ANTITRUST ENFORCEMENT IN HIGH TECH INDUSTRIES

By Stephen D. Houck†

Thank you. I am pleased to have the opportunity to speak at this symposium, which addresses important antitrust issues of particular relevance to high tech industries.

Before proceeding, I need to make some disclaimers. The first is the usual one that my remarks do not necessarily reflect the views of the New York State Department of Law or Attorney General. Also, since I am lead counsel for the 19 state plaintiffs in the *Microsoft* case, I need to broaden that disclaimer to include all my clients. Indeed, given the sensitive stage of the litigation, I have been enjoined —something we hope to persuade the Court to do to Microsoft —to steer clear of that case in my talk today. So I will preface my remarks by a version of the disclaimer sometimes seen at the outset of a film: any resemblance to real events, persons, corporations, software monopolists or evasive multibillionaires is purely coincidental.

I am particularly grateful for this invitation because state antitrust enforcement officials have not always been invited to join our federal colleagues at important academic symposia like this one. The fact that I am here today reflects, I think, the increased activity and profile of my colleagues in New York and other state attorney general offices throughout the country.

The Antitrust Bureau of the New York State Attorney General's Office, during my tenure, has not hesitated to litigate where necessary and appropriate. Our caseload is unprecedented in the history of the Antitrust Bureau and, although we have many fewer lawyers, rivals that of the federal enforcement agencies.

The Antitrust Bureau proceeds on its own in cases of primarily local impact. While perhaps not as noteworthy as *Microsoft* —probably no antitrust case in recent history is — they are nevertheless significant. For example, in the *Western New York Coupon Litigation*, we achieved the largest cash recovery ever obtained by the New York State Attorney General on behalf of New York consumers in an antitrust case, and we distributed it through a creative coupon program that allowed consumers to purchase products made by both defendants and their competitors.

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Anticompetitive conduct, however, often impacts citizens in more than one state. In those circumstances, the Antitrust Bureau may file multistate cases in cooperation with other state antitrust enforcement agencies, as it has recently in litigation against contact lens manufacturers and Toys 'R' Us. The Antitrust Bureau also acts, as well, in conjunction with the federal antitrust enforcement agencies, the Department of Justice ("DOJ") and Federal Trade Commission ("FTC"). This occurs most commonly in merger cases where the Antitrust Bureau is often a co-plaintiff with one of the federal agencies.

Cooperation is also increasingly common between state and federal antitrust enforcers in conduct cases, exemplified by recent simultaneous filings against generic drug manufacturers and, of course, Microsoft. Indeed, the *Microsoft* case has brought state and federal cooperation to a new level — from coordinated investigations through intensive discovery and a lengthy trial.

New York's interest in Microsoft was piqued initially because of the impact of the company's practices on New York consumers and businesses. At the time the Antitrust Bureau commenced its investigation into Microsoft's practices, there was widespread concern that a consent decree previously obtained by DOJ had exerted little constraint on Microsoft, and there was no guarantee that a subsequent DOJ investigation would eventuate in any enforcement action.

Some have questioned the role of state attorneys general in complex antitrust cases of nationwide import like *Microsoft.* The right —indeed, the obligation — of state attorneys general to bring such cases is, however, beyond doubt. They are the chief enforcers of their state antitrust statutes, like the Donnelly Act in New York, and have been specifically authorized by Congress to sue *parens patriae* on behalf of their citizens to redress violations of the Sherman Act.

Moreover, as the principal advocates for consumers in their respective states, the attorneys general bring a unique perspective to antitrust enforcement which may influence all facets of a potential prosecution — from the decision on whether a case should be brought to the appropriate remedy to be sought. I have worked on a number of state\federal antitrust enforcement actions and have found the cross-fertilization of ideas invariably to be mutually beneficial. In *Microsoft*, we have proved that state and federal antitrust enforcement officials can work together productively and effectively.

A key issue for both state and federal enforcement officials today — and one which permeates all the symposium's panels —is how antitrust law should be applied to so-called high tech industries. Much has been written about the characteristics of such industries —like network effects —that arguably require special treatment by antitrust agencies or courts.

Some even argue that because of the supposed uniqueness of high tech industries, antitrust law should be applied to them sparingly and cautiously, if at all.

I find such talk troubling. Indeed, my thesis this afternoon is that antitrust enforcement officials should, if anything, be more vigilant in their law enforcement efforts in the high tech area. I find such talk troubling, both because I don't think special antitrust treatment is warranted for high tech industries and because it sends the wrong message. Talk like that encourages people employed in those industries to feel that they are entitled to dispensation from the normal rules of business conduct. This is not the kind of encouragement they need.

On the contrary. High tech industries are often populated, if not led, by relatively young men and women who have been extremely successful in creating a great deal of wealth for themselves and others. They deserve considerable credit for their achievements and our thanks for developing new products and technologies that enrich our lives.

The danger, however, is that their success, youth and inexperience may engender a certain degree of hubris that mistakenly leads them to believe that they should be free from some of the legal strictures that bind others —certainly from something as stodgy as the Sherman Act, an artifact of the 19th century. Such feelings may be reinforced because the industries in which they labor, and indeed may have played a role in creating, are relatively young, freewheeling and without any history of antitrust enforcement.

To be sure, I am not advocating that antitrust enforcers disregard the specific characteristics of an industry they are investigating. Quite the contrary. It is axiomatic that any antitrust enforcement action take cognizance of an industry's structure, players, practices, history, likely development and so on. What I am saying is that it is wrong to encourage the notion that special rules apply to an industry simply because someone — be it industry participants, economists or counsel —denominate it "high tech." There is no reason that basic antitrust principles, developed by courts over the years, should apply differently to these industries as a general matter.

Why should it be otherwise? Indeed, it's hard even to define what it is that makes high tech industries high tech. For example, some high tech industries may be subject to such phenomena as tipping, lock-in and positive feedback loops while others are not. Nor is it possible to define a high tech industry by the complexity of the manufacturing process utilized in it. In fact, significant antitrust cases — based on tried and true antitrust principles — have been brought successfully over the years in many industries that employ sophisticated technology, from petroleum refining to electrical generation to telecommunications to computers.

In light of this rich history of antitrust jurisprudence, it is short-sighted to think that we are confronting for the first time problems engendered by the application of antitrust law to high tech industries. Such myopic thinking may lead to the false conclusion that special rules are necessary today — as some would argue, for example, in advocating a separate legal test for so-called technological tying cases —when general principles developed over the years and enunciated in landmark opinions like *Jefferson Parish* can and should be applied.

What then does typify what we generally perceive to be high tech industries? Two characteristics that come to mind are the relative immaturity of an industry and relatively rapid change. These two phenomena are, I think, related. Rapid change is most likely when a technology is new and undeveloped, when there are many horizons to conquer, and when large fortunes are there for the making virtually overnight. This heady mix is likely to attract not only the best and brightest young scientists and engineers, but the most aggressive and enterprising entrepreneurs —a positive feedback loop that accelerates the pace of development.

What are the implications for antitrust enforcement officials? As I've noted, the relative youth of an industry itself and\or the people employed in it may well lead to a variety of more aggressive business practices than is typically found in more mature industries. For that reason, high tech industries may well reward heightened scrutiny — not only by enforcement officials interested in making a case, but by private practitioners interested in providing good antitrust counsel to assure that their clients stay out of trouble.

Of even greater potential significance is the rapid pace of change that we have come to expect in high tech industries. As a preliminary matter, I should note two things. The first is that the rate of technological change and innovation is so great today, and perhaps distinguishes our industrial era from earlier ones, because the technology itself —such as computing, word processing, fax machines and e-mail —facilitates the aggregation, analysis, dissemination and communication of information and ideas. The second is that the rate of innovation in a given industry is unrelated to the concentration of market power in it. In other words, monopolists retain an incentive to innovate, if for no other reason than to protect the fruits of their monopoly power

A company's market power, however, may allow it unduly to influence or even control both the pace and direction of innovation in an entire industry. That is bad social policy for the reason articulated more than 35 years ago by Judge Wyzanski in his landmark *United Shoe* decision, where he wrote, "[An] increased rate in the growth of ideas not follow from an increased concentration of power. . . . [C]reativity in business as in other areas, is best nourished by multiple centers of activity, each following its unique pattern and developing its own esprit de corps to respond to the challenge of competition."[1]

What, then, are the implications of the rapid pace of technological development and innovation in today's high tech industries for antitrust enforcement officials? The first is that antitrust enforcers must have the resources, skills and abilities to conduct investigations not just thoroughly, but quickly. Without this capability, they will find themselves conducting what amounts to a historical exercise. Even worse, the violator will have been allowed to reap the rewards of its unlawful conduct and apply them to disadvantage competitors in other, newer technological arenas.

Likewise, courts must tailor their procedures —both in discovery and at trial — to accommodate the pace of change in the real world. To do otherwise is to risk irrelevancy, not just for the judiciary itself, but for the role of antitrust law generally in high tech industries. I think everyone has learned the lessons of the government's case against IBM in the 1970s. If cases cannot be litigated in a reasonable time frame with reasonable resources, they will not be brought at all. Violators will go unpunished. There will be no deterrence. It is not only possible, but essential, to balance the due process rights of defendants with the need for expedition. In fact, if anything, the need to move expeditiously works to a defendant's advantage since the government enforcement agencies have both a steeper learning curve and the burden of proof.

The *Microsoft* case provides a good example of the art of the possible. There the parties were able to conduct extensive discovery over the course of a summer for a trial commencing in October on a complaint filed in May. Thanks to innovative trial procedures put in place by Judge Thomas Penfield Jackson, such as a limitation of 15 witnesses per side and submission of direct testimony in written form, a verdict is likely to be rendered within 18 months of the filing of the complaint —quite an achievement in a Section 2 case involving complex legal and factual issues.

Moreover, the *Microsoft* case is living proof of the adaptability of the legal profession to the new rules of the game. I cite as Exhibit 1 my co-counsel David Boies. I am told that David spent 30 days grilling the government's economist at trial in *IBM*, and I can personally testify that he needed only two days of cross-examination to destroy the defendant's economist in the *Microsoft* case. I'm not sure if David's performance reflects the fact that he's learned something in the past twenty years or

1 United States v. United Shoe Mach. Corp., 110 F.Supp. 295, 347 (1953).

merely that he's now being compensated at government wages rather than the hourly rates he earned as private counsel in the *IBM* case.

More seriously, some would argue that the rapid pace of change in high tech industries suggests that market power may be ephemeral and that antitrust enforcers should therefore stay their hand. I don't think that their assumption is necessarily correct and in fact may be dead wrong. As a result of such economic phenomena as positive feedback loops, lock-in, low marginal costs and high barriers to entry, high tech industries may be peculiarly susceptible to the development and entrenchment of significant market power. Indeed, as these concepts are disseminated from bastions of academe like Cornell and become better understood in the corporate world, I think we are likely to see business men and women taking advantage of their more sophisticated understanding of economic forces at work in their industries to gain market power through such devices as low pricing to build volume, bundling, or tying.

Moreover, once market power is achieved, the temptation is great to employ even more coercive devices to protect it by preventing, delaying or controlling the development of new technologies that threaten it. That in essence is what the *Microsoft* case is about. And I would note that both the states' and DOJ's economists have testified there that, notwithstanding the dynamic nature of the software industry in general, Microsoft's share of the Intel-based PC operating system market has remained incredibly high —over 90% —for many years now with no end in sight.

In analyzing the impact of change in a market, one must be careful —as always —to define markets properly. Courts should not be deceived by the change or appearance of change in related markets. Where the persistence of market power is linked causally to the dominant company's anticompetitive conduct, strong medicine may be necessary to ensure the restoration of competition.

In fact, dynamic change in related markets may suggest that there is something seriously amiss in the stable market that can be rectified only by altering the structure of that market to foster conditions conducive to competition. In other words, relatively long-term stasis in a market impacted by anticompetitve conduct, while adjacent markets undergo changes in competitors, products and market shares, may point to the need for strong remedial measures. Relief that does nothing but prevent a recurrence of specific anticompetitive conduct may be insufficient in circumstances where the dominant company retains both the power and motive to stifle innovative technologies that threaten its continued dominance, and to do so in new and different ways that can scarcely be imagined.

What do the courts and commentators say? There is not an excess of learning on the subject, but what there is, is consistent. The last occasion the Supreme Court had to address in some detail the subject of relief in a Section 2 case was its 1968 opinion revisiting Judge Wyzanski's original consent decree in *United Shoe*. The Court there reaffirmed its language in *Grinnell* that "relief in a Sherman Act case should . . . break up or render impotent the monopoly power found to be in violation of the Act."[2] As Justice Fortas wrote on behalf of a unanimous Court:

> [I]n a Section 2 case, upon appropriate findings of violation, it is the duty of the court to prescribe relief which will terminate the illegal monopoly, deny to the defendant the fruits of its statutory violation, and ensure that there remain no practices likely to result in monopolization in the future.[3]

Professors Areeda and Turner, in their treatise, concur, succinctly summarizing the relevant law as follows: "The cases seem to say that monopoly to which plainly exclusionary conduct appears to have made a significant contribution is itself unlawful, and that it is the duty of the court to assure its 'complete extirpation.'"[4]

A final word on intellectual property rights. There can be no doubt, I think, that those who abuse the market power derived from their ownership of intellectual property to suppress actual or potential competition from innovative, alternative technologies are guilty of anticompetitive conduct —just as are those who achieve the same ends though their use of physical assets. It would be perverse, in my view, to permit such conduct to be protected by an assertion of purported rights in the very intellectual property used to commit the violation. Intellectual property rights are, after all, limited rights conferred by a beneficent government, largely for the purpose of encouraging innovation.

Private intellectual property rights should not be allowed to trump the antitrust laws, the fundamental public law underpinning our free market economy. Where intellectual property is used for anticompetitive purposes, it —like any other form of property —should, in appropriate cases, be subject to divestiture, licensing or other relief necessary to accomplish the objectives outlined by Justice Fortas in *United Shoe*. Any other result would not only eviscerate the antitrust laws, but turn the rationale underlying the grant of intellectual property rights on its head

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2 United States v. United Shoe Mach. Corp., 391 U.S. 244, 252 (1968).

3 *Id.* at 250.

4 PHILLIP E. AREEDA AND HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF PRINCIPLES AND THEIR APPLICATION, ¶ 653c4 (2d ed. 1996)

—permitting intellectual property to be used to suppress instead of encourage innovation.

While, probably inevitably, I have not avoided the *Microsoft* case altogether, I trust I have not revealed anything confidential and want to emphasize that what I've said about relief was not necessarily intended to apply to *Microsoft* or any other specific litigation. Thanks again to the Cornell Journal of Law & Social Policy for the opportunity to spend a spring weekend in Ithaca and to address this distinguished gathering.