New York Law Journal

NEW YORK LAW JOURNAL SPECIAL REPORT

An ALM Publication

Litigation

WWW.NYLJ.COM

FEBRUARY 10, 2022

Broken Windows and a Lost Search Engine: 'Microsoft' as a Roadmap for 'Google'

BY PAUL M. KAPLAN

Monopolies are not illegal under current legal jurisprudence. However, the possession of monopoly power in the relevant market and the willful acquisition or maintenance of that power through unlawful conduct is violative of §2 of the Sherman Act, as *U.S. v. Grinnell*, 384 U.S. 563, 570-71 (1966) has informed us. The unlawful conduct has been understood to mean anti-competitive conduct. As set forth in the Amended Complaint against Google filed on Jan. 15, 2021 in the U.S. District Court of the District of Columbia, the U.S. Department of Justice (the DOJ) and 14 states have alleged anticompetitive conduct that violates §2. There have been no responsive pleadings filed by Google. This article will address the parallels with the initial Microsoft litigation in the U.S. District Court, *U.S. v. Microsoft*, 87 F. Supp. 2d 30 (D.D.C. 2000) regarding §2 monopolization claim under the Sherman Act and what Google can expect during the litigation. See Paul M. Kaplan, "The Unfolding Microsoft Drama: Shattered Windows," The Antitrust Counselor (May 15, 2001).

PAUL M. KAPLAN *is a shareholder in* ANDERSON KILL P.C.'S *New York office and co-chair of the firm's antitrust and unfair competition group.*

Google Litigation

Maintenance of monopoly power is the cornerstone of the DOJ's action against Google—in general search services, search advertising market and the search text market. The Amended Complaint alleges that Google maintained its monopoly power and violated §2 of the Sherman Act by:

(1) Exclusionary Distribution Agreements that locked up the preset default positions for search access points on browsers, mobile devices, computers and other devices;

(2) Requiring preinstallation and prominent placement of Google's apps;

(3) Tying search access points to Google Play, and Google APIs (application program interfaces);

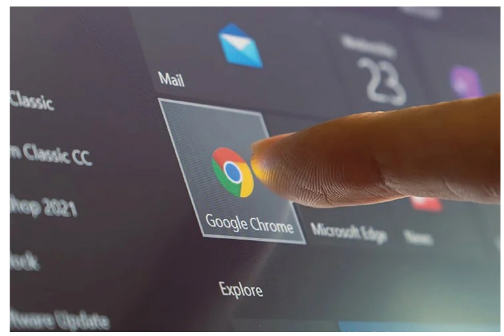
(4) Imposing restrictions that drove queries to Google at the expense of search rivals;

(5) Exclusionary conduct that has foreclosed a substantial share of the general search, search advertising and general search text advertising markets;

(6) Anticompetitive acts that have had harmful effects on competition, advertisers and consumers;

(7) Maintaining and abusing its monopoly power in general search services, search advertising and search text advertising through anticompetitive and exclusionary distribution agreements that lock up the preset default positions for search access points on browsers, mobile devices, computers and other devices; and

(8) Imposing other restrictions, such as Revenue Sharing Agreements to both Android Partners and Apple, that benefit Google at the expense of general search services, search advertising and general search text advertising rivals.



Amended Complaint at 55-57.

Microsoft Litigation

The Complaint filed on May 18, 1998 by the DOJ against Microsoft alleged violations of §§1 and 2 of the Sherman Act. The alleged violations of §2 are similar to the anti-competitive conduct detailed in the Google allegations. The Complaint states that Microsoft violated §2:

(1) In requiring original equipment manufacturers (OEMs) to license and distribute the Internet Explorer (I/E) browser or any other software when licensing the Windows operating system product (Windows) (Could be the basis a §1 or 2 claim);

(2) In entering into agreements with OEMs restricting their right to modify the screens and functions of Windows or to add non-Microsoft browser software or other software products during the boot-up sequence, or to substitute non-Microsoft browser software;

(3) Requiring persons to license and distribute its I/E software or any other software in order to receive placement or access to any Microsoft operating system product, any screen or function; and,

(4) Requiring or inducing person to agree *not* to license, distribute or promote such browser only on terms or conditions that materially disadvantage it in attempting to monopolize the market for I/E browsers and in willfully maintaining its monopoly in the market for PC operating systems.

Legal Analysis of Monopolization in Microsoft Litigation

Judge Thomas Penfield Jackson's analysis of the law in *U.S. v. Microsoft* is still applicable today. While the antitrust laws do not prevent a corporation from lawfully becoming a monopoly, they do "operate to limit the means by which a firm may employ to lawfully either acquire or perpetuate monopoly power." *U.S. v. Microsoft*, 87 F. Supp. 2d at 35. Generally, §2 is violated if a corporation obtains or preserves illegally its monopoly power, defined by the courts as the ability to raise prices, restrict output or exclude competition through anti-competitive acts.

There are two elements that define monopoly power: (1) the possession of monopoly power in a relevant market; and (2) the willful acquisition or maintenance of monopoly power, as distinguished from the growth or development of such power as a consequence of a superior product, business acumen or historic accident. *U.S. v. Grinnell*, 384 U.S. 563, 571 (1966). Regarding the first element, the court must first determine the boundaries of the commercial activity, which is referred to as the "relevant market"—without which there is no way to measure a corporation's ability to lessen or destroy competition. The court must then assess the corporation's actual power to control prices, to restrict output or, to exclude competition from the relevant market.

In *Microsoft*, the court concluded that the relevant market was the "worldwide licensing of Intel-compatible PC operating systems." *Microsoft*, 87 F. Supp. 2d at 36. "Because the ability of consumers to turn to other suppliers restrains a firm from raising prices above the competitive level, the definition of the 'relevant market' rests on a determination of available substitutes." Id. at 36, citing to *Rothery Storage & Van Co, v. Atlas Van Lines*, 792 F. 2d 210, 218 (D.C. Cir. 1986).

In order to determine the product market, its cross-elasticity is examined. That is, when faced with a price increase what are the available substitutes to which consumers can turn? Applied to Microsoft, the Court found no products existed that constituted substitutes for Intel-compatible PC operating systems without consumers incurring substantial costs, particularly where Microsoft possessed a market share in excess of 95% in such operating systems.

With Microsoft's established applications, there existed significant barriers to entry in the Intel-compatible PC operating systems. Barriers to entry are generally defined as the costs and business obstacles a new or repositioned entrant to the market would face in entering *de novo* into a particular market. In citing to the 1982 *AT&T* case, the court stated that a high market share with significant barriers to entry generally creates a presumption that a party enjoys monopoly power. *Microsoft*, 87 F. Supp. 2d at 36.

Similar to the allegations in the Google litigation, the court held that there was significant corroborative evidence of Microsoft's monopoly power based on its ability to maintain its monopoly power through anti-competitive practices. The threshold question was whether Microsoft's conduct was exclusionary; that is, had Microsoft restricted the ability of other firms to compete in a relevant market on the merits of their products. If there is a "significant exclusionary impact" in a relevant market, such conduct will be deemed to be anticompetitive and a §2 violation will be proven.

The only possible defense available to Microsoft was the assertion of a specific, procompetitive business motivation that would explain the full extent of its exclusionary conduct.

In attempting to meet this burden, Microsoft sought to rebut the allegation of possession of monopoly power by: (1) evidence of putative restraints on its ability to exercise such monopoly power, and (2) behavior of its own that is inconsistent with monopoly power. The Court dismissed this defense, asserting that such alleged constraints on its monopoly power did not deprive Microsoft of its ability to price Windows above a competitive level.

And Microsoft continued such pricing practice for a significant period of time without any erosion of its market share by a new entrant or expansion from its meager competitors. *Microsoft*, 87 F. Supp. 2d at 37; see P. Kaplan, Client Note, "Microsoft's Conclusions of Law: 'Placing an Oppressive Thumb on the Scale of Competitive Fortune'" (April 15, 2000).

Legal Analysis of Google Monopolization Allegation

It is alleged that Google possesses monopoly power in the following markets with the existence of significant barriers to entry:

(1) General Search Services Market, 88% market share;

(2) Search Advertising Market, 70% market share;

(3) Search Text Advertising Market, 70% market share; and

(4) Mobile Search Market, 90% market share.

The complaint alleges that Google employs its monopoly power in mobile search by entering into anti-competitive agreements with both Android device manufacturers (LG, Motorola, and Samsung) and Apple, while sharing significant revenue with them. In return Google is provided with: (1) a bundling of its Apps; (2) the making of certain Apps undeletable; (3) the most valuable and important location on the default home screen of devices; and (4) becoming the preset default, general search engine.

Paragraph 7 of the Amended Complaint summarizes Google's alleged anti-competitive conduct:

Google monetizes this search monopoly in the markets for search advertising and general search text advertising, both of which Google has also monopolized for many years. Google uses consumer search queries and consumer information to sell advertising. In the United States, advertisers pay about $40 billion annually to place ads on Google's search engine results page (SERP). It is these search advertising monopoly revenues that Google 'shares' with distributors in return for commitments to favor Google's search engine. These enormous payments create a strong disincentive for distributors to switch. The payments also raise barriers to entry for rivals-particularly for small, innovative search companies that cannot afford to pay a multi-billion-dollar entry fee. Through these exclusionary payoffs, and the other anticompetitive conduct …, Google has created continuous and self-enforcing monopolies in multiple markets.

We are best reminded of the dissent of the late Justice Antonin Scalia in *Eastman Kodak Co. v. Image Technical Services*, 504 U.S. 451, 488 (1992), where he stated:

Our Section 2 monopolization doctrines are directed to discrete situations in which a defendant's possession of substantial market power, combined with his exclusionary or anti-competitive behavior, threatens to defeat or forestall the corrective forces of competition and thereby sustain or extend the defendant's agglomeration of power … Where a defendant maintains substantial market power, his activities are examined through a special lens: Behavior that might otherwise not be of concern to the antitrust laws-or that might even be viewed as procompetitive-can take on exclusionary connotations when practiced by a monopolist.

These words aptly describe Google's conduct set forth in the Amended Complaint by the DOJ and the 14 states.

Conclusion

The market shares that the Amended Complaint asserts would be adequate to prove that Google is in possession of monopoly power in the above noted markets. But it remains to be seen whether Google can meet its burden to show that its current market shares are transitory and soon to be diminished either by technological advances or innovation that current or start up competitors will soon possess. In short, Google must show that there will be limits on its ability to exercise such monopoly power, as well as demonstrating that its behavior is inconsistent with the possession of monopoly power. See *Microsoft*, 87 F. Supp. 2d at 37. Moreover, Google must rebut the existence and significance of the barriers to entry set forth in Paragraph 22 of the Amended Complaint: that developing a search engine competitive with Google would require an up-front investment of billions of dollars, and hundreds of millions per year to maintain.

This litigation is sure to be of marathon length, as it will also be an important precursor of probable, subsequent litigation against other titans in the high-tech industry: witness the notices of appearance of counsel for Apple, AT&T, Microsoft, Oracle, Amazon and Samsung.

The litigation will undoubtedly define Google's future but, more importantly, may set out the roadmap for the high-tech industry in the United States, its role in bringing about innovation on the Internet in the coming years and whether it will be able to successfully compete in world markets.