All Hail the European Union: Implications of Microsoft v. Commission on Global Antitrust Enforcement

Clayton Graham
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I. INTRODUCTION

Microsoft is a global behemoth with billions of dollars of profit and tens of thousands of employees worldwide. It is a ubiquitous presence in the personal computer operating systems market (PC market) with a greater than ninety

* J.D. Candidate, International Legal Studies Certificate, Intellectual Property Concentration, University of the Pacific, McGeorge School of Law, 2009. I would like to thank my family and friends for their constant support. This Comment is dedicated to my wife, Jeana.


3. Id. (for the fiscal year ending June 30, 2008, Microsoft reported having 91,259 employees worldwide).
percent market share. Microsoft produces the Windows operating system as well as operating systems for the work group server market (server market). Microsoft enjoys a strong market share in the server market of more than fifty percent.

In the past fifteen years, Microsoft has faced allegations of violations of antitrust laws in both the United States and, more recently, in the European Union ("EU"). The U.S. investigation, brought by the Department of Justice, focused on Microsoft’s behavior concerning its Windows operating system and Internet Explorer web browser. The U.S. case was settled by a consent decree that will be analyzed in Part VIII. The European Commission ("Commission") conducted the EU investigation and focused primarily on Microsoft’s behavior concerning its server products starting with the Windows 2000 family of products. The EU case ended with a judgment against Microsoft that required it to disclose information to competitors and pay a substantial fine.

The Microsoft antitrust cases highlight the tension between antitrust and intellectual property (IP) law. In both cases, Microsoft argued that its actions were legal uses of its IP rights (IPRs). The tension between IP and antitrust is a question of the proper balance between IP’s goal of ensuring innovation and antitrust’s goals of ensuring competition. The two cases also highlight the
different views of the U.S. and EU over the discord between IP and antitrust laws. The divergent views concern the extent to which antitrust laws should be used to correct improperly granted or overbroad IP rights.

This Comment will analyze the U.S. and EU antitrust cases as well as the policies of the two jurisdictions concerning IP and antitrust law. Part II provides an overview of the Commission decision in the EU case. Part III discusses the economic theory pertinent to the IP/antitrust tension. Part IV discusses the U.S. policy regarding IP and antitrust. Part V discusses the likely outcome of the EU case under U.S. law. Part VI discusses the EU policy regarding IP and antitrust. Part VII discusses the EU decision and the change in EU IP/antitrust law that it represents. Part VIII discusses the effect of the decision.

This Comment argues the effect of this decision will be two-fold: (1) competition in the technology and software industries will increase and (2) the EU will become the dominant regulatory body with which technology and software companies must contend.

II. EU CASE OVERVIEW

On December 10, 1998, Sun Microsystems (Sun) applied to the Commission to initiate proceedings against Microsoft. Sun alleged Microsoft held a dominant position in the personal computer operating systems market in the EU. Sun further alleged Microsoft abused this dominant position by withholding information necessary to allow non-Microsoft work group servers to fully interoperate with Windows-based client PCs. Sun considered Microsoft’s action a violation of Article 82 of the Treaty establishing the European Community (EC Treaty). The Commission opened a case on August 1, 2000 and launched an investigation into Microsoft’s conduct focusing on the Windows 2000 generation of PC and work group server operating systems.

The Commission issued its decision on March 24, 2004. After providing the background information for the case and a thorough technical explanation of the
products and markets, the Commission discussed the specific interoperability information requested by Sun and Microsoft’s denial of the request. It also discussed Microsoft’s behavior regarding interoperability information for Windows PC operating systems and work group server operating systems.

The Commission found Microsoft denied Sun’s request for disclosure and that the value of the information requested by Sun derived from Microsoft’s dominant position in the PC market. The Commission rejected Microsoft’s argument that Sun was seeking disclosure of source code and found Sun was seeking disclosure of interoperability specifications. The Commission also found Microsoft’s failure to disclose the specifications was part of a pattern of behavior. It concluded Microsoft’s behavior was a disruption of supply; Microsoft had supplied similar specifications for previous generations of client PC operating systems.

According to the Commission’s decision, an essential objective of IP law is to stimulate creativity for the general public good. After establishing that Microsoft’s refusal to supply interoperability information created the risk of eliminating competition, the Commission assessed whether the effect of disclosure on Microsoft’s incentive to innovate outweighed the effect of the failure to disclose on the market and consumers.

Addressing Microsoft’s contention that the requested interoperability information is protected intellectual property, the Commission held, “a detailed examination of the scope of the disclosure at stake leads to the conclusion that, on balance, the possible negative impact of an order to supply on Microsoft’s incentives to innovate is outweighed by its positive impact on the level of innovation of the whole industry.” With regard to Microsoft’s claim it had no incentive to engage in anti-competitive conduct, the Commission found it “[was] not supported—and in fact is largely contradicted—by the evidence in this case.”

After addressing Microsoft’s arguments that its behavior was objectively justified, the Commission found “Microsoft’s refusal to supply interoperability

28. Id. ¶ 21-106.
29. Id. ¶ 185-90.
30. Id. ¶ 191-93.
31. Id. ¶ 194-301.
32. Id. ¶ 560.
33. Id. ¶ 567.
34. Id. ¶ 572.
35. Id. ¶ 577.
36. Id. ¶ 584.
37. Id. ¶ 711.
38. Id. ¶ 712.
39. Id. ¶ 783.
40. Id.
information violates Article 82 of the [EC] Treaty. The Commission found: (1) interoperability with the Windows domain architecture is necessary for a server operating system vendor to viably stay on the market; (2) Microsoft has decreased the disclosure it makes about interoperability information; (3) there is a risk of elimination of competition in the server market; (4) there is no actual or potential substitute for disclosure of the interoperability information; and (5) Microsoft's refusal to supply stifles innovation in the affected market.

Microsoft appealed the Commission’s finding to the Court of First Instance (CFI). The Court issued its ruling on September 17, 2007 upholding the Commission’s conclusion that Microsoft abused its dominant position in violation of Article 82 of the EC Treaty. Microsoft has decided not to appeal the Court of First Instance decision.

III. ECONOMIC THEORY

Before discussing the EU Microsoft case and its implications, it is necessary to outline the applicable economic theory. Important to this discussion of economic theory is the recognition that IP and antitrust laws serve distinct purposes. The goal of patents is to provide incentive to innovate by giving the patent holder a limited right to exclude others from using the invention. Antitrust, on the other hand, attempts to ensure competition by declaring certain business behavior, including certain exclusionary actions, to be illegal. Given

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41. Id. ¶ 784.
42. Id. ¶ 779.
43. Id. ¶ 780.
44. Id. ¶ 781.
45. Id.
46. Id. ¶ 782.
47. Microsoft Corp., 2007 E.C.R. 00. “The Court of First Instance is an appellate level judicial body within the European Union. The Court of First Instance can hear appeals of decisions from the European Commission. The Court of First Instance has jurisdiction to hear: direct actions brought by natural or legal persons against acts of Community institutions (addressed to them or directly concerning them as individuals) or against a failure to act on the part of those institutions, for example, a case brought by a company against a Commission decision imposing a fine on that company . . . The rulings made by the Court of First Instance may, within two months, be subject to an appeal, limited to questions of law, to the Court of Justice.” Europa, The Court of First Instance, http://curia.europa.eu/en/instit/presentationfr/index_ipi.htm (last visited Nov. 1, 2008).
49. Id.
52. Id.
53. Id.
the differing goals of IP and antitrust, there is a certain degree of tension between the two bodies of law.\footnote{54}

Antitrust law is designed to ensure competition in order to ensure maximization of efficiency.\footnote{55} Antitrust law is concerned with three efficiencies: productive, allocative and dynamic.\footnote{56} Productive efficiency exists when costs are minimized; allocative efficiency exists when market prices are close to incremental production costs; dynamic efficiency exists when the appropriate amount of innovation is present in the market.\footnote{57} Decrease in competition results in a loss of allocative efficiency; this loss is tolerated on the theory that the short-term monopoly profits guaranteed by the patent provide the appropriate incentive for individuals to engage in innovative activity.\footnote{58} After all, monopoly profits are "the baits that lure capital onto untired trails."\footnote{59}

Antitrust issues arise when a patent holder uses its monopoly power in the patented market to exclude competitors in a different market, a practice known as monopoly leveraging.\footnote{60} In a working paper for the NET Institute, Professor Economides and his co-author Hebert provide a particularly clear discussion of the economic conditions necessary to enable monopoly leveraging.\footnote{61} First, firm A has a patent and monopoly on good 1.\footnote{62} Second, there is an adjacent market that produces goods complementary to good 1.\footnote{63} Firm A's patent on good 1 allows it to control the interface of good 1 and, by extension, the degree to which good 1 and good 2 are complementary.\footnote{64} Thus, firm A's patent on good 1 allows it to leverage that monopoly and extend it to the market for good 2.\footnote{65}

To illustrate the way in which Microsoft can leverage its monopoly in the PC market into the server market consider the following example. Suppose firm A has a monopoly on a patented bolt. Let us further assume firm A also manufactures nuts that connect to the patented bolt but that the market for nuts is competitive. If any nut can firmly connect to firm A's patented bolt, then firm A will be forced to compete in the competitive market for nuts. If, however, firm A modifies the design of the bolt so that only firm A's nut can make a firm


\footnotesize{55. Economides & Hebert, supra note 51. For an overview of the economics of antitrust, see HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE 2-25 (3d ed. 2005).}

\footnotesize{56. Economides & Hebert, supra note 51.}

\footnotesize{57. Id.}

\footnotesize{58. Id. at 4.}


\footnotesize{60. Economides & Hebert, supra note 51, at 4-5.}

\footnotesize{61. Economides & Hebert, supra note 51.}

\footnotesize{62. Id. at 9.}

\footnotesize{63. Id.}

\footnotesize{64. Id. at 10.}

\footnotesize{65. Id.}
connection with the patented bolt, firm A can use its monopoly on the patented bolt to improperly diminish competition in the market for nuts.

In the EU case, Microsoft argued it "'[was] highly implausible that [it] had ... the incentive to foreclose competitors through leveraging in the ways suggested by [the Commission].'" Microsoft based its argument on the one monopoly profit theory. This theory holds "there is a 'single monopoly profit' in the combination of a sale of [good 1] with [good 2], and therefore any leveraging of the monopoly in [the] market [for good 1 to the] market [for good 2] cannot be attributed to anti-competitive motivations." However, according to more modern economic theory, the one monopoly profit theory "holds only in very exceptional circumstances." For the one monopoly profit theory to hold, good 1 and good 2 must be "combined in a fixed and constant ratio ... each buyer buys only one unit, there is perfect foresight, the market in good [2] is competitive and the goods are produced with constant returns to scale." Some commentators argue that when the markets allegedly being monopolized are entered into simultaneously (market for nuts and bolts), the traditional theory of leveraging does not hold. However, when the markets are entered into consecutively (computer users moving from applications accessed through operating system to applications accessed through a web browser), the possibility for leveraging may exist.

The Commission found two flaws with Microsoft's application of the one monopoly profit theory. First, the Commission found the PC and server markets are not perfect complements with fixed ratios. Second, the Commission noted the theory does not hold when limiting competition in market 2 reinforces the dominant undertaking's position in market 1 because "by strengthening its dominant position in the [server] market, Microsoft effectively reinforces the barriers to entry in the [PC] market." Accordingly, the Commission held "Microsoft has incentives to leverage its market power from the [PC] market into the [server] market."
Society provides the temporary monopoly in the market for good 1 to provide the theoretically exact amount of incentive necessary to promote the production of good 1. In Microsoft's case, market 1 is the market for the Windows operating system and market 2 is the server operating system market. The extension of the monopoly in the patented market to a new market is problematic because it provides the firm with more monopoly profit than is intended by the patent. The extra monopoly profit Microsoft receives is two-fold. First, it receives the monopoly profit from market 2 that it is able to derive from its patent in market 1. Second, by raising the barriers to entry to market 1, Microsoft is able to extract more monopoly profit from market 1 than it could without the increased barriers to entry.

IV. U.S. IP/ANTITRUST POLICY

In the U.S., antitrust actions are governed by section 2 of the Sherman Act, which prohibits "monopoliz[ing] or attempt[ing] to monopolize... any part of the trade or commerce." According to the Supreme Court, a violation of section 2 requires, in addition to possession of monopoly power, "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." Monopoly power is defined as "the power to... exclude competition." Accordingly, the Sherman Act prohibits using monopoly power "to foreclose competition, to gain a competitive advantage, or to destroy a competitor."

The Supreme Court has noted that generally, the Sherman Act does not restrict the right of a firm to choose the parties with whom it will deal. Furthermore, monopoly power is not unlawful unless it is "accompanied by an element of anticompetitive conduct." Moreover, the Court did note, "[u]nder certain circumstances, a refusal to cooperate with rivals can constitute anticompetitive conduct." However, the Court is "very cautious" about recognizing these exceptions.

77. Economides & Hebert, supra note 51, at 10.
78. Id.
80. Id.
83. Id. (quoting Eastman Kodak Co. v. Image Technical Servs. Inc., 504 U.S. 451, 482-83 (1992)).
84. Trinko, 540 U.S. at 407.
85. Id. at 407.
86. Id. at 408.
A. Refusal to Deal

Two Supreme Court cases hold that the unilateral refusal by one firm to deal with a competitor can violate antitrust law: *Kodak I* and *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.* In *Kodak I*, the Court considered a claim by a group of independent service organizations (ISOs) that Kodak had violated antitrust law by refusing to sell the ISOs repair parts for Kodak copiers; the ISOs claimed Kodak did this to gain a monopoly in the market for service of Kodak copiers. *Kodak I* put forward two important propositions: it recognized a firm could be subject to antitrust liability for using its properly gained monopoly power in one market to leverage into another market and it recognized that Kodak’s behavior could give rise to a section 2 claim if it was part of a “scheme of willful acquisition or maintenance of monopoly power.” *Kodak I* has been described as an “aggressive” decision and some suggest it should be overruled. The majority of courts have “constru[ed] Kodak narrowly” in a number of ways suggested by Hovenkamp in his hornbook on antitrust.

The second case, *Aspen*, is important both for its finding of antitrust liability for refusal to deal and its discussion of the essential facilities doctrine that will be explored in the next section. *Aspen* involved two competing ski resorts: Ski Co., which owned three of the four mountains available for skiing in a geographic area, and Highlands Skiing, which owned the other mountain. The dispute arose when Ski Co. stopped participating in a joint ski pass that allowed skiers to purchase one pass and have access to all four mountains. The Court found that “the absence of an unqualified duty to cooperate” did not mean this “may not have evidentiary significance” or that it “may not give rise to liability in certain circumstances.” Since Ski Co. was not able to provide a valid business justification for discontinuing its participation in the joint program, the Court found liability under section 2.

87. *Id.*
91. *Id.* at 479 n.29.
92. *Id.* at 483.
97. *Id.* at 593.
98. *Id.* at 601.
Three cases further illustrate the U.S. policy concerning antitrust and intellectual property: *Kodak II*, *ISO I* and *Verizon Communications v. Law Offices of Curtis V. Trinko*. In *Kodak II*, the Ninth Circuit interpreted the Supreme Court's holding in *Kodak I* that a refusal by a patent holder to license was subject to a rebuttable presumption that the refusal was harmful to consumers. The court stated that "exploit[ing] a dominant position in one market to expand [the] empire into the next is broad enough to cover monopoly leveraging under § 2." The court noted the desire to exclude competitors by not licensing is a "presumptively valid business justification," but that a showing of the monopolist's state of mind or subjective motivations can rebut this presumption.

In *ISO I*, the Federal Circuit took a different approach than the Ninth Circuit. The court held that the patent holder may exclude competitors without incurring antitrust liability except under very limited circumstances such as illegal tying, fraud or sham litigation. In a related case, the Circuit stated, "where a patent... has been lawfully acquired, subsequent conduct... permissible under the patent... laws cannot give rise to liability under the antitrust laws," and that "[a] patentee may unilaterally exclude others... even if such conduct allows the patentee to obtain monopolies in multiple markets." In *Trinko*, the Supreme Court significantly limited the circumstances under which a firm can be required to license intellectual property. The Court rejected plaintiff's claim because it did "not believe that traditional antitrust principles justify adding the present case to the few existing exceptions from the proposition that there is no duty to aid competitors." *Trinko*, like *Aspen*, is important for both its discussion of traditional antitrust principles and its discussion of the essential facilities doctrine that will be explored in the next section. The opinion is notable because of the strong tone used throughout in favor of limited antitrust intervention and liability. The Court described *Aspen*
as "at or near the outer boundary of § 2 liability"\textsuperscript{113} and noted the Court was "very cautious" about recognizing exceptions to the general rule against requiring a firm to cooperate with its competitors.\textsuperscript{114} The Court further cautioned against antitrust intervention noting that "[u]nder the best of circumstances, applying the requirements of § 2 'can be difficult'"\textsuperscript{115} and that the "cost of false positives counsels against an undue expansion of § 2 liability."\textsuperscript{116}

B. Essential Facilities Doctrine

The essential facilities doctrine requires licensing of intellectual property to competitors when a refusal to license makes it impossible for competitors to compete with the dominant entity.\textsuperscript{117} The doctrine arguably has its roots in \textit{U.S. v. Terminal R.R. Ass'n}\textsuperscript{118} where the court found an antitrust violation involving railroad facilities that were deemed essential to being able to operate in the St. Louis railroad market; however, it has been noted the case makes a poor argument for section 2 liability because it involved concerted action, which is a violation of section 1.\textsuperscript{119} The first Supreme Court case to use the doctrine to find a section 2 violation was \textit{Otter Tail Power Co. v. U.S.}\textsuperscript{120} where the Court found a public utility's refusal to distribute power for municipal utility companies that wanted to supply their own electricity by purchasing it elsewhere violated section 2.\textsuperscript{121}

The most direct, clear application of the essential facilities doctrine came in \textit{MCI Communications Corp. v. AT & T}.\textsuperscript{122} In \textit{MCI}, the Seventh Circuit outlined a four part test for invoking the doctrine: (1) control of the essential facility by a monopolist; (2) a competitor's inability, practically or reasonably, to duplicate the essential facility; (3) the denial of the use of the essential facility to a competitor; and (4) the feasibility of providing the essential facility.\textsuperscript{123}

As mentioned earlier, the two recent Supreme Court cases of \textit{Aspen} and \textit{Trinko} both addressed the extent to which the essential facilities doctrine influences U.S. IP and antitrust law.\textsuperscript{124} In \textit{Aspen}, the Court did not directly address the issue because it found it was "unnecessary to consider the possible

\textsuperscript{113} Id. at 409.
\textsuperscript{114} Id. at 408.
\textsuperscript{115} Id. at 414 (quoting \textit{U.S. v. Microsoft Corp.}, 253 F.3d 34, 58 (D.C. Cir. 2001)).
\textsuperscript{116} Id. at 414.
\textsuperscript{117} See Czapracka, \textit{supra} note 17, at 51.
\textsuperscript{118} 224 U.S. 383 (1912).
\textsuperscript{119} HOVENKAMP, \textit{supra} note 55, at 309.
\textsuperscript{120} 410 U.S. 366 (1973).
\textsuperscript{121} Id.
\textsuperscript{122} 708 F.2d 1081 (7th Cir.), cert. denied, 464 U.S. 891 (1983).
\textsuperscript{123} Id. at 1132-33.
relevance of the ‘essential facilities’ doctrine.\textsuperscript{125} Similarly, in \textit{Trinko}, the Court did not specifically address the applicability of the doctrine. Instead, the Court took a narrow view of the doctrine holding it “[h]as never recognized such a doctrine . . . and we find no need . . . to recognize it.”\textsuperscript{126} In dicta, the Court elaborated that it would probably apply the doctrine in very narrow circumstances that are unlikely to apply in most cases.\textsuperscript{127}

The essential facilities doctrine has been strongly criticized by commentators in the U.S.\textsuperscript{128} Professor Areeda derides the doctrine as “so-called . . . because most Supreme Court cases invoked in support do not speak of it and can be explained without reference to it.”\textsuperscript{129} Professor Hovenkamp is more strident in his criticism describing the doctrine as “one of the most troublesome, incoherent and unmanageable of bases for Sherman section 2 liability.”\textsuperscript{130} He further suggests “[t]he antitrust world would almost certainly be a better place if it were jettisoned.”\textsuperscript{131} According to Hovenkamp, “the doctrine is either superfluous or else inconsistent with basic antitrust principles.”\textsuperscript{132} As will be discussed later, the position of the U.S. courts and commentators stands in stark contrast to Europe where the doctrine is recognized and has “been steadily growing in significance.”\textsuperscript{133}

V. EU MICROSOFT CASE UNDER U.S. LAW

If the EU Microsoft case were decided under current U.S. law, the result would be significantly different from that reached by the Commission and upheld by the Court of First Instance. The case would likely be analyzed using the tests and reasoning from \textit{ISO I} and \textit{ISO II}. \textit{Trinko} and the court’s treatment of the essential facilities doctrine would also govern the decision. A claim for antitrust liability may be possible under \textit{Kodak I} or \textit{Aspen}, but the likelihood of success is not high.

Microsoft would not incur antitrust liability under the \textit{ISO} tests or under \textit{Trinko}. The first two circumstances that produce liability are not satisfied because there was no allegation of illegal tying concerning servers or fraud. The third circumstance is not satisfied because Microsoft did not sue Sun or any other competitor to which it denied interoperability information. The essential facilities

\textsuperscript{125} \textit{Aspen}, 472 U.S. at 611 n.44.
\textsuperscript{126} \textit{Trinko}, 540 U.S. at 411.
\textsuperscript{127} \textit{Id}.
\textsuperscript{128} See Phillip Areeda, \textit{Essential Facilities: An Epithet in Need of Limiting Principles}, 58 \textit{Antitrust L.J.} 841 (1989); Hovenkamp, supra note 55, at 309.
\textsuperscript{129} Areeda, supra note 128, at 841.
\textsuperscript{130} Hovenkamp, supra note 55, at 309.
\textsuperscript{131} \textit{Id}.
\textsuperscript{132} \textit{Id} at 313 (explaining how the doctrine requires price administration by the court and undercuts incentives of competitors to develop alternative sources of supply).
\textsuperscript{133} Czapracka, supra note 17, at 52.
doctrine, if recognized at all, would be given a very narrow reading in accord with *Trinko*. This would present a significant obstacle to a successful claim against Microsoft, as the three categories of *ISO I* cannot be satisfied. Therefore, Microsoft's behavior, despite the potential for monopoly leveraging, would not incur antitrust liability under *ISO I* or *Trinko*. This is precisely the situation considered and expressly allowed by the Federal Circuit in *ISO II*.\(^\text{134}\)

The cases most likely to support a finding of section 2 liability if the EU Microsoft case were tried in the U.S. would be *Kodak I* and *Aspen*. Both these cases support a broader reading of when a firm has a duty to deal with a competitor and can incur antitrust liability for failure to do so. However, a court considering the current Microsoft case would likely differentiate both *Aspen* and *Kodak I*. The influence of *Aspen* has been significantly limited by *Trinko*’s description of *Aspen* as at the edges of section 2 liability and its refusal to recognize the limitation of the essential facilities doctrine. After *Trinko*, it is doubtful whether *Aspen* is strong enough to support a section 2 claim based on the essential facilities doctrine.

*Trinko* also suggests that a section 2 claim under *Kodak I* would be difficult. The clear, almost strident tone of *Trinko* strongly supports limiting antitrust intervention whenever possible. This stands in stark contrast to the "aggressive"\(^\text{135}\) *Kodak I* decision. Furthermore, *Kodak I* likely would be distinguished on its facts. In *Kodak I*, Kodak controlled the market for copier repair parts since only Kodak parts would work on Kodak machines.\(^\text{136}\) This allowed Kodak to foreclose competition from ISOs by refusing to sell them repair parts. Although the denial of interoperability information by Microsoft negatively affected the other competitors in the server market, Microsoft was not able to foreclose competition in the server market by denying the interoperability information. This factual difference, as well as *Trinko*’s admonition about the danger of overzealous antitrust intervention, suggests *Kodak I* would not support a section 2 claim in the current Microsoft case.

The best prediction of how the current Microsoft case would be decided can be gained through an analysis of the U.S. antitrust case against Microsoft in the late 1990s. At first glance, the U.S. Microsoft decision would seem to suggest a court would find liability in the current case; after all, the D.C. District Court did find Microsoft guilty of a section 2 violation.\(^\text{137}\) However, a closer examination of the case reveals the current case would not be found a section 2 violation.

In *Microsoft I*, the District Court articulated a three part liability test for attempted monopolization under section 2: "1) that the defendant has engaged in predatory or anticompetitive conduct with 2) a specific intent to monopolize,” and 3) that there is a "dangerous probability’ that the defendant will succeed in


\(^{135}\) HOVENKAMP, supra note 55, at 297.


The dangerous probability requirement is a significantly higher standard than the risk of elimination of competition standard required under Article 82 analysis. The finding of attempted monopolization in Microsoft I was based on Microsoft's position in the web browser market where the dangerous probability standard was clearly satisfied. While Microsoft has gained a strong position in the server market because of its anticompetitive behavior, it is doubtful the dangerous probability standard could be satisfied.

The decision of the D.C. Circuit Court of Appeals in the Microsoft case casts further doubt on the success of a claim in the current case. In Microsoft II, the D.C. Circuit restated the Spectrum Sports three-part test for determining liability regarding attempted monopolization; however, it reversed the District Court's finding of liability for attempted monopolization under section 2. The Court found "a pervasive flaw in the District Court's and plaintiffs' discussion of attempted monopolization." "Simply put, plaintiffs have made the same argument under two different headings-monopoly maintenance and attempted monopolization. They have relied upon Microsoft's § 2 liability for monopolization of the operating system market as a presumptive indicator of attempted monopolization of an entirely different market." While the browser market at issue in Microsoft I and Microsoft II does not have identical economic characteristics as the server market at issue in the EU decision, it is likely that a section 2 attempted monopolization claim would also be rejected by the D.C. Circuit.

VI. EU IP/ANTITRUST POLICY

Article 82 of the EC Treaty prohibits "any abuse by one or more undertakings of a dominant position within the common market." According to the Court of Justice of the European Communities (ECJ), a dominant position under Article 82 of the EC Treaty is "a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of the consumers." The Commission demonstrated Microsoft is able to control the quasi-standard of the PC market, and thus holds a dominant position that

138. Id. at 45 (quoting Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 456 (1993)).
139. Id. at 45-46.
140. United States v. Microsoft Corp. (Microsoft II), 253 F.3d 34 (D.C. Cir. 2001).
141. Id. at 80-84.
142. Id. at 80.
143. Id. at 80-81.
144. Treaty Establishing the European Community, supra note 23.
exhibits extraordinary features. Microsoft Windows is not only a dominant product on the PC market; it is the de facto standard.

An entity with a dominant position in a market is not automatically in violation of competition laws. However, the entity is under a “special responsibility” not to engage in conduct that may affect competition. Undertakings are generally free to choose their business partners. However, a refusal by a dominant entity to supply information may constitute an abuse of dominant position.

The Software Directive provides guidance to resolve the tension between antitrust and IP in the technology area. Article 6 of the Directive addresses interoperability and outlines the requirements of a firm to provide interoperability information. The Directive also expressly provides that its terms do not preclude antitrust liability under EU competition law.

The refusal by the owner of an exclusive right to grant a license may, in exceptional circumstances, constitute abusive conduct. In the IMS case, the ECJ provided a “comprehensive pronouncement” on what conditions would satisfy the exceptional circumstances requirement that would make refusal to license abusive behavior. The Court held that refusal to license by a dominant company constitutes abusive behavior when four cumulative conditions are met: (1) the product or service is indispensable to compete in a particular market; (2) the refusal will exclude competition on a secondary market; (3) the refusal prevents the emergence of a new product for which there is potential consumer demand; and (4) the refusal is not objectively justified.

The IMS decision “illustrates a trend in the Court’s case law to set higher standards for compulsory licensing under Article 82.” The Court held the essential facilities doctrine cannot be applied “simply because rival firms are not capable of competing with the product incorporating IP.” Unless there is “complete foreclosure of the secondary market” and “the refusal to license

146. Commission Decision, supra note 12, ¶ 429.
147. Id. ¶ 472.
148. Id. ¶ 542.
151. Id.
153. Id. art. 6.
156. Czapracka, supra note 17, at 61.
158. Czapracka, supra note 17, at 61.
159. Id. at 63.
prevents the emergence of a new product,” the balance between IP and antitrust tips in favor of IP.160

VII. EU MICROSOFT DECISION

Microsoft argued disclosure of the interoperability information would “upset the ‘careful balance between copyright and competition policies’ struck by the Software Directive.”161 Before addressing Microsoft’s argument, the Commission noted the EC Treaty, not the Software Directive, governed the case.162 In fact, the Software Directive is secondary legislation and cannot supersede the EC Treaty.163

The Commission began its discussion of the Directive by discussing Article 6.164 The Commission found Article 6 “limits a copyright-holder’s rights in favour of interoperability, whether the copyright-holder is dominant or not.”165 The Commission found that given “Microsoft’s extraordinary market strength as well as the other exceptional circumstances in this case... Microsoft has an obligation to actively supply interface information to other work group server operating system vendors.”166

Next, the Commission addressed Microsoft’s argument that this is not a case governed by the interoperability disclosure requirements of the Directive.167 Microsoft argued the information requested by Sun was “a degree of interoperability that [was] too high and [went] beyond the ‘full interoperability’ that would be contemplated by the Software Directive.”168 Microsoft argued full interoperability as envisioned by the Directive is achieved when “‘all of the functionality of [a] program can be accessed from a Windows client operating system.”169 The Commission noted Microsoft’s definition of full interoperability could be interpreted to require nothing more than partial interoperability.170 The Commission rejected Microsoft’s decision because it relies on the “ambiguous concept of ‘access to functionality.'”171 The Commission also held Microsoft’s

160. Id. at 60-61.
162. Id. ¶ 744.
165. Id. ¶ 747.
166. Id.
167. Id. ¶ 749.
168. Id. ¶ 750.
169. Id. ¶ 751.
170. Id. ¶ 756.
171. Id. ¶ 755.
view must be rejected because “inter-operability, by its very nature, relates to a two-way relationship.”

The Commission determined this case was one in which a dominant supplier refused to supply necessary interoperability information as envisioned in the Directive. While the Commission did not find that this meant Microsoft’s behavior was automatically abusive, it did find the Directive’s express mention of refusal to supply interoperability information as a possible violation of Article 82 “[was] not inconsequential for [its] analysis.”

The Commission found Microsoft’s behavior satisfied the four requirements established by the ECJ in IMS. Despite Microsoft’s claims, the Commission found there were no realistic substitutes for disclosure that would enable Microsoft’s competitors to develop products capable of full interoperability with Windows-based client PCs. Microsoft put forward three categories of substitutes for the interoperability information: use of open industry standards; distribution of client-side software on the client PC; and reverse engineering of Microsoft products. After discussing the viability of each suggestion, the Commission found none of them provided a realistic substitute for the requested interoperability information. Indeed, the indispensability requirement will often be met in interface cases and the Commission’s finding “broadly accords with existing precedent.”

The Commission found Microsoft’s refusal to disclose the specifications put competitors at such a strong competitive disadvantage that it created a risk of elimination of competition in the server market. This determination is influenced by two elements: Microsoft has an extraordinarily strong position in the PC market and interoperability with a client PC operating system is of significant competitive importance in the server market. The Commission elaborated that risk of elimination of competition is sufficient to establish abusive conduct. Immediate elimination of competition is not required, particularly
where the market has strong network effects that would make reversing elimination of competition difficult.\textsuperscript{185}

The Commission considered three factors to determine there was a risk of elimination of competition in the server market: market share, uptake of Windows 2000 technologies, and the uptake of alternatives to Windows.\textsuperscript{186} Regarding the first factor, market share, the Commission acknowledged that Microsoft’s server market products have attained a dominant position in the server market.\textsuperscript{187} In the span of a few years, Microsoft’s main competitor has gone from being an industry leader to a relatively minor player.\textsuperscript{188} The significant rise in market share of Microsoft products coincided with the release of the Windows 2000 generation of PC and work group server operating systems, the generation for which Microsoft has provided less interoperability specifications than for prior generations.\textsuperscript{189}

The other two factors closely interrelate and work together to reduce competition for Microsoft in the server market. As the market share of Windows 2000 grows, more customers will make use of the features present in the Windows 2000 family of products not present in previous products.\textsuperscript{190} Due to the decreased interoperability information, it is increasingly difficult for non-Microsoft work group servers to utilize these same features.\textsuperscript{191} Utilization of the new Windows 2000 features contributes to locking the client into a homogenous Windows work group server platform.\textsuperscript{192} The 2003 market enquiry conducted by the Commission confirms this effect; out of more than one hundred enquiry respondents, only seven planned to migrate their work group server system from Windows to an alternative technology.\textsuperscript{193}

The Commission’s interpretation of the second IMS factor is a relaxation of the standard as initially articulated. The requirement has been lowered from actual elimination of competition to only a likelihood of elimination. This lowering of the degree of exclusion required creates a more plaintiff-friendly standard than the ECJ standard.

The Commission’s interpretation of the third IMS factor was controversial.\textsuperscript{194} The Commission analyzed the effect of Microsoft’s refusal to supply the information on technical development in the server market and the effect of the refusal on consumers.\textsuperscript{195} The lack of interoperability between Windows based

\textsuperscript{185} Id.
\textsuperscript{186} Id. ¶ 590-636.
\textsuperscript{187} Id. ¶ 590.
\textsuperscript{188} Id. ¶ 590.
\textsuperscript{189} Id. ¶ 592.
\textsuperscript{190} Id. ¶ 613.
\textsuperscript{191} Id.
\textsuperscript{192} Id.
\textsuperscript{193} Id. ¶ 632-33.
\textsuperscript{194} Batchelor, supra note 180, at 18.
\textsuperscript{195} Commission Decision, supra note 12, ¶ 693-701.
client PCs and non-Windows based work group servers tends to lock consumers into a homogenous Windows based work group server system. This prevents consumers from benefitting from innovative features developed by Microsoft’s competitors and discourages Microsoft’s competitors from developing new products. Therefore, the Commission found Microsoft’s behavior limited technical development and prejudiced consumers.

The new interpretation of the third IMS factor is the most controversial aspect of the decision. It “substantially lowers the bar for mandatory licensing in respect of the ‘new product’ requirement, articulated in Magill and IMS.” The new test has been described as a “‘new features’ rather than a ‘new product’” test. This new interpretation is “far-reaching” because “[i]t is very rare in the IT sector for two competing products to have the same feature set.”

According to the Commission, the “natural remedy” to Microsoft’s behavior was an order to supply the interoperability information. The Commission ordered Microsoft to disclose “complete and accurate specifications for the protocols used by Windows work group servers” to provide work group services to Windows work group networks. This disclosure covered interactions between both a Windows client PC and a Windows server including interactions between two or more Windows servers. The Commission noted that there is no need for Microsoft to disclose its implementations of the specifications it is required to disclose.

Next, the Commission discussed the extent of the disclosure requirement. The Commission noted that since interoperability with future purchases is important for the consumer, the disclosure requirement “appl[ies] in a prospective manner to future generations of Microsoft[] products.” Therefore, the information will “have to be updated each time Microsoft intends to bring to market new versions of its relevant products.”

Furthermore, the disclosure order is “not limited to disclosing specifications but also encompasses authorising the implementation of such specifications in work group server operating system products.” The Commission, in passing, stated, "to the extent [the] Decision might require Microsoft to refrain from fully

196. Id. ¶ 694.
197. Id.
198. Id. ¶ 701.
199. Batchelor, supra note 180, at 18.
200. Id.
201. Id.
203. Id. ¶ 999.
204. Id.
205. Id.
206. Id. ¶ 1002.
207. Id.
208. Id. ¶ 1003.
enforcing any of its intellectual property rights, [it] would be justified by the need to put an end to the [abusive behavior].

The specifications disclosure must be conducted in a non-discriminatory, timely manner as determined by the Commission. The disclosures must be made to "any undertaking having an interest in offering work group server operating system products." This is necessary to avoid "introducing new distortions of competition." Microsoft must disclose present specifications within one hundred and twenty days and disclose future specifications when Microsoft makes future products available to customers for beta testing. Some commentators have suggested that the approach taken by the EU and U.S. parallels that taken when addressing public utilities and that Microsoft is now a regulated monopoly.

**VIII. EFFECT OF DECISION**

The Court of First Instance opinion was a controversial decision. The decision is the largest EU antitrust judgment to date and is a major victory for the Commission. A loss by the Commission would have "neuter[ed the] anti-competition department." The ramifications of the decision on competition within the EU and around the globe are unclear. Some commentators argue the decision was an important step toward increasing consumer freedom and producing innovation. Others argue the decision will stifle innovation in the software industry.

This Comment argues the effect of the decision will be two-fold: (1) competition in the technology and software industries will increase and (2) the EU will become the dominant regulatory body with which technology and software companies must contend.

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209. Id. ¶ 1004.

210. Id. ¶ 1006.

211. Id.

212. Id. ¶ 1010.

213. Id. ¶ 1009.

214. See First, supra note 59, at 1412-15.


218. Id.

A. Increased Competition

The requirement that Microsoft disclose its interoperability information with competitors will lead to increased competition in the technology and software industries. Prior to the Windows 2000 family of products, Microsoft disclosed interoperability information similar to that which it is required to disclose by the EU decision. Increased competition will result from the increased market share of Microsoft’s competitors that results from Microsoft having to compete on the merits.

Analysis of the market prior to Microsoft’s denial of interoperability information is indicative of the competitive environment that is likely to prevail after the required disclosure. Microsoft’s market share has grown from 55.6 percent in 2000 to 66.4 percent in 2002. This growth has come at the expense of Microsoft’s chief rival, Novell, whose market share fell from 33.3 percent to 23.6 percent over the same period. Furthermore, Sun and other companies that have attempted to enter the market have had limited success because of interoperability issues.

When Microsoft is forced to disclose the interoperability information it has withheld, customers will choose based on the merits instead of being improperly influenced by interoperability issues. Microsoft has made the decreased interoperability between Windows client PCs and non-Windows servers a focus of its marketing materials; this decreased interoperability is the direct result of Microsoft’s practice of discontinuing its disclosure of interoperability information. Seventy-five percent of the respondents to the Commission’s market inquiry considered interoperability with Windows client PCs an important factor in purchasing decisions. In the second Mercer survey, seventy-four percent of the respondents considered interoperability an important factor in making purchasing decisions; of those respondents, sixty-eight percent ranked interoperability a four or five on a scale of five.

This focus on interoperability, a result of Microsoft’s discontinued disclosure, has skewed the decision making process away from choice on performance and other purely competitive factors. The results of the Mercer surveys reveal that UNIX, which has the highest rating on performance qualities,
ranks below Windows in market share.\textsuperscript{228} As the Mercer surveys reveal, Microsoft is not considered the best server system in terms of performance and reliability.\textsuperscript{229} Requiring the disclosure will free consumers from the interoperability considerations that currently drive them toward a “homogeneous Windows solution.”\textsuperscript{230}

\textbf{B. Incentive to Innovate}

Microsoft claimed that requiring disclosure would reduce its incentives to innovate.\textsuperscript{231} The Commission stated that, when analyzing the effect of disclosing the interoperability information requested by Sun, Microsoft’s incentive to innovate the entire product, not just the interoperability protocols, must be considered.\textsuperscript{232} The Commission elaborated that the assessment “must be conducted \textit{in comparison to} the alternative situation where Microsoft’s anti-competitive behaviour remains unfettered.”\textsuperscript{233} The Commission found that, in the situation where Microsoft’s behavior is not restricted, “there is a serious risk that Microsoft will succeed in eliminating all effective competition in the [server] market.”\textsuperscript{234} According to the Commission, this would have “a significant . . . negative effect on its incentives to innovate” because “Microsoft’s research and development efforts are indeed spurred by the innovative steps its competitors take in the [server] market.”\textsuperscript{235} The Commission found disclosure of the interoperability information will “liven up” the competitive landscape.\textsuperscript{236} It found “Microsoft would no longer benefit from a lock-in effect that drives consumers towards a homogenous Microsoft solution, and such competitive pressure would increase Microsoft’s own incentives to innovate.”\textsuperscript{237} Furthermore, the Commission found “it is dubious whether an order to supply . . . would have any negative impact on Microsoft’s incentives to innovate.”\textsuperscript{238}

Requiring Microsoft to disclose the interoperability information at issue in the decision will not stifle innovation in the technology and software industries. Microsoft and various industry observers claim that the EU decision will reduce the incentives for companies to innovate. This claim is belied both by

\begin{itemize}
\item \textsuperscript{228} Id. ¶ 662. UNIX is the highest rated when each characteristic is weighted by its relative importance according to the consumers in the surveys. Id.
\item \textsuperscript{229} Id. ¶ 662.
\item \textsuperscript{230} Id. ¶ 613.
\item \textsuperscript{231} Id. ¶¶ 723-29.
\item \textsuperscript{232} Id. ¶ 724.
\item \textsuperscript{233} Id.
\item \textsuperscript{234} Id. ¶ 725.
\item \textsuperscript{235} Id.
\item \textsuperscript{236} Id.
\item \textsuperscript{237} Id.
\item \textsuperscript{238} Id. ¶ 729.
\end{itemize}
Microsoft's experience as a result of the U.S. settlement and the general practice of the technology and software industries.

Microsoft's experience as a result of forced disclosure pursuant to its settlement of the U.S. antitrust case is indicative of the outcome that can be expected because of the EU decision. The U.S. settlement required Microsoft to disclose protocols implemented in certain Windows desktop operating systems and used to interoperate or communicate natively with Microsoft server operating system products. As in the EU decision, the U.S. settlement required Microsoft make the disclosures in a reasonable, non-discriminatory manner.

Microsoft did not lose incentive to innovate because of the disclosure made pursuant to the U.S. settlement. At the Oral Hearing in the Commission case, Microsoft confirmed it had not noticed any negative impact on its incentives to innovate because of the disclosures made pursuant to the Communications Protocol Program. While it is true that the EU decision requires disclosure that is more extensive than that of the U.S. settlement, there is no reason to believe this will stifle Microsoft's incentive to innovate. The required communications protocols disclosures are similar to those required under the U.S. settlement. The primary difference is that under the EU decision, Microsoft must allow the disclosed protocols to be used to develop a work group server product. While this will lead to increased competition for Microsoft, it will spur its incentive to innovate, as it will no longer to be able to maintain its market lead without genuine product innovation and performance.

C. Industry Practice

In the EU case, Microsoft argued it is common practice in the software industry to withhold interface information. The Commission found disclosure of interoperability information is "not exceptional" and "the economic characteristics of software markets actually suggest that industry practice is often interoperability oriented." The Commission noted that Microsoft itself provided interoperability information "when its position in the [server] market was still marginal." Microsoft went so far as to "disclose[] source code in order to promote its programming models and communication standards."

Microsoft's experience with prior disclosure and industry practice are inconsistent with their claim that requiring interoperability information will

240. Id.
242. Id. ¶ 731.
243. Id. ¶ 730.
244. Id. ¶ 732.
245. Id. ¶ 734.
246. Id.
reduce incentives to innovate. Sharing interoperability information and utilizing industry standards instead of developing proprietary standards is in fact industry practice. Indeed, Microsoft's behavior prior to becoming the dominant force in the server market was to share interoperability information with competitors.

Given that Microsoft retained its ability to innovate when it followed the industry practice of providing interoperability information, there is no reason to believe following industry practice again will suddenly remove its incentive to innovate. Furthermore, given that Microsoft did not experience any loss of incentive to innovate because of the U.S. disclosure program, there is no reason to think the EU disclosure program will cause Microsoft to lose incentive to innovate. The increased competition the disclosure will provide will serve as an incentive for Microsoft to innovate in order to maintain its market lead.

Microsoft has acknowledged independently of the EU case that disclosure of interoperability information will not reduce its incentive to innovate, but, in fact, will strengthen Microsoft's products. In a recent whitepaper on interoperability, Microsoft stated that its disclosure program "represent[s] a new and strategic approach... to licensing its intellectual property." According to the whitepaper, "Microsoft aims to expand the market for its products and those of its partners, and to broaden industry support for Microsoft platforms." Microsoft also noted customers would benefit "because this expanded licensing program results in greater product choice, more assured interoperability, lower total cost of ownership, and easier and faster integration of products from multiple vendors."

D. Emergence of the EU as the Leading Anti-Trust Regulatory Body

The effect of the EU decision will not be limited to competition within the server market. This decision will lead to increased competition throughout the whole of the technology and software industries. The EU has already taken a more aggressive approach to antitrust regulation than the U.S. From the time of the initial Commission decision finding Microsoft guilty of abusive behavior and the CFI decision upholding the Commission's ruling, the Commission has expanded antitrust investigations against Intel and Qualcomm for similar abusive

247. Id. ¶ 732-33. For an explanation of standardization in the technology industry and its effect, see Mark A. Lemley, Antitrust and the Internet Standardization Problem, 28 CONN. L. REV. 1041, 1043-54 (1996).
249. EVE PSALTI & KEITH HAGEMAN, MICROSOFT CORPORATION, MICROSOFT'S INTELLECTUAL PROPERTY LICENSING PROGRAM BOOSTS CUSTOMER CHOICE 6 (2007).
250. Id.
251. Id. at 7.
behavior. Antitrust Chief Neelie Kroes sees the CFI decision as an endorsement of the more aggressive attitude and approach taken by the Commission.

Beyond increasing competition in both the EU and around the globe, the CFI decision upholding the Commission’s findings positions the Commission and the EU as the global leaders in antitrust regulation and enforcement. Indeed, the different approaches taken by the U.S. and the EU in their antitrust cases against Microsoft provide the groundwork for the EU to become the leading antitrust regulatory body. If the EU continues to apply a higher level of scrutiny and place stricter regulation on companies than the U.S., the requirements of the EU will become the de facto global standard for behavior.

The different approach is evidenced by the level of disclosure required under the EU decision as opposed to the U.S. settlement, including the difference in terms of the EU requirement and the U.S. settlement. Not only is the EU decision’s scope of disclosure broader than the U.S. settlement, it is also more stringent in the length of the required disclosure. These two factors demonstrate a more aggressive EU approach that the Commission will likely utilize in future and pending antitrust cases.

The U.S. settlement requires Microsoft to disclose “any Communications Protocol that is used to interoperate, or communicate, natively with a Microsoft server operating system product.” The disclosure is limited to protocols “implemented in a Windows operating system product installed on a client computer.” The settlement expressly limits use of the disclosed protocols to interoperating with a Windows client PC; expressly prohibited is use of the protocols to allow a non-Windows server to interoperate with a Windows server. Furthermore, the duration of the required disclosure is limited; it expires on November 12, 2009.

In contrast to the U.S. decision, the EU decision establishes more rigorous disclosure requirements and does not include an end date for the required disclosure. The decision requires Microsoft to disclose “complete and accurate specifications” of the protocols used by Windows work group servers to provide work group services; this disclosure includes both client PC-to-server communication and server-to-server communication. The decision also


255. See generally id.


257. Id.

258. Id.

259. Id. at *13.

expressly requires Microsoft to allow competitors to implement the disclosed specifications in work group servers.\footnote{Id. \S 1003.} In addition to requiring more extensive disclosure, the EU decision imposes more stringent temporal requirements, both backward and forward-looking. Microsoft is required to disclose specifications for any product for which it still provides online self-help support\footnote{Id. \S 1001.} (older product lines not currently marketed by Microsoft) as well as any future product developed by Microsoft.\footnote{Id. \S 1002.} Interestingly, the decision places no time limit on the required disclosure.\footnote{Id.}

The EU decision subjects Microsoft to more extensive disclosure requirements than the U.S. settlement. The most noticeable difference between the two disclosure requirements concerns work group servers. The U.S. settlement specifically disallowed use of the disclosed specifications to allow a non-Windows work group server to interoperate with a Windows work group server as well as a Windows work group server,\footnote{Microsoft III, No. 98-1232, 2006 WL 2882808, at *3 (D.D.C. Sep. 7, 2006).} whereas the primary intention of the EU decision is to allow a Microsoft competitor to develop a work group server that will interoperate with Windows client PCs and Windows work group servers as well as a Windows work group server.\footnote{Commission Decision, supra note 12, \S 1003.}

The difference in approach between the EU and U.S. Microsoft decisions is indicative of the distinct overall treatment of the intersection of antitrust and IP taken by the two jurisdictions. One U.S. antitrust official described the EU Microsoft decision as “protecting competitors, not competition, in ways that may ultimately harm innovation and the consumers that benefit from it.”\footnote{Czapracka, supra note 17, at 47.} The focus of antitrust law in the U.S. is efficiency.\footnote{Id. at 49.} This focus on efficiency is the “legacy of the Chicago School of Law and Economics.”\footnote{Id. For an explanation of the Chicago School, see Richard A. Posner, The Chicago School of Antitrust Analysis, 127 U. PENN. L. REV. 925 (1979). For an unapologetic endorsement of the Chicago School’s economic theories and their application to antitrust see ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF (The Free Press rev. ed. 1993) (1978).} Although only some of the school’s economic theory was accepted in mainstream analysis, “the pro-market and largely anti-government Chicago School approach had significant and lasting consequences for the U.S. antitrust analysis.”\footnote{Czapracka, supra note 17, at 50. For a discussion of the Chicago School and its effect on antitrust analysis see HOVENKAMP, supra note 55, at 61-71; Herbert Hovenkamp, Antitrust Policy After Chicago, 84 MICH. L. REV. 213 (1985); Lawrence A. Sullivan, Post-Chicago Economics: Economists, Lawyers, Judges, and Enforcement Officials in a Less Determinate World, 63 ANTITRUST L. J. 669 (1995).} On the other hand, the EU and the Commission take a more aggressive approach to antitrust enforcement. They
"perceive [the] competition process as vulnerable and are more eager to address perceived distortions."

U.S. antitrust officials "see little scope for antitrust policy to mitigate the consequences of imperfect IP policies." They are reluctant to intervene in IP policy and believe "any competitive concerns are better remedied by changes in the IP policy." In comparison, the Commission and the ECJ "see a role for competition law to correct improvidently defined IPRs, even if it entails adjusting competition principles." Even Bronner, where the ECJ adopted its most narrow reading of the essential facilities doctrine, "goes further than the U.S. Supreme Court in Trinko." At least one commentator, however, has suggested the ECJ should follow the lead of the Supreme Court in Trinko and limit the application of the essential facilities doctrine in Article 82 cases.

The U.S. and EU Microsoft decisions demonstrate a clear difference in approach to regulation where IP and antitrust intersect. The more aggressive approach taken by the EU will present software and technology companies with a choice: produce a different version of their products for the EU than for the U.S., or market an EU compliant version worldwide. Economies of scale as well as other business considerations suggest companies will choose the latter.

IX. CONCLUSION

Microsoft is the world's largest technology company with dominant market share in most of its product markets. This dominance has not come without difficulties, namely, allegations of antitrust abuse. Microsoft has been investigated for violation of antitrust law in the both the U.S. and the EU. The difference in the outcome of the two cases is illustrative of the difference between the two jurisdictions in antitrust and IP policy.

The antitrust/IP policy of the U.S. favors upholding IP rights. The Supreme Court is unlikely to find a violation of antitrust laws based solely on behavior that is consistent with already granted IPRs. Although there are limited circumstances where U.S. courts will find abuse of antitrust law in situations involving IPRs, they are much less likely to find an abuse than the EU.

The EU antitrust/IP policy favors antitrust enforcement over IP rights. The EU is more likely than the U.S. to find refusal to license IP an abuse of an

271. Czapracka, supra note 17, at 50.
272. Id. at 70.
273. Id.
274. Id.
275. Id. at 55.
277. Cohen, supra note 254 (after IBM agreed to comply with demands made by the European Commission in the IBM Case, IBM distributed compliant products in both Europe and the U.S.).
entity’s dominant position. The EU recognizes and applies the essential facilities doctrine, a doctrine not recognized by the Supreme Court. Recognition of this doctrine makes it significantly easier for a court to find an antitrust violation.

The EU Microsoft case is the latest step in the evolution of the EU’s essential facilities doctrine. The decision provides a reinterpretation of the test outlined in IMS. This reinterpretation is more plaintiff-friendly. Indeed, a significantly lowered standard has been applied to two of the IMS factors.

The EU Microsoft decision will have two significant implications. First, it will lead to increased competition in the software and technology industries. Requiring disclosure of interoperability information by dominant entities will prevent monopoly leveraging and ensure consumers are free to choose based on the merits of products and not artificial constraints created by the dominant firm. Disclosure of interoperability information will not reduce incentives to innovate. The economic characteristics of the technology industry as well as industry practice indicate that disclosing interoperability information does not reduce incentive to innovate.

The second implication of the EU Microsoft decision is that it will establish the EU as the dominant antitrust regulatory body with which technology firms must contend. The decision by the CFI upholding the Commission’s decision has emboldened the Commission in its antitrust policy. The CFI decision approves of the more aggressive antitrust approach taken by the EU to as compared to that of the U.S. If the behavior of the Commission since the Microsoft decision and the statements of Ms. Kroes are any indication, the EU is moving full steam ahead toward becoming the world’s foremost antitrust enforcer.