

U.S. v. Microsoft: The Appeal

by [Thomas W. Hazlett](#)

FEBRUARY 27, 2001 - The following is an exchange between Thomas Hazlett and Ken Auletta, author of *World War 3.0: Microsoft and Its Enemies*.

From: Thomas Hazlett
To: Ken Auletta
Posted: Thursday, March 1, 2001, at 10:00 a.m. PT

Hi Ken,

You think I've been sipping the Kool-Aid. Perhaps you'll recommend a good ER. But so far I'm feeling fine. It is a virtual certainty that the divestiture order will be struck down in the D.C. circuit's ruling, and it's a good bet lots of Microsoft's antitrust liability will be reversed. You suggest I'd be foolish to put much money on this, but I—like millions of technology bulls invested in the Nasdaq—already have. The tech sector is pulling hard for Microsoft to pull this case out, a distinct clue about the merits of the case we might discuss later.

You seem to set the "consumer harm" issue to one side and focus on Microsoft's "thuggish behavior to block innovation." I do not see that as a good approach. One of the colossal mistakes in Judge Jackson's opinion is where he divests Microsoft into two monopolies (using his market share assumptions), one in operating systems and one in applications. Using Judge Jackson's own beliefs about market power, both companies would raise their prices. Pay more for Windows and Word. Consumer protection?

You are right, Ken, that Judge Jackson lowered the boom on Microsoft and that the burden is now very high in requesting that the appeals court sweep it all away. But Judge Jackson's opinion cannot stand up to scrutiny. Take the foreclosure issue, where the district court found that Microsoft bundled Internet Explorer (its browser) with Windows (its operating system), denying Netscape access to customers.

Jackson got it wrong. Bundling IE with Windows does not foreclose Netscape's browser, Navigator, which works very nicely with Windows/IE (I have personally demonstrated this proposition at least one thousand times since 1995). What tends to make things tough for Netscape is that Microsoft bundled IE efficiently and inexpensively. Customers didn't pay extra for browsing functionality, and the browser could be fired right up even on a brand new computer. That forced Netscape to drop the \$49 price tag, resume its initial free download campaign, and search for revenues through Web site development and e-commerce services. Good for customers, not predatory.

You know better about Microsoft's brutalities than I, Ken. Keep reporting them, as they make good reading and healthy sunshine. But corporate rudeness, nor even "strong-arm" tactics, is not the purview of antitrust. We have business torts, property law, and contract law. They protect firms from bullying each other. As, quite often, does the market.

Consider the case of Apple. According to Jim Carlton's painful-to-read 1997 book, the Republic has never seen a better product made less of than the Mac. Rejecting the urgings of even the young Mr. Gates to license the innovative Mac operating system to major computer makers in 1985, the company arrogantly restricted their user-friendly computer technology to in-house exploitation. Partners were shunned, retailers abused, software developers alienated, customers taken hostage. Their philosophy was high prices and high profit margins; a computer technology boutique. A terrible shame. Apple coulda been a contenda for *industry standard*.

It was Microsoft that seized the moment, exuding its own arrogance. But that is embedded in the DNA of entrepreneurship, on the one side, and standard setting, on the other. What is remarkable about Microsoft is not that it irritates its rivals, or even that it does so in far clumsier fashion (from every account I've read) than other big-time corporations. What is distinct is its low-price, quick-to-market, extend-the-network vision, coupled with relentless execution.

You ask a provocative question: How to prove something that didn't happen? This comes up in reference to the government's speculation that, in discouraging innovation by squishing Netscape, Microsoft hurts future customers.

There are a couple of answers. The first is: Wait until the harm is evident, and then file the antitrust case. American Airlines chased upstart rivals out of the Dallas-Fort Worth market, according to the government, and so the government filed suit. This timing has the great advantage of allowing low prices to obtain without a prosecution, while high prices are attacked with a lawsuit. In the Microsoft case, the consumer gain is visible and apparent, while the consumer harm is speculative and fuzzy. On modern standards for antitrust jurisprudence, this set of facts is—and ought be—a loser for the government.

But there are enlightening facts in evidence even today. Among the kettle of ironies in this case is the sizzling fact that Microsoft's scorched-earth policy vis-à-vis Netscape directly led to browserware everywhere. By 1996, one could not buy an Intel-based PC (the monopoly brand, per Judge Jackson) without Web surfing capability built-in. AOL, assisted by its free browser deal with Microsoft, was "carpet-bombing" the nation with free-trial log-on disks for dial-up online service. Netscape added e-mail functionality to Navigator and frantically sought to fend off the 800-pound gorilla.

This spurred the mother of all industrial revolutions in Internet Time. Capital threw itself at the dot-com entrepreneurs, in heat to hop onto the networks enabled and made vast by millions of Web surfing PC users. Indeed, the "on" twist for this spigot of risk capital was Aug. 8, 1995—the Netscape IPO. The ferocious counterassault by Microsoft was not in the least unexpected, but it did not deter billions from pouring into the startups, VC's, technology plays, and application gambits.

Every great invention suppresses countless others. The transcontinental railroad doomed the entire long-haul covered wagon sector. But in opening new vistas it invites headier entrepreneurs to build on an elevated platform. Microsoft's attack on Netscape was as lowdown and dirty as Apple's bullheaded refusal to license the Mac OS. But it contributed in a way that helps customers far beyond the dreams of Apple's less visionary leaders. For this, shareholders in the beast from Redmond deserve nothing more—or less—than the spoils of capitalist victory.

And I, too, have eaten up the allotted space. Please do tell me more about Judge Jackson. He's a curious fellow, and you have been spending quality time together.

Cheers,
Tom

From: Ken Auletta
To: Tom Hazlett
Posted: Thursday, March 1, 2001, at 10:05 a.m. PT

Dear Tom,

You say the bulls are betting Microsoft emerges victorious. How, then, explain why Michael Kinsley's Microsoft stock options are today worth roughly half their December 1999 value?

You and I have no argument over a government-imposed breakup of Microsoft. It makes little sense, is too risky, was not undertaken after due deliberation, and is unnecessary—and here perhaps we disagree—because the marketplace is already punishing Microsoft. Judge Jackson and the government assumed that they were looking at a static snapshot, when in fact we are watching a moving picture. We are rapidly moving to a post-PC world no longer dominated by Microsoft. Nor do we have an argument over whether bundling the browser in with Windows harmed consumers. We may differ over whether Microsoft's intent was to help consumers or hurt Netscape. Nevertheless, the browser was free, it made navigating the Internet easier, and in the end Microsoft produced a better browser. Score a victory for consumers. Nor do we disagree that Apple was arrogant (and stupid) when it chose not to license its innovative operating system. Nor do we disagree that capitalism involves winners and losers, pain—"creative destruction."

The Kool-Aid has rendered you too polite. You say I am "right" that "the burden is now very high" on Microsoft to get the court of appeals to overrule Judge Jackson's decision (thus hard). Then you say Jackson's decision "cannot stand up to scrutiny" (thus easy). Which is it, hard or easy? A reason Jackson's liability finding against Microsoft will not be easy to dismiss is that evidence was produced in court certifying that Microsoft was guilty of more than the mere "corporate rudeness" you suggest. Microsoft imposed restrictive contracts on companies telling them who they could and could not do business with. When IBM would not bend to its demands, Microsoft shipped to others but would not ship IBM the new Windows 95 until after the vital fall and Christmas sales season had passed. It's too boring to recount the brutal litany again. Suffice it to say that Judge Jackson's interpretation of the antitrust law, one supported by most legal scholars, says that those with a 90 percent market share may not behave as mere mortals may.

You go on to say that government antitrust intervention should "wait until the harm is evident." This is a fair argument made by those who worry that a trigger-happy government will slow down innovation and suppress enterprise. I understand that. I don't understand, however, when it leads critics to say government should just get out of the way and be a spectator while corporations battle to the death. When we attend a football or basketball game we expect a referee to blow the whistle when a foul is committed. This is what government, however imperfectly, was trying to do in the Microsoft case: serve as a referee. The Microsoft case raises serious questions about the proper role of government, and about whether 100-year-old antitrust laws are always relevant in the Internet Age. Yet one core principle doesn't change: Government has a legitimate role in trying to protect competition and the public interest.

You ask about Judge Jackson. He's a more interesting man than portrayed in a Washington courtroom this week. Listening to Microsoft's lawyers, and more than a few of the seven appeals court judges, one would think Thomas Penfield Jackson were a liberal Democratic judge. As you know, he was the first judge appointed by Ronald Reagan to the D.C. district court. As a Republican, he supported Goldwater over Rockefeller in 1964 and Reagan over Bush in 1980. His bias, to invoke a word promiscuously tossed about in Washington this week, is to favor big corporations like Microsoft and to favor less government intervention in the economy. His natural bias, as he told me, was to think well of Bill Gates and Microsoft. However, this trial convinced him that Microsoft's actions impeded rather than advanced business competition.

Microsoft asserts that when Jackson told me Gates was Napoleonic, or when he carelessly compared Microsoft to unrepentant drug dealers he once harshly sentenced, that he was revealing a bias. No question, as Jackson told me, he was offended by Microsoft's truculent behavior in a consent decree case that he adjudicated in December 1997, nearly a year before the antitrust trial commenced. But Microsoft's behavior was truculent. And when Jackson made withering comments about Gates and Microsoft was he revealing a bias or was he describing what he learned about Microsoft after presiding over a 78-day trial?

When I asked Judge Jackson why he talked to me his answer is worth noting: He said that he had agreed to talk on condition that I use what he said only for my book, which would be published after the case had left his courtroom. He further went on to say that anyone who had read his decisions in the Microsoft case knew

he found Gates and much of Microsoft's testimony not credible. What he was doing with me, he said, was trying to speak for history. He was doing something judges rarely do: opening the doors and helping reveal how a judge acts and thinks in an historic case. Whether he should have talked to me is a decision that will be made above my pay grade.

In our first four-hour session, Judge Jackson told me that his two contemporary political heroes were Barry Goldwater and John McCain. He admired them because they spoke bluntly. Later, when Jackson said some of the inflammatory things he did about Gates and Microsoft and the "supercilious" judges on the court of appeals, I understood that he was trying to be true to himself and speak the truth. Perhaps he should not have. Surely the court of appeals believes he should have kept his mouth shut and will likely remove him from the case if they send it back to the district court. But as Microsoft once claimed that Bill Gates was being demonized during the trial, so now Microsoft demonizes Judge Jackson. This effectively shifts the subject under discussion; it does not, I think, erase the antitrust issues raised by Microsoft's behavior.

Best,
Ken Auletta

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