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ARTICLES

WINDOWS XP: ANOTHER COURT BATTLE FOR MICROSOFT?

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ABSTRACT

Microsoft Windows XP's possible antitrust violations are addressed in relation to the *U.S. v. Microsoft* court of appeals decision. The aftermath and settlement of the *Microsoft* case are described. The implications of this case on Microsoft's Windows XP are discussed. Windows XP operating system is analyzed within the antitrust framework. Finally, current events that may affect a Windows XP antitrust case are discussed.

I. INTRODUCTION

On October 25, 2001, Microsoft Corp. launched Windows XP amid much fanfare and speculation.¹ Windows XP is the newest version of

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1. Microsoft, *Press Pass Home, Windows XP Newsroom, Windows XP is Here!: Bill Gates Joins Industry Leaders and Partners in New York to Launch Microsoft's Best Operating System Ever In Time For Holiday Season* ¶ 1 <<http://microsoft.com/presspass/Press/2001/Oct01/10-25XPOverallPR.asp>> (Oct. 25, 2001).

Microsoft's Windows operating system.² Its new features include a Windows Messenger and Windows Media Player for Windows XP.³ Some improved features include Windows Movie Maker, My Pictures, a new version of Internet Explorer, and an easier Network Setup Wizard.⁴ All of these new and improved features caused the fanfare for the Windows launch; the possibility of additional antitrust violations caused the speculation.⁵ Microsoft has again "bundled" its products with its operating system.⁶ Many commentators are alleging new antitrust violations based on the District of Columbia Circuit Court of Appeals ruling in *U.S. v. Microsoft Corp.*⁷

This paper will address Microsoft's Windows XP's possible antitrust violations by first analyzing the *U.S. v. Microsoft* court of appeals decision. Within this section, this paper will address the aftermath and settlement of the *Microsoft* case. Second, this paper will address the implications of that case on Microsoft's Windows XP. Within this section, this paper will provide some analysis on the Windows XP operating system within the antitrust framework. Additionally, within this section, this paper will look briefly at the current events in the possible Windows XP antitrust case.

II. THE LAW AND *U.S. V. MICROSOFT CORP.*

The case against Microsoft involved violations of the *Sherman Act*, an act that was meant to provide guidelines on U.S. antitrust law.⁸ The crux of the *Microsoft* case was that Microsoft attempted to use its power in the market from one product, the Windows operating system, to benefit sales of another of its products, the Internet Explorer ("IE") browser.⁹ Because of this, the government accused Microsoft of having a monopoly

2. Jamie Doward, *Is the New Windows an XP-erience to be Missed?: Even a \$1 Billion Marketing Drive May Not Make Up for Microsoft's Lousy Timing*, Observer 4 (Oct. 28, 2001) (available in 2001 WL 26833777).

3. See generally Microsoft, *Windows XP Home, Windows XP Home Edition, Product Information, Why Windows XP Home Edition?, Top Ten Reasons to Get Windows XP Home Edition* <<http://www.microsoft.com/windowsxp/home/evaluation/whyupgrade/top10.asp>> (accessed Apr. 9, 2002).

4. See generally *id.*; Dan Richman, *Microsoft Breakup Order Struck Down: Finding of Monopoly Upheld: Ruling "Lifts Cloud," Gates Says: Mixed Decision Gives All a Win*, Seattle Post-Intelligencer A1 (June 29, 2001) (available in 2001 WL 3563481).

5. Mike France & Jay Greene, *Get Ready for Windows XP: Trustbusters Are*, 3743 Bus. Week 36 (July 30, 2001).

6. See *Bundle of Joy Brings Legal Grief*, Observer 4 (Oct. 28, 2001) (available in 2001 WL 26833778).

7. See generally James Buchok, *The Undoing of XP*, 5:28 Computing Canada 8 (Mar. 1, 2002).

8. *U.S. v. Microsoft Corp.*, 253 F.3d 34, 47 (D.C. Cir. 2001).

9. *Id.* at 64-65.

in the PC operating systems market.¹⁰ The government claimed that Microsoft misused its monopoly power by promoting sales of its IE browser software at the expense of competing products, such as Netscape Navigator (“Navigator”).¹¹

The *Sherman Act*, also the primary U.S. statute prohibiting “monopolization,” dictates the two elements of monopolization: “(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.”¹² A monopoly alone, however, does not violate the *Sherman Act*.¹³ “A firm [only] violates [the *Sherman Act*] when it acquires or maintains [a monopoly], or attempts to acquire or maintain [one] by engaging in exclusionary conduct.”¹⁴ This is “distinguished from growth or development [that results from] a superior product, business acumen, or historic accident.”¹⁵

It is often difficult to discern whether any particular act of a monopolist is exclusionary or merely a form of vigorous competition.¹⁶ “The challenge for any antitrust court lies in stating a general rule for distinguishing between exclusionary acts [that] reduce social welfare, and competitive acts[that] increase” social welfare.¹⁷

In *Microsoft*, the court of appeals provided a thorough analysis of how to approach an antitrust issue in the dynamic technology industry.¹⁸ U.S. courts have over “a century of case law on monopolization under [the *Sherman Act*].”¹⁹ Based on this case law, several general principles have emerged.²⁰ “First, to be condemned as an exclusionary, a monopolist’s act must have an ‘anticompetitive effect.’”²¹ For a corporation to have an anticompetitive effect, its actions “must harm the [entire] competitive process and thereby harm consumers.”²² “Second, the plaintiff . . . must demonstrate that the monopolist’s conduct . . . has the requi-

10. *Id.* at 47.

11. *Id.* at 50.

12. 15 U.S.C. § 2 (2001).

13. *Microsoft*, 253 F.3d at 58.

14. *Id.*

15. *Id.*

16. *Id.* (stating that “the means of illicit exclusion, like the means of legitimate competition, are myriad”).

17. *Id.*

18. *Id.* at 48-50.

19. *Id.* at 58.

20. *Id.*

21. *Id.*

22. *Id.* (emphasis omitted) “The [*Sherman Act*] directs itself not against conduct which is competitive, even severely so, but against conduct which unfairly tends to destroy competition itself.” *Id.* (quoting *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 458 (1993)).

site anticompetitive effect."²³ "Third, if a plaintiff successfully establishes [an] anticompetitive effect, then the monopolist may [provide] a 'pro competitive justification' for its conduct."²⁴ "If the monopolist asserts a pro-competitive justification[, such as] greater efficiency or enhanced consumer appeal[,] then the burden shifts back to the [government] to rebut that claim."²⁵ "Fourth, if the monopolist's procompetitive justification stands un rebutted, then the [government] must demonstrate that the anticompetitive harm of the conduct outweighs the procompetitive benefit."²⁶ "Finally, in considering whether the monopolist's conduct on balance harms competition and is therefore [illegal under the *Sherman Act*, the] focus is [on] the effect of that conduct [and] not [on] the intent behind it."²⁷

Based on this analysis, the court of appeals held that all but one original equipment manufacturer ("OEM") "license restrictions at issue represent uses of Microsoft's market power to protect its monopoly, unredeemed by any legitimate justification."²⁸ In other words, the court of appeals upheld the district court's holding that Microsoft violated antitrust laws by using monopoly power to intimidate some of its competitors and improperly compete with others.²⁹ Thus, the restrictions violated the *Sherman Act*.³⁰

On the issue of "integration" or "bundling," the district court found that that bundling IE with Windows "both prevented OEMs from pre-installing other browsers and deterred consumers from using them."³¹ "In particular, [IE software codes that were irremovable from Windows] would 'increase an OEM's product testing costs,' because . . . OEM[s] must test and train support staffs to answer calls related to every software product preinstalled on the machine."³² Furthermore, "pre-installing a [second] browser in addition to IE would[,] to many OEMs, be 'a questionable use of the scarce [but] valuable space on a PC's hard drive.'³³

23. *Id.* at 58-59.

24. *Id.* at 59.

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.* at 64. It is important to note that the district court in *Microsoft* ordered the Microsoft Corporation broken-up into several smaller companies. *Id.* at 99-100. The Court of Appeals reversed this order, but did not outright reject the possibility that a break-up order might be an appropriate remedy. *Id.* at 107.

29. *Id.* at 64.

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

To support this finding, “[t]he [d]istrict [c]ourt first condemned as anticompetitive Microsoft’s decision to “exclude IE from the ‘Add/Remove Programs’ utility in Windows.”³⁴ “Second, the [d]istrict [c]ourt found that Microsoft designed Windows 98 ‘so that using Navigator with Windows 98 [had an] unpleasant consequence for users’ by, in some [cases], overriding the user’s choice of a browser other than IE as his or her default browser.”³⁵ “Finally, the [d]istrict [c]ourt condemned Microsoft’s decision to bind IE to Windows 98 ‘by placing [the] code specific to Web browsing in the same files as code that provided operating system functions.’”³⁶

For the most part, the court of appeals unanimously affirmed the district court’s holding that Microsoft abused its monopoly power by engaging in exclusionary and anti-competitive conduct because it bundled IE with Windows.³⁷ As Microsoft did not offer any justifications for its conduct regarding the first and third district court findings,³⁸ the court of appeals held “that Microsoft’s exclusion of IE from the Add/Remove Programs utility and its commingling of browser and operating system code constitute[ed] exclusionary conduct . . . in violation of [the *Sherman Act*].”³⁹

Microsoft did provide a justification for the second district court finding.⁴⁰ Microsoft argued in the court of appeals “that it was necessary to design Windows to override the user’s preferences when he or she invoke[d] one of ‘a few’ out of . . . nearly [thirty] means of accessing the Internet.”⁴¹ Based on Microsoft’s justification, and the lack of rebuttal

34. *Id.* at 65.

35. *Id.*

36. *Id.* Additionally, the court stated that, “[p]utting code supplying browsing functionality into a file with code supplying operating system functionality ‘ensures that the deletion of any file containing browsing-specific routines would also delete vital operating system routines and thus cripple Windows.’” *Id.*

37. *Id.* at 66.

38. *Id.*

39. *Id.* at 66-67. It is important to note that Microsoft recognized the danger of this ruling and petitioned the Court of Appeals for rehearing on this issue. *U.S. v. Microsoft Corp.*, 2001 U.S. App. LEXIS 17137 at *1 (D.C. Cir. Aug. 2, 2001). The Court of Appeals denied Microsoft’s petition for rehearing on August 2, 2001. *Id.* This was the basis for concern regarding Microsoft’s plans for the release of Windows XP software that bundles browser functions with system code and fully integrates them. See generally Ian Lynch, *Microsoft XP Injunction ‘Highly Unlikely’: Industry Watchers Predict Microsoft Will Get Off the Win XP Legal Hook* <<http://www.vnunet.com/news/1124537>> (accessed Apr. 11, 2002).

40. *Microsoft*, 253 F.3d at 67.

41. *Id.* Microsoft’s Opening Brief stated:

The Windows 98 Help system and Windows Update feature depend on ActiveX controls not supported by Navigator, and the now-discontinued Channel Bar utilized Microsoft’s Channel Definition Format, which Navigator also did not support. Lastly, Windows 98 does not invoke Navigator if a user accesses the Internet through “My Computer” or “Windows Explorer” because doing so would defeat one

for which government bears the burden, the court of appeals held that “Microsoft [could] not be held liable for this aspect of its product design.”⁴²

Finally, the court of appeals addressed the issue of whether “tying” Windows to IE is per se illegal.⁴³ The “four elements [of] per se tying [are]: (1) the tying and tied goods are two separate products; (2) the defendant has market power in the tying product market; (3) the defendant affords consumers no choice but to purchase the tied product from it; and (4) the tying arrangement forecloses a substantial volume of commerce.”⁴⁴ The district court found that Microsoft had engaged in per se tying.⁴⁵ At the court of appeals, Microsoft “argue[d] that Windows . . . and IE [were] not ‘separate products.’”⁴⁶ On this issue, the court of appeals essentially held that “the nature of the platform software market . . . suggests that per se rules might stunt valuable innovation.”⁴⁷

THE AFTERMATH

After holding on the above issues, the court of appeals remanded the case back down to the district court for a finding on what remedies to employ.⁴⁸ Then, “[i]n early September, the [Department of Justice (“DOJ”)] formally announced that it would no[t] longer [seek to] break-up” the Microsoft Corporation.⁴⁹ Additionally, the DOJ announced that it would drop the cornerstone “of the case: [W]hether Microsoft should be allowed to ‘tie’ other programs to Windows.”⁵⁰

What resulted was a settlement on November 2, 2001, in which the DOJ “impose[d] strict contract [conditions], force[d] Microsoft to disclose previously secret [applications program interfaces (“APIs”)] and [gave] OEMs [the] freedom to use the icons and applications of Microsoft rivals without penalty or punishment.”⁵¹ As of November 10, 2001, “nine of the

of the purposes of those features – enabling users to move seamlessly from local storage devices to the Web in the same browsing window.

Id. (emphasis in the original).

42. *Id.* As was previously stated, the government “bears the burden not only of rebutting a proffered justification[,] but also of demonstrating that the anticompetitive effect of the challenged action outweighs” the justification. *Id.*

43. *Id.* at 84-97.

44. *Id.* at 85.

45. *Id.*

46. *Id.*

47. *Id.* at 92.

48. *Id.* at 105-07.

49. *Microsoft: A Lucky Escape: Events Have Conspired to Save Microsoft's Bacon – So Far*, Economist 14 (Nov. 10, 2001) [hereinafter *Lucky Escape*].

50. *Id.*

51. Paula Rooney, *Microsoft Bends: Deal Puts Limits on Software Giant*, Computer Reseller News 3 (Nov. 5, 2001). For example, these restrictions will now allow “[p]roducts such as AOL Instant Messenger and Real Networks’ multimedia player . . . ‘operate deep

[eighteen] states that were co-plaintiffs in the case” had agreed to the settlement.⁵² Based on the settlement, “[a] three-member panel would oversee the enforcement of the restrictions [for five years], resolve technical disputes and prevent the software giant from using back-door tactics to coerce OEM’s to follow its dictates.”⁵³

Commentators have cited several issues that may have prompted the settlement.⁵⁴ One possible rationale for the rationale was “worsening economic climate.”⁵⁵ “PC sales [had been] stagnating [and] the computer industry [had pinned its hopes on] the launch of a new version of Microsoft’s Windows operating system, Windows XP,” to boost sales.⁵⁶ This made delaying the launch of Windows XP through an injunction more difficult to justify, regardless of the possible antitrust implications.⁵⁷

Another factor cited as rationale for the settlement was the fallout from the terrorist attacks of September 11, 2001.⁵⁸ Suddenly, it seemed irrelevant at best and unpatriotic at worst to attack Microsoft, an American company, through the courts.⁵⁹

III. MICROSOFT’S IMPACT ON WINDOWS XP

The court of appeals had in the *Microsoft* case unanimously found on two counts that Microsoft violated antitrust law by bundling its products and because one of the reasons for not finding an antitrust violation on the third count was the lack of a government rebuttal, it was argued that

within the operating system in the same way [that] Microsoft’s own products do.” Barbara Darrow & Amy Rogers, *Ashcroft Hails Deal: Says Settlement Will Stop Unlawful Practices, Give Consumers Choice*, Computer Reseller News 4 (Nov. 5, 2001).

52. *Lucky Escape*, *supra* n. 49, at 14. Several of the states, including “New York and California, said they would continue to press for ‘stringent remedies’” by the district court. *Id.* However, as of November 6, “New York [had] signed up to a similar settlement.” *Id.*

53. Rooney, *supra* n. 51, at 3. It should be noted that some OEMs claim that Windows will still continue to dominate, and they do not anticipate any change from the settlement restrictions. *Id.*

54. *See id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.* This is exemplified by Gate’s comments at the launch of Windows XP. See Eryn Brown, *Just Another Product Launch: In That Demure, Subdued, \$200 Million Microsoft Kind of Way: Inside the Introduction of Windows XP*, *Fortune* 102 (Nov. 12, 2001). Gates stated, “[w]e all support the global fight against terrorism. New York is back and open for business. And though the economy’s tough, the tech industry will keep making the investments and the innovations that will revive our economy.” *Id.* Additionally, the jacket Gate’s wore to the ceremony had both the Window’s logo and the “American flag sewn onto the back.” *Id.*

59. *Lucky Escape*, *supra* n. 49, at 14.

the court might enjoin Microsoft from launching Windows XP.⁶⁰ This, however, that did not occur, presumably for two reasons. First, the legal standard for granting an injunction is very difficult because injunctions are to be granted only in dire cases.⁶¹ Second, courts generally favor monetary damages in lieu of an injunction.⁶²

Additionally, the restrictions outlined in the settlement of the *Microsoft* case would force Microsoft to change Windows XP to accommodate them.⁶³ Microsoft would “have to create defaults[,] and will have [several] months to change [its] add-delete functions and middleware default settings.”⁶⁴ However, what is left open for antitrust analysis is that Microsoft emerged from the settlement whole and was still free to integrate or bundle its software products.⁶⁵ Additionally, Microsoft was not required “to disclose the source code of [the] Windows operating system.”⁶⁶

ANALYSIS OF THE ISSUES

Generally, one of the weaknesses of Windows XP is that it links the Windows operating system “far more closely to the Internet” than previous versions.⁶⁷ Additionally, “it incorporates a host of features and services designed to make Microsoft even more indispensable than it already is.”⁶⁸ Unlike the Windows operating systems of the past, Windows XP is “a platform for building personalized software that remembers users’ preferences, detects if they [are] online . . . and automatically swaps data among their applications.”⁶⁹ Windows XP was developed to use Microsoft’s upcoming .Net Server, Visual Studio.Net and Passport Internet authentication software.⁷⁰ Microsoft’s .Net software is intended to permit businesses to build networks that allow numerous “people inside and outside company walls to use [the] client-server software and [to] disseminate company data to employees and customers’ PCs, serv-

60. See generally Lynch, *supra* n. 39.

61. See *id.*

62. *Id.*

63. Darrow, *supra* n. 51, at 4.

64. *Id.*

65. Rooney, *supra* n. 51, at 3.

66. *Id.*

67. Fred Vogelstein, *The Long Shadow of XP: For Years Critics Waived That Microsoft Was an Unrepentant Monopolist: Now They’re Resigned to Living With That*, *Fortune* 112 (Nov. 12, 2001).

68. *Id.*

69. Aaron Ricadela, *Business as Usual?: Microsoft May Have Outlasted Government Efforts to Break it Up, but Business Customers Say a Lot About the Company Hasn’t Changed* ¶ 5 <<http://informationweek.com/story/TWK20011012S0006>> (Oct. 15, 2001).

70. *Id.*

ers . . . and wireless devices.”⁷¹

Connecticut Attorney General Richard Blumenthal and other government lawyers believe that the *Microsoft* “ruling bar[red] the company from [bundling] any features into [Windows] XP that could hobble a non-Microsoft competing software ‘platform,’ or program that serves as a base for other applications.”⁷² There are numerous XP products that may fit this category.⁷³ One such feature of Windows XP is Microsoft’s instant messaging technology.⁷⁴ This technology is “expected to one day offer a wide variety of new services, such as programs that help engineers in different locations work off the same blueprints at the same time.”⁷⁵ A second feature of Windows XP that may raise antitrust implications is Microsoft’s passport authentication technology.⁷⁶ Passport “verifies a consumer’s identity and will allow the development of a new breed of services – . . . Microsoft is calling it HailStorm – that can, for example, send an alert when a consumer’s plane is late.”⁷⁷ “Finally, [the] Windows Media Player, which allows computers to play music and video,” may raise possible antitrust concerns because it “one day [may] serve as a platform for new forms of entertainment.”⁷⁸

It is important to note within the framework of the court of appeals holding in *Microsoft* that Windows Media Player and Microsoft Instant Messaging were previously separate products.⁷⁹ Microsoft’s defense for now bundling these products with Windows XP generally is the “embrace and extend” philosophy.⁸⁰ Microsoft argues that its competitors are attempting to prohibit it from improving its products, and that the inclusion of these two features in Windows XP will allow Microsoft to stay

71. *Id.*

72. France, *supra* n. 5, at 36.

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.* Microsoft is publicly calling this feature “Net My Services.” Ricadela, *supra* n. 69, at ¶ 5. This service, “which offers users hosted e-mail and contacts databases, has people wondering if Microsoft will protect the personal data they must reveal [through] Passport online authentication software to use these services.” *Id.*

78. France, *supra* n. 5, at 36.

79. *See id.* The current market leader in instant-messaging is AOL. Alec Klein, *Microsoft Takes AIM: New Instant-Messaging Service to Challenge AOL Product*, The Washington Post E01 (June 5, 2001). “In April, 2001, 22.7 million people used AIM[*i.e.*, AOL’s instant messenger].” *Id.* That is an increase of thirty-one percent from one year ago. *Id.*

80. *See generally* Eric Foster-Johnson, *Will Linux Succumb to the Dark Side?: Plans to Build GNOME on Top of Microsoft’s .NET cause a stir: Linux*, 4 Computer User 12 (Apr. 1, 2002); *Embrace, Extend, Extinguish, Repeat*, 6 DVD Rpt. 39 (Dec. 24, 2001); Howard Millman, *Great XPections: The Newest Version of Windows Updates 2000, Replaces Me and Says Bye-Bye to the 9x Code Base*, Computerworld 50 (July 30, 2001).

competitive in the dynamic technology market.⁸¹

Furthermore, as of April 24, 2001, "Microsoft . . . requir[ed] consumers who want[ed] to use the [newest] version of Windows Media Player to upgrade to the new Windows XP operating system."⁸² While this type of bundling is reminiscent of the type of bundling Microsoft employed with IE and Windows, Microsoft has gone one step further this time regarding the Windows Media Player by not making this upgrade available anywhere else.⁸³ Features of Windows Media Player such as CD burning and DVD movie playback "can only be delivered with . . . XP."⁸⁴

Additionally, another bundling has occurred with SharePoint Team Services, a set of collaboration Windows XP features for corporations.⁸⁵ This service, "accessed programmatically through a set of APIs, let[s] groups of users set up Web sites where they can share documents, calendars and to-do lists related to team projects."⁸⁶ While this "service[] will be available through [Microsoft] Office XP[, Microsoft has also included it] along with additional services [like] white boarding, remote assistance and application sharing" in "the core program for the operating system."⁸⁷ These "features will provide [Information Technology ("IT")] executives with base collaboration features as part of the core of Windows.Net Server and [will] let developers embed those services in applications designed for the platform."⁸⁸ Along with other XP features, SharePoint is a "part of Microsoft's .Net plan to create an infrastructure to support the [Internet] delivery . . . of software as [part of Internet] services."⁸⁹

The overall problem is that there is no general mandate in the *Microsoft* court of appeals' opinion making bundling a per se illegal procedure.⁹⁰ In fact, the court of appeals stated that the per se test is invalid when addressing platform software.⁹¹ The court of appeals did, however, clearly provide the analysis that must be employed when addressing these issues.⁹² With each aspect of technology that may raise antitrust violations (i.e., Microsoft Instant Messenger that was indepen-

81. *Microsoft*, 253 F.3d at 49-50.

82. Joe Wilcox, *Want Media Player 8? Buy Windows XP* ¶ 1 <<http://news.com.com/2100-1040-256387.html>> (Apr. 24, 2001).

83. *Id.*

84. *Id.* at ¶ 7.

85. See generally John Fontana, *Microsoft Boldly Bundles Again: New Windows Collaboration Features Heralded But Raise Questions*, *Network World* 1 (Oct. 8, 2001).

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. France, *supra* n. 5, at 36.

91. *Microsoft*, 253 F.3d at 89-95.

92. *Id.* at 58-59.

dent software and is now bundled with Windows XP), the government must first demonstrate that there is an anticompetitive effect.⁹³ Under this first prong, the government must show that Microsoft's actions in bundling the technology with the Windows operating system harmed that competitive process and thereby harmed consumers.⁹⁴ Once that is established, Microsoft then has the opportunity to justify its actions.⁹⁵ Microsoft may do this by demonstrating that XP provides greater efficiency or that consumers are demanding this type of technology.⁹⁶ After Microsoft provides its justification, the government must then demonstrate that the anticompetitive harm it previously described outweighs Microsoft's justification.⁹⁷ Thus, in the end, the court employs a balancing test, which is a subjective and very fact intensive examination.⁹⁸

As the Windows XP instant messaging function support a wide variety of innovative products and thus have an anticompetitive, or exclusionary effect, it is one of the new Microsoft features that government lawyers have a good chance of attacking.⁹⁹ One future use of the XP instant messenger is in conjunction with new game software that would let multiple users play through the Internet against each other.¹⁰⁰ Additionally, "Microsoft is also clearly trying to leverage its Windows monopoly to build a customer base for its messenger system rather than those produced by rivals."¹⁰¹ An antitrust suit alleging an anticompetitive effect, however, is not an open-and-shut case.¹⁰² "Instant messaging could never be the type of broad platform that . . . Netscape's Navigator browser could have been."¹⁰³ Since "[t]he number of programs suitable to run on messaging software is much smaller than the number able to run on a browser, so the Netscape precedent set in the [court of appeals] decision may not fully apply."¹⁰⁴

Because this type of analysis is subjective and is based on a point-counterpoint approach with a final weighing of justifications, it is difficult to definitively determine whether Windows XP will be found to violate the *Sherman Act*. It is relatively certain, however, that possible antitrust ramifications exist from Windows XP. Based on the DOJ's decision in September it is difficult to know whether they will further press

93. *Id.*

94. *Id.*

95. *Id.* at 59.

96. *See id.*

97. *Id.*

98. *Id.*

99. France, *supra* n. 5, at 36.

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

the issue of Microsoft "tie"-ing other programs to its Windows operating systems.¹⁰⁵

CURRENT EVENTS IN THE POSSIBLE WINDOWS XP ANTITRUST CASE

Since there was no injunction enjoining its release, Microsoft launched Windows XP on October 25, 2001.¹⁰⁶ State attorney generals have already initiated investigations into the possible antitrust implications of Windows XP.¹⁰⁷

One telling strategic move occurred on July 13, 2001, when "incoming Justice . . . Charles James joined [several attorneys] in a request to quickly [have] a new judge assigned to the Microsoft case."¹⁰⁸ "The motion [suggests] that the Bush Administration could be tougher on [Microsoft] than expected."¹⁰⁹ "Microsoft responded [with a] motion asking the court to reaffirm [its] control over the [Windows] design."¹¹⁰

Moreover, commentators believe that Bill Gates is clearly aware that Windows "XP is under scrutiny."¹¹¹ "[H]e has taken a few small steps to appease critics, such as giving PC makers and consumers more power to choose non-Microsoft products" and he has started the process of adapting Windows XP to the settlement provisions.¹¹² Gates is still forcing other issues, however.¹¹³ For example, he withdrew Sun Microsystems' Java technology from Windows XP and insisted that Microsoft be allowed to "put any new technology it wishes into [its] operating systems."¹¹⁴

IV. CONCLUSION

Thus, the issue has become, "When is it legal to add new features to

105. *Lucky Escape*, *supra* n. 49, at 14.

106. Rooney, *supra* n. 51, at 3.

107. France, *supra* n. 51, at 36. Connecticut Attorney General Richard Blumenthal stated, "Microsoft may be repeating some of its predatory practices . . . If [Microsoft] uses [Windows] XP to extend its monopolistic power in the operating system, that's a real problem." *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.* One of the possible rationales for this decision is that in October 1997, Sun Microsystems sued Microsoft and the settlement agreement restricted Microsoft to an older version of Java. Elise Ackerman, *Microsoft to Drop Java Support for Future Products*, San Jose Mercury News, p. 10. Microsoft stated that it was not going to ship old technology in its new operating system. *Id.* Instead, Microsoft granted PC manufacturers the freedom to preload other versions of the code needed to run Java on computers before they are sold to consumers. *Id.*

Windows?"¹¹⁵ At the heart of this issue is the age-old question of whether a monopoly in the technology industry helps or hinders innovation.¹¹⁶ On one hand, Microsoft's monopoly has created a standard the rest of the industry has rallied around to create products that work well together.¹¹⁷ On the other, Microsoft has grown so powerful that it has expanded into new markets, gobbling up rival technologies and possibly smothering potential innovations.¹¹⁸ Unfortunately, the court of appeals in *Microsoft* did not clearly define a set of rules delineating when Microsoft can add new features to Windows.¹¹⁹ The court stated that each new instance of bundling should be evaluated individually on its own merit.¹²⁰

What we are left with is a subjective, fact intensive, analysis provided by the court of appeals and a settlement that requires Microsoft to reveal some previously secret information and provides OEMs with a little more freedom.¹²¹ What is still unclear are the rules that corporations such as Microsoft should follow to encourage innovation without smothering competition. Without those guidelines, Microsoft will continue to aggressively develop, market and sell operating systems that may hinder and/or even stunt innovation in the technology industry.

115. *See France, supra* n. 5, at 36.

116. *See id.*

117. *See id.*

118. *See id.*

119. *See Microsoft*, 253 F.3d 34.

120. *Id.* at 84.

121. *Id.* at 84-95; *Rooney, supra* n. 51, at 3.

