Microsoft injured Novell by thwarting the development of Novell's office productivity applications. Novell asserted that it relied on Microsoft's publication of the namespace extension APIs in developing Windows 95-compatible versions of WordPerfect and Quattro Pro, and Microsoft's later withdrawal of support forced Novell to re-engineer the programs to the new specifications. This time-intensive process made it impossible for Novell to release PerfectOffice within sixty days of the launch of Windows 95, the window Novell believed was crucial to capture customers, who generally only purchase one word processing and spreadsheet product per operating system.

Novell asserted that Microsoft's conduct was anticompetitive, rather than just injurious to Novell alone, because Microsoft intentionally harmed Novell's office productivity applications as a way to maintain its monopoly power in the PC operating systems market. According to Novell, Microsoft protected its monopoly in PC operating systems by an "applications barrier to entry" stemming from two characteristics of the software market: first, that most consumers prefer operating systems for which there is an abundance of high-quality, practical applications, and second, that most developers prefer to write programs for operating systems that have a substantial consumer base. This "chicken-and-egg" situation ensures that applications will continue to be devel-

[1] Complaint, Novell, Inc. v. Microsoft Corp., No. 2:04 CV 1045 (D. Utah filed Nov. 12, 2004) [hereinafter Novell Complaint].

oped for the dominant operating system, Windows, which in turn ensures that consumers will continue to prefer Windows over other operating systems.[2] While many firms possess the financial and technological wherewithal to develop competing operating systems, the applications barrier to entry inhibits demand for anything other than niche systems.

Novell contended that its popular WordPerfect and Quattro Pro applications, though not competitors in the operating systems market, could crack the application barriers to entry in two respects. First, under its "franchise" theory, Novell claimed that its office productivity products were so popular that, if available on rival operating systems, would have "provide[d] a path onto the operating-system playing field" by legitimizing the competing operating system, which would thereby increase competition in the PC operating systems market.[3] Novell further alleged that Microsoft intentionally targeted WordPerfect and Quattro Pro so that Microsoft would own the key office productivity franchises, which would increase the barriers to entry into the operating system market.

Second, under its "middleware" theory, Novell argued that its PerfectOffice applications (along with certain related applications) lessened the applications barrier to entry because they functioned as "middleware." Middleware relies on interfaces provided by the underlying operating system while simultaneously exposing its own APIs and related functionality to software developers.[4] Developers can then write their own applications using the middleware's APIs, and not those of the underlying operating system. Middleware thus allows application developers to write one version of an application for use on multiple operating systems, by writing to middleware instead of to the actual APIs of each operating system. It also reduces the need for end-users to upgrade their operating system in order to obtain new application features. By attacking the middleware, Novell claimed that Microsoft "widen[ed] the moat" of the applications barrier to entry and thereby unlawfully maintained its monopoly in the PC operating systems market.[5]

Relevant Markets. Novell's cross-market theory of harm implicates multiple product markets: the word processing and spreadsheet application markets, as well as the PC operating systems market.

The word processing market consists of software used to create, edit, print, and store text-based documents. In its complaint and subsequent briefs, Novell claimed that WordPerfect was a significant player in the late 1980s, peaking at about 47 percent market share across all operating systems in 1990. However, its share declined precipitously in the early 1990s, and by 1996 it held less than 10 percent market share. The share of Microsoft Word, initially a small player, exploded from 20 to 90 percent share during the same time.

The spreadsheet application market was similarly characterized by numerous players during the relevant time, including Quattro Pro and Microsoft Excel. Quattro Pro was a small player, possessing only a "very, very small fraction" of the Windows-compatible spreadsheet market.[6]

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[2] Novell's Opposition to Microsoft's Renewed Motion for Judgment as a Matter of Law at 27–28, *Novell, Inc.*, No. 2:04 CV 1045 (D. Utah Mar. 9, 2012) [hereinafter Novell's Opp. to Ren. JMOL]. *See also* Novell, Inc. v. Microsoft Corp., 505 F.3d 302, 306 (4th Cir. 2007) (quoting United States v. Microsoft Corp., 253 F.3d 34, 55 (D.C. Cir. 2001)).

[3] *Novell, Inc.*, 505 F.3d 302 at 308.

[4] United States v. Microsoft Corp., 84 F. Supp. 2d 9, 17 (D.D.C. 1999).

[5] Complaint, *supra* note 1, ¶ 62 (internal quotations omitted). *See also* Novell's Opp. to Ren. JMOL, *supra* note 2, at 70.

[6] Microsoft's Memorandum in Support of Its Renewed Motion for Judgment as a Matter of Law at 65, *Novell, Inc.*, No. 2:04 CV 1045 (D. Utah Feb. 3, 2012) [hereinafter Microsoft's Mem. in Supp. of Ren. JMOL].

Both the word processing and spreadsheet application markets feature a common unique characteristic in that consumers typically purchase only one product per operating system. Thus, to be successful, developers must have a new version of their software ready at the time a new operating system is released or else they will be effectively foreclosed from a large percentage of the market.

The Intel-compatible PC operating systems market consists of software that controls a PC's resources and manages the execution of software applications. During the relevant time, Microsoft was a market leader (if not a monopolist) in the PC operating systems market, first with its Windows 3.0 operating system and later with Windows 95.[7]

***Relationship to* U.S. v. Microsoft.** Novell's claim echoes those made by the Department of Justice in its investigation and subsequent 1998 civil suit against Microsoft in *United States v. Microsoft Corp.*[8] In that action, the DOJ alleged, among other things, that Microsoft maintained its monopoly in the PC operating systems market by targeting "middleware" products, such as Sun's Java programming environment and the Netscape Navigator Web browser. Java and Netscape Navigator are not operating systems and did not compete directly with Microsoft's Windows. However, the DOJ claimed, and the courts agreed, that the middleware applications "ha[d] the capability to serve as platforms for software applications themselves" for which developers could write applications rather than rewriting them for each operating system.[9] Despite the fact that the primary threats operated outside of the PC operating systems market, the courts found that Microsoft unlawfully monopolized that market by harming middleware products.

[W]hether the Microsoft conduct that injured Novell also caused anticompetitive harm to the PC operating systems market . . . remains hotly contested.

Like the cross-market theory espoused in *U.S. v. Microsoft*, Novell asserted that it suffered antitrust harm from Microsoft injuring competition in the PC operating systems market, a market in which Novell did not participate. Given the similarity of many of the facts and issues, Novell argued in its complaint that many of the findings of fact and conclusions of the District Court for the District of Columbia were binding on Microsoft under principles of collateral estoppel, including the court's findings on the "applications barrier to entry" and the existence and significance of middleware.

The Cross-Market Causation Issues

Over the course of the proceedings, the court condensed Novell's claim to three elements: (1) whether Microsoft's withdrawal of the namespace APIs was anticompetitive; (2) whether Microsoft's conduct caused injury to Novell by delaying the introduction of Novell's applications for Windows 95; and (3) whether the Microsoft conduct which caused injury to Novell also caused anticompetitive harm to the PC operating systems market.[10] The third element—the crux of Novell's cross-market causation claim—was, and remains, hotly contested.

One of the key points of contention has been the extent to which Novell was required to show that Microsoft's withdrawal of the namespace extension APIs impacted the relevant market—i.e., the PC operating systems market. Microsoft argued that Novell was required to show that Microsoft's conduct contributed significantly to the maintenance of Microsoft's monopoly in the PC

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[7] The District Court for the District of Columbia made findings of fact in the government's case against Microsoft that Microsoft possessed a monopoly in the PC operating systems market. *See U.S. v. Microsoft*, 84 F. Supp. 2d at 14–28.

[8] United States v. Microsoft Corp., 87 F. Supp. 2d 30 (D.D.C. 2000). *See Novell, Inc.*, 505 F.3d at 306.

[9] *Novell, Inc.*, 505 F.3d at 309 n.14 (citing *U.S. v. Microsoft*, 253 F.3d at 53).

[10] Novell, Inc. v. Microsoft Corp., 699 F. Supp. 2d 730, 747–48 (D. Md. 2010).

operating systems market.[11] Novell argued that it need only show Microsoft's conduct was reasonably capable of contributing to Microsoft's continued monopoly power.[12] Another key dispute concerned the sufficiency of Novell's proof that Microsoft's conduct caused Novell's claimed injuries.

How the Courts Addressed Causation.

Microsoft's Motion to Dismiss. Microsoft moved to dismiss Novell's complaint in January 2005, claiming that Novell lacked antitrust standing for harm caused to the PC operating systems market. Microsoft challenged Novell's cross-market theories of injury, arguing that Novell was neither a consumer nor a competitor in the relevant market for PC operating systems and that its injuries were too remote to the alleged antitrust violation to confer standing.[13] The district court rejected this argument, however, holding that there was no bright-line rule providing standing only to consumers or competitors.[14] Additionally, the court foreshadowed the dispute over the standard of proof by noting that Novell alleged specific facts that, if proven, could show that Microsoft had engaged in a strategy of maintaining its operating system monopoly through ownership of key application franchises, such as Microsoft Word and Excel. The court also held that Novell stated facts sufficient to show that Microsoft intended to harm WordPerfect and Quattro Pro by withholding key Windows integration functionality from Novell. These specific allegations, demonstrating intent to harm Novell and a causal link to the relevant market, were sufficient to plead the basis for antitrust standing. The Fourth Circuit affirmed.[15]

Summary Judgment. On cross-motions for summary judgment, the district court reduced Novell's "unique" monopolization claim to three elements: (1) whether Microsoft's withdrawal of the namespace APIs was anticompetitive; (2) whether Microsoft's conduct caused injury to Novell's applications; and (3) whether the Microsoft conduct which caused injury to Novell also caused anticompetitive harm to the PC operating systems market.

With regard to the first question, Judge Motz found that Novell raised questions of material fact regarding whether Microsoft engaged in anticompetitive conduct. The judge did not address the second question, whether Microsoft's conduct had caused Novell's claimed injuries.

Judge Motz's discussion of the third question would eventually give rise to the dispute between the parties (as discussed below) as to whether Novell was required to prove that the challenged conduct contributed significantly, or the lesser showing that the conduct was reasonably capable of contributing significantly to harm to competition through Microsoft's continued monopoly. In finding that Novell established a triable issue of fact regarding whether Microsoft's anticompetitive conduct caused anticompetitive harm in the PC operating systems market, Judge Motz addressed the standard by which Novell had to prove that causation. He explained that Novell was required "to show that the conduct at issue 'contribut[ed] significantly to a [Microsoft's] con-

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[11] Microsoft's Mem. in Supp. of Ren. JMOL, *supra* note 6, at 82–84.

[12] Novell's Opp. to Ren. JMOL, *supra* note 2, at 75. As noted, the thorny causation issue would not have arisen if Novell's action against Microsoft had been for unlawful monopolization of the office productivity application markets. These claims, however, were time-barred by the time Novell filed its complaint. *See Novell, Inc.*, 505 F.3d at 320–23.

[13] Microsoft's Memorandum in Support of its Motion to Dismiss Novell's Complaint at 18–20, *Novell, Inc.*, No. 2:04 CV 1045 (D. Utah Jan. 7, 2005).

[14] Novell, Inc. v. Microsoft Corp., 2005 WL 1398643, at *2 (D. Md. 2005).

[15] *Novell, Inc.*, 505 F.3d at 315–16.

tinued monopoly power.'"[16] As authority for this standard, he cited and quoted three cases.[17] One of these cases "suggest[ed]" that the plaintiff must prove a "measurable impact" on competition.[18] Microsoft would later urge that this holding by Judge Motz established that Novell was required to prove that Microsoft's conduct "contributed significantly" to injury to the PC operating systems market.

The other two cases on which Judge Motz relied both provide that a plaintiff need only prove that the alleged anticompetitive conduct is *reasonably capable* of contributing to creating or maintaining monopoly power.[19] In addition, Judge Motz explained that the "plaintiffs need *not* 'present direct proof that a defendant's continued monopoly power is precisely attributable to its anticompetitive conduct.'"[20] He noted that "Novell has no obligation to create some 'hypothetical market place,' in which none of the other ISVs or applications had been weakened by anticompetitive conduct, and then prove that the conduct at issue would still have significantly contributed to anticompetitive harm in that hypothetical market."[21] Novell would take the position later, in the battle over jury instructions and in Microsoft's post-trial motion, that this discussion established that Novell was required only to show that Microsoft's conduct was reasonably capable of contributing significantly to its monopolization of the PC operating systems market.

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TRIAL PROCEEDINGS. At trial, Novell limited its allegations to the three questions identified by Judge Motz in his summary judgment opinion: (1) whether Microsoft's withdrawal of support for the namespace extension APIs was anticompetitive, (2) whether it delayed Novell's release of WordPerfect and Quattro Pro for Windows 95, and (3) whether such delay harmed competition in the PC operating systems market. The first two questions were simply questions of fact for which the jury had to consider the quantum of evidence presented by each party. The third question, however, gave rise to the cross-market problem as well as the dueling jury instructions on the standard by which to judge causation.

The Cross-Market Problem: Did Novell Prove Injury to a Market in Which It Was Not a Participant? Microsoft advanced three primary arguments. First, Microsoft argued that Novell's products were not "middleware" as claimed, and in any event would have had no impact on the applications barrier to entry. The district court in *U.S. v. Microsoft* defined "middleware" only as those products that run on multiple operating systems and that expose a sufficient number of APIs to allow ISVs to design general purpose productivity applications that call upon the APIs exposed by the software, rather than on the APIs exposed by the underlying operating system. Microsoft argued principally that Novell's products failed to fall within the scope of this definition.[22] As such, WordPerfect and Quattro Pro had "no potential to displace Windows as a platform for developing"

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[16] *Novell, Inc.*, 699 F. Supp. 2d at 748 (quoting *U.S. v. Microsoft*, 253 F.3d at 80).

[17] *Id.* at 747–48 (quoting *U.S. v. Microsoft*, 253 F.3d at 80, and citing Data Gen. Corp. v. Grumman Sys. Support Corp., 36 F.3d 1147, 1182 (1st Cir. 1994) and Morgan v. Ponder, 892 F.2d 1355, 1361–63 (8th Cir. 1989)).

[18] *Id.* at 748 (quoting *Morgan*, 892 F.2d at 1361–63).

[19] *Id.* at 748 (citing *U.S. v. Microsoft*, 253 F.3d at 80 (plaintiff needs to show that the conduct at issue is "reasonably capable of contributing to a defendant's continued monopoly power") and *Data General Corp.*, 36 F.3d at 1182 (explaining that exclusionary conduct is conduct "that reasonably appears capable of making a significant contribution to creating or maintaining monopoly power.'" (internal citations omitted)).

[20] *Id.* (quoting *U.S. v. Microsoft*, 253 F.3d at 79).

[21] *Id.* at 749.

[22] Microsoft's Memorandum in Support of Its Motion for Judgment as a Matter of Law at 45–46, *Novell, Inc.*, No. 2:04 CV 1045 (D. Utah Nov. 17, 2011) (citing Transcript of Trial at 1929, *Novell, Inc.*, No. 2:04 CV 1045 (Testimony of Roger Noll, expert for Novell)).

general purpose productivity applications and Microsoft's withdrawal of the namespace extension APIs could not have harmed the PC operating systems market. Novell countered by arguing that its products would have become middleware but for Microsoft's conduct, and that it only had to show that its products could have weakened the applications barrier to entry, not destroyed it by displacing Windows.

Second, Microsoft attacked Novell's franchise applications theory on the ground that Novell's applications were not sufficiently popular to sway users one way or another when purchasing an operating system. Microsoft further pointed to the *U.S. v. Microsoft* findings of fact, which explained that the applications barrier to entry arises from a positive feedback loop consisting of tens of thousands of applications.[23] Under this definition, Microsoft argued that WordPerfect and Quattro Pro standing alone could not have significantly affected competition in the PC operating systems market. In response, Novell pointed out that, during the relevant time, consumers spent the majority of their time on PCs using word processing and spreadsheet applications, and cited internal Microsoft documents to demonstrate the importance of the WordPerfect and Quattro Pro franchises.

Finally, Microsoft argued that Novell's utilization of the namespace extension APIs would have enhanced the attractiveness of Windows, which would have increased overall sales and market share. Thus, withdrawing support for the functionality could not have caused anticompetitive harm to the PC operating systems market, nor could it have contributed to Microsoft's monopoly in that market. Novell rebutted this argument by pointing out that Microsoft's conduct made no commercial sense, and as such was consistent with a monopolist's sacrifice of short-term profits in exchange for a long-term competitive advantage.

Jury Instructions. The dispute about the correct standard under which Novell had to prove harm to competition in the PC operating systems market ("contributed significantly" or "was reasonably capable of contributing significantly") appears to have crystallized during the protracted battle over jury instructions. Judge Motz gave the jury a verdict form with seven questions it was to answer in deciding the case, two of which (Questions 4 and 5) reflected the dueling standards. The jury was first asked to answer whether (1) Microsoft's decision to withdraw support for the namespace extension APIs caused Novell's productivity applications to be late to market; (2) but for Microsoft's decision, Novell would have released its productivity applications at or shortly after the release of Windows 95; and (3) Microsoft's decision amounted to anticompetitive conduct.

If the jury answered Questions 1–3 in the affirmative, then Judge Motz directed it to answer Questions 4 and 5. Judge Motz prefaced those two questions by stating, "You are being asked to answer questions 4 and 5 because of uncertainties I believe exist in antitrust law, and your answers to them may clarify the record and prevent a retrial of this case. These questions are important because they are related to an element of Novell's claim that Novell must prove." The questions were:

> 4. Has Novell proven by a preponderance of the evidence that the delay caused to Novell by Microsoft's decision to withdraw support for the namespace APIs *caused harm* to competition in the market for PC operating systems and *contributed significantly* to the maintenance of Microsoft's monopoly in that market?
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> 5. Has Novell proven by a preponderance of the evidence that Microsoft's withdrawal of support for the namespace extension APIs *was reasonably capable of* contributing

[23] *Id.* at 41 (citing *U.S. v. Microsoft*, 84 F. Supp. at 14–15).

> significantly to the maintenance of Microsoft's monopoly in the market for PC operating systems?[24]

Question 4 thus represented Microsoft's view that Novell had to show Microsoft's conduct appreciably affected the PC operating systems market by increasing the applications barrier to entry. The alternative formulation in Question 5 demonstrates Novell's view that Novell need not prove harm, but instead merely show that Microsoft's conduct could have increased the applications barrier to entry.

The jury apparently struggled with these questions. A local newspaper reported on December 15, 2011, that the jury sent the judge a note asking him to explain the difference between Questions 4 and 5.[25]

[T]he holdout juror was unconvinced of Novell's theories that delay of its office productivity products caused injury to the PC operating systems market.

Mistrial and the Jurors' Views. After three days of deliberation, the district court declared a mistrial because the jurors could not reach a unanimous verdict. One juror, twenty-one-year old security guard Corbyn Alvey, held out for a defense verdict despite the agreement of the other eleven jurors on a verdict for Novell. But in discussions with the media following the mistrial, it emerged that even the eleven jurors who wanted to reach a verdict for Novell had differing views of Novell's case.

As noted above, the three questions on which Novell focused at trial were (1) whether Microsoft's withdrawal of support for the namespace extension APIs was anticompetitive, (2) whether it delayed Novell's release of WordPerfect and Quattro Pro for Windows 95, and (3) whether such delay harmed competition in the PC operating systems market). All twelve jurors agreed that Microsoft failed to overcome Novell's showing that Microsoft had engaged in anticompetitive conduct, and that Novell had prevailed as to the first question. Alvey, the holdout juror, discussed his views in an interview with KSL.com, a local news provider.[26] He explained, "It's been 17 years, [Bill Gates] could have forgotten. But it just seems to me that he—his testimony wasn't matching up with the e-mails he had written in '93, '94, and '95."

With respect to the second question, the jury was more divided. Alvey did not believe that Novell had proven that Microsoft's anticompetitive conduct caused Novell's injuries. In the video news report, Alvey was asked, "You think [Microsoft] used anticompetitive behavior, but that it didn't have the impact that Novell claimed?" He responded emphatically, "Yes. Yes. And yes." Alvey also told a reporter that he believed a Microsoft expert's testimony that WordPerfect already was in a steep decline by the time Novell bought it in 1994, shortly before Gates' fateful decision.[27] Alvey was not alone among the jurors in this view. Other jurors shared the view that Novell was at least partially responsible for its own problems. Jury foreman Carl Banks explained to a reporter that some jurors believed Novell's CEO "didn't put as much emphasis on that WordPerfect stuff as everybody else felt it needed, and [Novell] kind of self-destructed because of some choices the upper echelon made." Banks also told the reporter, "There were three or four people who said [Novell] hurt [itself] and couldn't be awarded and there were other people who felt they should be awarded the maximum."

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[24] Jury Instructions at 11, *Novell, Inc.*, No. 2:04 CV 1045 (emphasis added).

[25] Dennis Romboy, *Jurors in Novell-Microsoft Case Ask Court About Meaning of 'Hung Jury,'* Deseret News, Dec. 15, 2011, *available at* http://www.deseretnews.com/article/print/705395917/Jurors-in-Novell-Microsoft-case-ask-court-about-meaning-of-hung-jury.html.

[26] Dennis Romboy, *Holdout Juror Talks About His Experience in Novell-Microsoft Case*, KSL.Com, Dec. 17, 2011, http://www.ksl.com/?nid=960&sid=18540421 (video interview).

[27] Tom Harvey, *Microsoft Trial: 11 Jurors, 1 Holdout Hung Up on Single Question*, Salt Lake Trib., Jan. 1, 2012, *available at* http://www.sltrib.com/sltrib/money/53188674-79/novell-microsoft-alvey-jurors.html.csp?page=1.

With respect to the third question, holdout Alvey was unwilling to find for Novell. According to *The Salt Lake Tribune*, Alvey said that "he just couldn't agree with the question on the verdict form about Novell's assertion that a successful WordPerfect/Quattro Pro suite would have raised the 'prospect' that consumers might have an 'attractive alternative to Windows.'"[28] In other words, the holdout juror was unconvinced of Novell's theories that delay of its office productivity products caused injury to the PC operating systems market. Because Alvey held out for no liability at all, the other jurors did not have to resolve their conflicting views about the extent to which Microsoft was responsible for Novell's claimed injuries.

Post-Trial. Following the hung jury, Microsoft renewed its motion for judgment as a matter of law. Microsoft's brief and reply emphasized that Novell failed to provide sufficient evidence that Microsoft's withdrawal of support for the namespace extension APIs actually harmed competition in the PC operating systems market.[29] Microsoft further argued that no reasonable juror could find that Microsoft was responsible for the delays in Novell's introduction of its PerfectOffice suite, as the evidence at trial demonstrated that the delays resulted from internal issues at Novell.

Novell, on the other hand, argued in its opposition brief that it need only prove that Microsoft's conduct "appeared to be reasonably capable of contributing significantly to maintaining monopoly power."[30] Novell cited *U.S. v. Microsoft* for the proposition that "neither plaintiffs nor the court can confidently reconstruct a product's hypothetical technological development in a world absent the defendant's exclusionary conduct' and requiring such proof would only encourage monopolists to take 'more and earlier anticompetitive action.'"[31] Thus, Novell asserted that it only must show that its applications "could have" diminished or weakened the applications barrier to entry, thereby affecting the PC operating systems market, to recover damages.

Novell's attorneys also indicated that they would seek a new trial.

The Standard of Proof for Cross-Market Causation

In its post-trial motion, Microsoft continued to urge the court to require Novell to show that Microsoft's withdrawal of support for the namespace extension APIs "contributed significantly" to its monopoly in PC operating systems. Novell, on the other hand, argued that the applicable standard is that which prevailed in *U.S. v. Microsoft*, that the alleged anticompetitive conduct is *reasonably capable* of contributing to creating or maintaining monopoly power. But case law and the relevant authorities suggest that the appropriate standard lies somewhere in between.

The Standard of Proof of Causation by a Private Plaintiff. Microsoft's test, that its conduct "contributed significantly" to its monopoly, would require Novell to prove the impossible. As the Areeda and Hovenkamp treatise—cited by both Novell and Microsoft in their briefs—explains, many exclusionary practices "are one-of-a-kind situations in which it is impossible to prove that an outcome would have been different absent the violation. . . . Once the challenged events have occurred, the alternative reality can never be recreated."[32] To require a plaintiff to prove that the defendant's conduct did in fact contribute to harm to competition is simply not possible once the conduct has occurred.

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[28] *Id.*

[29] Microsoft's Mem. in Supp. of Ren. JMOL, *supra* note 6, at 82 (citing *Novell, Inc.*, 699 F. Supp. 2d at 747–48).

[30] Novell's Opp. to Ren. JMOL, *supra* note 2, at 3 (citing Multistate Legal Studies, Inc. v. Harcourt Brace Jovanovich Legal & Prof'l Publ'ns, Inc., 63 F.3d 1540, 1550 (10th Cir. 1995)).

[31] *Id.* (quoting *U.S. v. Microsoft*, 253 F.3d at 79).

[32] 3 Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law ¶ 657a2 (3d ed. 2012).

But Novell's test, whether defendant's conduct is "reasonably capable" of creating monopoly power, overlooks the distinction between private and government plaintiffs. Unlike the government, private plaintiffs seek recovery of damages, and damages are not available unless a plaintiff proves actual injury to business or property. Thus, as Areeda and Hovenkamp observe, "[I]t is well established that the . . . plaintiff must demonstrate not only that the defendant has violated the antitrust laws, but also that the plaintiff's business or property in fact suffered compensable injury as the result of that violation."[33] While the government must simply show that anticompetitive consequences are a likely outcome of the challenged conduct, a private plaintiff must show "*somewhat more* . . . [I]f it shows a violation and harm of a type that is highly likely to be the result of such a violation, then the ordinary tort rule would shift the burden of proof to the defendant to show that the harm had a different source."[34]

[T]he applicable standard for Novell to prove that its injury resulted from the violation should be neither the standard from the government's case against Microsoft nor the strict proof demanded by Microsoft.

Thus, the applicable standard for Novell to prove that its injury resulted from the violation should be neither the standard from the government's case against Microsoft nor the strict proof demanded by Microsoft. Applying the formulation offered by Areeda and Hovenkamp, if Microsoft is found to have committed an antitrust violation (harm to the PC operating systems market through unlawful maintenance of monopoly), Novell would then be required to show that its alleged injury is "highly likely" to have been the result of that violation. Thus, appropriate jury instructions on the issue of whether Novell's injury was caused by the violation could be:

> 1. Has Novell proven by a preponderance of the evidence that Microsoft's withdrawal of support for the namespace extension APIs caused the delay in Novell's introduction of its Windows 95 office productivity software products?
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> 2. (*If yes:*) Has Novell proven by a preponderance of the evidence that the delay in Novell's introduction of its Windows 95 office productivity software products was highly likely to have contributed to Microsoft's maintenance of monopoly power in the PC operating systems market?

Under the preponderance standard, of course, Microsoft would then be entitled to present evidence showing that the claimed harms resulted from other causes.[35]

The Cross-Market Nature of Novell's Theories Made the Standard of Proof Unusually Problematic. Courts, of course, routinely instruct juries about the standard by which a plaintiff must prove antitrust injury in monopolization cases. It is the cross-market nature of Novell's theories that appears to have made the standard problematic in this case.

For example, in *Masimo Corp. v. Tyco Health Care Group*,[36] plaintiff Masimo alleged that Tyco unlawfully abused its monopoly power in the market for pulse oximetry products to exclude competition, by offering loyalty discounts, bundled rebates, and other conduct. Both Tyco and Masimo were participants in the pulse oximetry product market. The jury reached a verdict for Masimo on its Section 2 claim (although it awarded no damages on that claim, having already awarded damages for the same conduct on other claims).

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[33] *Id.* ¶ 657a.

[34] *Id.* ¶ 657a2 (emphasis added).

[35] *See id.* (noting that "if [the plaintiff] shows a violation and harm of a type that is highly likely to be the result of such a violation, then the ordinary tort rule would shift the burden of proof to the defendant to show that the harm had a different source").

[36] Masimo Corp. v. Tyco Health Care Group, L.P., 2006 WL 1236666, *1 (C.D. Cal. 2006).

After instructing the jury with respect to proof of the violation, the court explained that to establish antitrust injury, "Masimo must have offered evidence that establishes as a matter of fact and *with a fair degree of certainty* that Tyco's alleged illegal conduct was a material cause of Masimo's injury. . . It is enough if [Plaintiff] has proved that the alleged antitrust violation was a material cause of its injury. Injury may be established by inference of circumstantial evidence."[37] This instruction could be read to support either Microsoft's or Novell's proposed standard. It requires demonstrating that the defendant's violation was a "material cause" of the plaintiff's injury, thus supporting Microsoft. But it also requires only a "fair degree of certainty," thus supporting Novell.

Because Masimo and Tyco were participants in the same market, there was no cross-market causation problem to test the standard. Applying the dueling standards sought by Microsoft and Novell to these facts makes little difference to the analysis. Did Tyco's discounts and rebates "contribute significantly" to Masimo's loss of business? Or was Tyco's conduct "reasonably likely to have significantly contributed" to that loss? Nor does the Areeda and Hovenkamp formulation, whether the plaintiff's harm was "highly likely" to result from the violation, make any significant difference. Given that the question was simply whether Tyco's conduct caused customers to buy from it rather than from Masimo, the degree of certainty in the causal link would not be likely to become a sticking point in the litigation.

In the *Novell-Microsoft* case, however, the cross-market nature of Novell's theories of injury made the degree of certainty in the standard of proof more significant. Unlike *Masimo*, it was not enough for Novell to simply prove that the antitrust violation was the cause of its injury. Novell faced the additional challenge of linking that conduct to Microsoft's monopoly power in PC operating systems. And because cross-market theories of harm allege "one-of-a-kind situations" that can be "impossible to prove," Novell was forced to ask the jury to make additional inferences to connect harm across two separate product markets. Thus, the standard for causation becomes critical for Novell, where it was much less so in *Masimo*.

There is no way to know whether Alvey, the holdout juror, would have reached a different conclusion if he had been given the jury instruction proposed above. As noted above, he "just couldn't agree . . . that a successful WordPerfect/Quattro Pro suite would have raised the 'prospect' that consumers might have an 'attractive alternative to Windows.'" Thus, he may not have believed Novell met even its proposed lower standard. But other jurors, believing that Novell may have caused some but not all of its own injuries, might have reached a different conclusion—and so might the next jury.

Conclusion

The fractured jury in the *Novell v. Microsoft* mistrial demonstrates the inherent difficulties in proving an unlawful monopolization claim using a cross-market theory of harm. A but-for counterfactual world is difficult to prove in ordinary circumstances. But when the but-for world involves harm in one market resulting from conduct in a different market, the theory of causation can become even more difficult to demonstrate.

The holdout juror may have said it best: "The problem was there was so much differing in the understanding of the evidence and what could have happened in the but-for world and what happened in the real world." ●

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[37] Jury Instructions, Masimo Corp. v. Tyco Health Care Group, L.P., at 30–31, Case No. CV 02-4770 (C.D. Cal. Mar. 18, 2005) (emphasis added).