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The Perfect Caper? Private Damages and the *Microsoft* Case

Robert H. Lande & James Langenfeld*

As readers of crime novels know, there are many definitions of the perfect caper.¹ Under most, the perpetrator gets to keep its ill-gotten gains and goes unpunished. Even if the perpetrator is arrested and brought to trial, he or she still typically escapes punishment completely due to a variety of unusual circumstances. This is essentially what Professors John E. Lopatka and William H. Page are arguing about Microsoft's actions.² They assert that even though Microsoft has violated the antitrust laws, it will not be made to pay for its anticompetitive conduct, at least not by private plaintiffs.

Their conclusions can be divided into four key parts. First, the case was never primarily about money, about Microsoft charging too much or too little. Rather, it was always about Microsoft detrimentally affecting innovation and consumer choice. Some of these effects will manifest themselves in the short run, but mainly these are long-term effects. Second, when it comes to damages in private actions, the only harms that can potentially be quantified are those harms from higher prices. Damages resulting from harms to innovation—the innovation that never happened and the choices that were never presented to consumers—are too difficult to quantify.³ Third, even if one could find some price effects from Microsoft's actions, they will be too hard to disentangle from Microsoft's legitimate business practices.⁴ Finally, as a

* Venable Professor of Law, University of Baltimore, and Senior Fellow, American Antitrust Institute; and Director, Law & Economics Consulting Group, LLC, and Senior Fellow, American Antitrust Institute, respectively. Neither author has been directly involved in the Microsoft case, except insofar as Professor Lande has been involved with the American Antitrust Institute's participation in the Microsoft case's Tunney Act proceeding. This article's analysis and opinions are based upon our review of some, but not all, of the extensive publicly available evidence in the record. We wish to thank Bert Foer for extremely helpful comments and Samuel Collings and Joseph King for exceptional assistance in preparing this article. The opinions expressed are only those of the authors, and do not necessarily reflect those of LECC or the American Antitrust Institute.

¹ We are not, of course, arguing that Microsoft has committed any crimes. It was merely charged with, and found liable for, civil violations of the antitrust laws. Interestingly, the case's trial judge, Judge Thomas Penfield Jackson, characterized Microsoft's "crime" as hubris." *United States v. Microsoft Corp.*, 253 F.3d 34, 110 (D.C. Cir. 2001) (per curiam) (en banc).

² John E. Lopatka & William H. Page, *Who Suffered Antitrust Injury in the Microsoft Case?*, 69 GEO. WASH. L. REV. 829 (2001).

³ Lopatka and Page do not explicitly say that there is no chance whatsoever of any private plaintiff recovering any damages from Microsoft, but the tone of their symposium piece certainly suggests this. *See id.*

⁴ Moreover, most states lack *Illinois Brick* repealer statutes. *See generally* Roland W. Davis, *Indirect Purchaser Litigation: ARC America's Chickens Come Home To Roost On The Illinois Brick Wall*, 65 ANTITRUST L.J. 375, 391-93 (1997). In these states only direct purchasers can sue for damages.

result of the above, Microsoft will not have to pay any significant amount of damages in private cases.⁵

Professors Lopatka and Page have written an excellent symposium piece, and there is substantial merit to their arguments. However, we believe that their conclusions are overstated. We differ from them in degree, and believe that there could be antitrust claims against Microsoft that private plaintiffs may be able to prove to a reasonable certainty.⁶ Their arguments are essentially the same as those made by defendants (correctly or not) in most monopolization cases.⁷ Proving damages can be particularly difficult in cases where a new competitor is being excluded from a market. That situation is analogous to some of the claims in *Microsoft*. Such cases always require a projection of what would have happened to the excluded entrants' sales "but-for" the anticompetitive acts.⁸ However, the difficulty in making such projections does not necessarily mean that the required proof of damages is impossible. Economists use various methods for estimating antitrust damages in these types of cases all of the time with varying degrees of success.⁹ These methods include "before and after," "yardstick," and "market share," as well as various statistical techniques such as econometric analysis.¹⁰

In this piece, we provide a brief overview of a variety of possible claims in the *Microsoft* case, and discuss the challenges to proving damages for each type. We will show that, from a private plaintiff's perspective, Microsoft's capers may not necessarily have been perfect.

In its June 28, 2001, decision, the U.S. Court of Appeals for the District of Columbia Circuit ("D.C. Circuit") held that Microsoft engaged in twelve illegal courses of conduct, any one of which would alone constitute a violation of section 2 of the Sherman Act.¹¹ The court found many of Microsoft's actions to be part of a scheme to illegally maintain a monopoly in the market for personal computer ("PC") operating systems ("OS").¹² The D.C. Circuit

⁵ Lopatka & Page, *supra* note 2.

⁶ In the *Microsoft* case there may be an inverse correlation between the seriousness of the effects of Microsoft's illegal behavior on competition, and the ease or probability of proving any damages.

⁷ See, e.g., Steven C. Salop & R. Craig Romaine, *Preserving Monopoly: Economic Analysis, Legal Standards and Microsoft*, 7 GEO. MASON L. REV. 617, 620-22 (1999) (an analysis of *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951)); see also *Ill. Brick Co. v. Illinois*, 431 U.S. 720, 728-732 (1977). Defendants like Microsoft typically posture that allowing private plaintiffs to sue in addition to the federal government would create a problem of multiple liability for defendants and extremely complex damages proceedings. The courts allegedly would not be in a position to allocate the damages among all of the parties involved due to the overlapping, complex, and numerous factors.

⁸ Salop & Romaine, *supra* note 7.

⁹ See ABA ANTITRUST SECTION, 1998 ANNUAL REVIEW OF ANTITRUST LAW DEVELOPMENTS 282-89 (1999); ABA ANTITRUST SECTION, ANTITRUST DEVELOPMENTS 787-94 (4th ed. 1997).

¹⁰ ABA ANTITRUST SECTION, 1998 ANNUAL REVIEW OF ANTITRUST LAW DEVELOPMENTS 282-89 (1999); see also ABA ANTITRUST SECTION, PROVING ANTITRUST DAMAGES: LEGAL AND ECONOMIC ISSUES ch. 5 (1996).

¹¹ *United States v. Microsoft*, 253 F.3d 34, 51 (D.C. Cir. 2001) (per curiam) (en banc).

¹² *Id.* at 50-51. The Department of Justice and some of the plaintiff-states have reached a settlement with Microsoft. Press Release, U.S. Department of Justice, Department of Justice and Microsoft Corporation Reach Effective Settlement on Antitrust Lawsuit, Settlement Pro-

dismissed the lower court ruling that Microsoft had attempted to monopolize “the putative browser market.”¹³ It remanded the tying allegation to the district court for further proceedings,¹⁴ vacated the district court’s Final Judgment on remedies, and remanded the case to a different trial judge.¹⁵ The United States Department of Justice, however, has indicated it would not pursue the tying allegations on remand.¹⁶

For simplicity, we will group possible plaintiff damages allegations into three categories: (1) harms directly concerning the OS market; (2) harms directly concerning the browser market; and (3) harms resulting from the specific conduct that constituted the illegal maintenance of Microsoft’s OS monopoly.

I. Private Damages Directly Concerning the OS Market

The D.C. Circuit condemned a series of Microsoft’s actions for illegally maintaining its OS monopoly.¹⁷ Microsoft was found to have illegally suppressed nascent competition that could have developed into the threat of a competing OS.¹⁸ In many respects, each of these actions amounted to exclusive dealing arrangements. For example, Microsoft illegally prevented original equipment manufacturers (“OEMs”) from “(1) removing any [Microsoft] desktop icons, folders, or ‘Start’ menu entries; (2) altering the initial boot sequence [by, for example, adding icons for rival products]; and (3) otherwise altering the appearance of the Windows desktop.”¹⁹ Additionally, in certain circumstances users were not permitted to select a default browser other than

vides Enforcement Measures to Stop Microsoft’s Unlawful Conduct, Prevents Its Recurrence and Restores Competition (Nov. 2, 2001) (on file with author). The following states have joined the proposed settlement agreement: New York, Ohio, Illinois, Kentucky, Louisiana, Maryland, Michigan, North Carolina, and Wisconsin. *United States v. Microsoft*, No. Civ-98-1232 (D.D.C. filed Nov. 6, 2001) (stipulation). The judge is now reviewing the settlement pursuant to the Tunney Act to determine whether the settlement is in the public interest. 15 U.S.C. § 16(e) (1994). However, some of the plaintiff-states concluded that the settlement was not in the public interest because it would not achieve the goals of an antitrust remedy procedure. The following states are maintaining a civil action: California, Connecticut, Florida, Iowa, Kansas, Massachusetts, Minnesota, Utah, West Virginia, and the District of Columbia. *United States v. Microsoft*, No. Civ-98-1233 (D.D.C. filed Dec. 7, 2001) (plaintiff litigating states’ remedial proposals). They continue to pursue a remedy case against Microsoft. *Id.*

¹³ *Microsoft*, 253 F.3d at 80.

¹⁴ *Id.* at 94.

¹⁵ The D.C. Circuit did this for three reasons: “First, the District Court failed to hold an evidentiary hearing despite the presence of remedies-specific factual disputes. Second, the court did not provide adequate reasons for its decreed remedies. Finally, we have drastically altered the scope of Microsoft’s liability.” *Id.* at 107. Although the district court’s remedy in the government’s case involve divestiture and other interim limitations on Microsoft’s actions, and not monetary damages, the D.C. Circuit’s first two reasons provide an indication of the complexities involved in linking Microsoft’s actions to specific damages to customers and competitors.

¹⁶ Press Release, U.S. Department of Justice, Justice Department Informs Microsoft of Plans for Further Proceedings in the District Court, Action Seeks Prompt, Effective, and Certain Relief for Consumers (Sept. 6, 2001) (on file with author).

¹⁷ *Microsoft*, 253 F.3d at 50-51.

¹⁸ *Id.* at 60-61.

¹⁹ *Id.* at 61. These restrictions were held to be illegal. *Id.* at 64.

Internet Explorer (“IE”).²⁰ PC users were on occasion not permitted to remove IE, because Microsoft removed IE from the Windows “Add/Remove Programs” control panel.²¹ Further, Microsoft entered into fourteen exclusive dealing arrangements with Internet access providers,²² and similar deals with Internet content providers, independent software vendors, and Apple Computer, Inc.²³ Microsoft also engaged in other illegal exclusive dealing arrangements.²⁴ The D.C. Circuit found these practices had the effect of illegally foreclosing rival browsers from the market²⁵ and illegally maintaining their monopoly power in the OS market.²⁶

This raises the question of whether any potential “nascent”²⁷ producer of a potentially competing operating system could show in a subsequent private damages actions that, if not for Microsoft’s illegal actions, it might well have been able to develop and market a competing operating system. This task would be difficult. The would-be producer may have to prove that it was likely that a new OS would have come into being, succeeded in capturing significant market share, and made a profit.

We are unaware of evidence that any company was close to succeeding at producing a new OS.²⁸ There was certainly considerable speculation in the industry that Sun, Oracle, and Netscape together could have one day developed such a competing OS.²⁹ The public record does not contain information, however, showing how far their efforts to create a new OS advanced. Furthermore, we are unaware of evidence in the *Microsoft* record that would permit plaintiffs to demonstrate that, if not for Microsoft’s actions, these firms might have been able to enter the OS market profitably.

Alternative operating systems, such as Linux and IBM’s OS/2 were selling approximately five percent of PC operating systems at the time the *Microsoft* case was filed.³⁰ Moreover, their market shares have declined in recent years.³¹ Could any of these sellers of a competing OS prove that

²⁰ *Id.* at 64-67.

²¹ *Id.* at 65. This was also judged illegal. *Id.* at 67.

²² *Id.* at 67-69, 70-71.

²³ *Id.* at 71-74.

²⁴ *Id.* at 74-78.

²⁵ *Id.* at 71.

²⁶ *Id.* “[B]y keeping rival browsers from gaining widespread distribution . . . the deals have a substantial effect in preserving Microsoft’s monopoly.” *Id.* at 72.

²⁷ *Id.* at 54.

²⁸ *United States v. Microsoft Corp.* 84 F. Supp. 2d 9, 110 (D.D.C. 1999) (Findings of Fact ¶ 407).

It is not clear whether, absent Microsoft’s interference, Sun’s Java efforts would by now have facilitated porting between Windows and other platforms enough to weaken the applications barrier to entry. What is clear, however, is that Microsoft has succeeded in greatly impeding Java’s progress to that end with a series of actions whose sole purpose and effect were to do precisely that.

Id.

²⁹ *Id.* at 28, 110.

³⁰ Microsoft’s share of the relevant OS market exceeded ninety-five percent. *Id.* at 19, 22-23; see also Marcus Maher, *Open Source Software: The Success of an Alternative Intellectual Property Incentive Paradigm*, 10 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* 619, 684 n.305 (2000).

³¹ *Microsoft*, 84 F. Supp. 2d at 19, 23.

Microsoft's exclusionary conduct hurt their sales and profits significantly? Such a claim might well lend itself to proof.

If IBM or any maker of Linux were to be a plaintiff, they would still have to show how much their market share would have grown "but-for" Microsoft's illegal actions and how that would have affected their profit. It might be possible to estimate a competitor's growth rate from the experience or "benchmarks" of other new entrants in software gaining market share at the expense of a dominate incumbent, such as Word's displacement of WordPerfect.³²

In addition, economists may be able to use standard statistical techniques to quantify the impact of various Microsoft actions on Linux and OS/2 sales and market shares.³³ Disaggregation of damages into each separate action could present challenges because several of the actions at issue took place at the same time. However, the combined effect of various anticompetitive actions that served to maintain the OS monopoly illegally would presumably, and most appropriately, be combined to measure the full effect of illegal monopolization. The more difficult aspect would be separating the procompetitive aspects of new product introductions that took place concurrently with the Microsoft actions at issue.

Microsoft may have also lowered its OS price out of a fear that purchasers might otherwise switch to these alternative OSs, even if the ones under development would not actually have succeeded in successfully and profitably entering the market.³⁴ Potential entrants can affect the price charged by firms in a market.³⁵ Professor Robert E. Hall has even used potential entry by PC makers to estimate "but-for" prices absent Microsoft's actions and absent a new entrant.³⁶ In a private suit, plaintiffs presumably would have to show that as there increasingly "could," not "would," have been a rival OS, or that if a revitalized Linux or OS/2 might have been a more serious competitor, Microsoft may have lowered the price of its OS. Purchasers of OSs, such

³² See Timothy J. Muris, *The FTC and the Law of Monopolization*, 67 ANTITRUST L.J. 693, 721 n.114 (2000).

³³ ABA ANTITRUST SECTION, *PROVING ANTITRUST DAMAGES: LEGAL AND ECONOMIC ISSUES* ch. 5 (1996).

³⁴ Memorandum from Bill Gates, Microsoft, *The Internet Tidal Wave* (May 26, 1995), Gov't Ex. 20, *Microsoft* ("[Netscape is] pursuing a multi-platform strategy where they move the key API into the client to commoditize the underlying operating system."). Microsoft executive Brad Chase wrote: "Netscape's primary strategy has not changed: they still want to obsolete Windows. Netscape and Sun endeavor to commoditize the OS and drive developers to adopt their technologies and APIs." Memorandum from Brad Chase, Microsoft, *Preserving the desktop paradise* (April 4, 1997), Gov't Ex. 510, *Microsoft*. This and many of the other citations to the *Microsoft* case record were taken from Stephen D. Houck, *Injury to Competition/Consumers in High Tech Cases*, Address Before the New York Bar Conference on Consumer Injury in Antitrust Litigation: Necessary or Not? (Nov. 30, 2000).

³⁵ See generally Malcolm B. Coate & James Langenfeld, *Entry Under the Merger Guidelines 1982-1992*, 38 ANTITRUST BULL. 557 (1993); see also *Microsoft*, 84 F. Supp. 2d at 45 (Findings of Fact ¶ 55) ("OEMs believe that the likelihood of a viable alternative to Windows emerging any time in the next few years is too low to constrain Microsoft from raising prices.").

³⁶ Robert E. Hall, *Toward a Quantification of the Effects of Microsoft's Conduct*, Address at the Hoover Institution and Department of Economics, Stanford University (December 16, 1999).

as computer manufacturers or indirect purchasers in states where such claims are allowed, might then be able to claim these damages.³⁷

Proving these price reduction damages could be a formidable task.³⁸ First, plaintiffs would have to establish a date by which entry would have been likely. Absent business plans and supporting testimony from the potential entrants, picking and supporting a date would be difficult. Second, plaintiffs would have to establish benchmarks as to what had, in the past, happened to the prices of other monopoly software under the threat of entry.³⁹ This also would not be easy for plaintiffs to do, even if Professor Hall's approach is accepted. The hint in Judge Jackson's opinion—that Microsoft considered pricing at \$49 but instead chose \$89⁴⁰—would only be the starting point in plaintiffs' difficult case. We do not believe, however, that the required proof necessarily would be impossible.

II. Private Damages Directly Concerning the Browser Market

A second broad category of potential damages actions concern Microsoft's destruction of competition from Netscape and others in the browser "market."⁴¹ The D.C. Circuit dismissed the charge that Microsoft illegally attempted to monopolize this market because it found that the plaintiffs failed to adequately define a browser, and they had not shown barriers to entry into such a market.⁴² While the appellate court will not permit the government to now attempt to define a browser market in any subsequent

³⁷ Davis, *supra* note 4.

³⁸ For some of the complexities involved in this type of case, see Edmund Sanders and Joseph Menn, *Big Error Found in Microsoft Hearing*, L.A. TIMES, Nov. 28, 2001, pt. 3, at 2. An expert witness for Microsoft, Dr. Keith Leffler, testified that the class action plaintiffs "might be entitled to recoup between \$2 billion and \$5 billion." *Id.* After a cross examination wherein a significant error was pointed out to him, Leffler "returned to the court and announced he had made a mistake and that the potential damages were more than twice that, or \$5 billion to \$13 billion." *Id.* For a very different analysis of the damages involved in this case, see the calculations of plaintiffs expert witness, Prof. Jeffrey MacKie-Mason, available at <http://www-personal.umich.edu/~jmm>.

³⁹ Perhaps plaintiffs could use other examples of entry into software markets where prices have fallen as a benchmark. For example, if prices fell forty percent for WordPerfect when Word was introduced, perhaps this reduction could apply to the price of Microsoft's operating systems as well. Muris, *supra* note 32.

⁴⁰ *United States v. Microsoft Corp.*, 84 F. Supp. 2d 9, 27 (D.D.C. 1999) (Findings of Fact ¶ 63) ("A Microsoft study from November 1997 reveals that the company could have charged \$49 for an upgrade to Windows 98—there is no reason to believe that the \$49 piece would have been unprofitable—but the study identifies \$89 as the revenue-maximizing price. Microsoft thus opted for the higher price."). Some of the necessary information that is in the *Microsoft* case record might include Microsoft executive Kempin noting that Windows prices have increased while prices of all other PC system components have decreased sharply. Memorandum from Joachim Kempin to Bill Gates (Dec. 16, 1997), Gov't Ex. 365, *Microsoft*. Dr. Warren-Boulton testified that Microsoft profits were an "astonishing" 38.5% of revenue, by far the highest of any Fortune 500 company. Transcript of Testimony of Dr. Warren-Boulton (Nov. 23, 1998), *Microsoft*. Warren-Boulton also estimated that Windows prices were "significantly" more than 5% above competitive levels. *Id.* (Nov. 19, 1998).

⁴¹ *Microsoft*, 84 F. Supp. 2d at 80-84.

⁴² *Id.* at 81-82.

portion of this case,⁴³ Netscape⁴⁴ or another maker⁴⁵ or potential maker of browsers could attempt to do so in a private suit. If they succeeded, they might be able to show that Microsoft's anticompetitive conduct caused them to be illegally damaged.

There is little doubt that Netscape has been severely reduced as a competitive browser. It is withering, and its market share has been shrinking rapidly, especially for new users.⁴⁶ Microsoft's well-publicized attempt to "choke off" Netscape's air supply⁴⁷ succeeded, and its actions cost Netscape many sales.⁴⁸ In calculating damages, however, plaintiffs would have to dis-aggregate Netscape's lost sales and profits caused by Microsoft's anticompetitive actions from Netscape's losses caused by legitimate competition from IE.

For example, browsers cost nothing now, but before Microsoft's campaign against Netscape, Netscape had been able to charge for its browser.⁴⁹ This price probably would have decreased if Microsoft had entered the market but not used certain tactics that were or could be found to be anticompetitive. However, Netscape might be able to show that the price would not have decreased as quickly, or to zero. Moreover, Netscape also profited from advertising on its browser, and it might be able to prove that illegal tactics by Microsoft cost Netscape advertising revenue. Again, plaintiffs may have to

⁴³ *Id.* at 84.

⁴⁴ Netscape has recently filed such a suit. Complaint, Netscape Comm. Corp. v. Microsoft Corp. (D.D.C. filed Jan. 22, 2002) (Nos. 98-1232, 98-1233). The complaint is based upon the finding of the D.C. Circuit in *United States v. Microsoft* "that Microsoft's illegal acts had 'inflicted considerable harm on Netscape's business.'" *Id.* at 1. They allege that Microsoft since 1995 has used its monopoly power "to prevent the Netscape Web browser from serving as an alternate platform." *Id.* ¶ 26. Microsoft has effectively reduced Netscape's market share eliminating any risk of Netscape developing an alternative platform to Microsoft's operating system. *Id.* ¶ 32. Microsoft has unreasonably restrained competition in the web browser market by illegally tying Internet Explorer to Microsoft Windows. *Id.* ¶ 37-38. "Microsoft has willfully and wrongfully acquired, maintained and abused its monopoly power in Web browsers through anticompetitive and exclusionary behavior." *Id.* ¶ 44. Microsoft has a dominant position in the Web browser market by acting with specific intent to destroy competition in that market. *Id.* ¶ 49. Microsoft has intentionally interfered with Netscape fulfilling its real and prospective contractual obligations to third parties. *Id.* ¶ 57-58. The tortious acts committed by Microsoft against Netscape were "with deliberate and actual malice . . . and . . . willful and wanton disregard [for] Netscape's legal rights." *Id.* ¶ 66. Netscape requested relief as follows: "injunctive relief sufficient to prevent further antitrust injury to Netscape and to restore competition lost in the market for Web browsers, and to enable middleware platforms to compete with Intel-compatible PC operating systems," and actual damages, treble damages, interest on treble damages, attorney fees, and any other costs of Netscape associated with this suit "under Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15 and 26." *Id.* at 18.

⁴⁵ Be has recently filed such a suit. Complaint, Be, Inc. v. Microsoft, Corp. (N.D. Cal. filed Feb. 18, 2002) (No. 02837MEJ).

⁴⁶ Robin Cooper Feldman, *Defensive Leveraging in Antitrust*, 87 GEO. L.J. 2079, 2097 (1999).

⁴⁷ Thomas A. Piraino, Jr., *An Antitrust Remedy or Monopoly Leveraging by Electronic Networks*, 93 Nw. U. L. REV. 1, 10 n.58 (1998).

⁴⁸ See Transcript of Testimony of Cameron Myhrvold (Feb. 8, 1999), *Microsoft*; E-mail from Christian Widreuer, Memphis IEU focus groups report (Feb. 24, 1997), Gov't Ex. 202, *Microsoft* ("It seems clear that it will be very hard to increase browser market share on the merits of IE 4 alone. It will be more important to leverage the OS asset to make people choose IE instead of Navigator.").

⁴⁹ *United States v. Microsoft Corp.*, 84 F. Supp. 2d 9, 103 (D.D.C. 1999)

establish relevant benchmarks based upon what had happened to other monopoly software prices and market share levels when there was legitimate competitive entry.⁵⁰ Alternatively, statistical analysis may offer some quantification of Netscape's loss due to particular Microsoft actions, but this analysis would again need to separate the procompetitive aspects of new Microsoft products from the actions at issue in this case.

It is also possible that Netscape would have remained a monopolist absent Microsoft's illegal conduct.⁵¹ Microsoft's actions may have caused one monopolist (Netscape) to be replaced with another (Microsoft).⁵² Since Netscape presumably earned its monopoly honestly, however, it should be allowed to keep these profits.⁵³ Still, predicting Netscape's future normal or monopoly profits would be difficult.

There might, however, be one item that Netscape might be able to prove relatively easily. The district court found that Microsoft used its monopoly power in the OS market to illegally foreclose the most cost-effective browser distribution channels.⁵⁴ Netscape presumably incurred higher distribution costs for its browser due to this conduct. Such a comparison of the cost of alternative distribution channels may not be simple in the final analysis, but it appears to be conceptually possible.

There is another part of the losses involving the browser market that would be more difficult to quantify. The district court found that many consumers would have preferred to use Navigator but were "forced" to use IE.⁵⁵ Calculation of consumers' damages from their lack of an ability to exercise free choice would require a number of steps. A technologically sophisticated consumer who desired Navigator probably simply downloaded and installed it. The consumer's harm should presumably be less than the cost of doing this. The damage calculation would have to estimate how much this is worth on the average. It would also have to estimate what percentage of consumers

⁵⁰ One route a browser plaintiff might consider would be a predatory pricing claim. Such a claim was never alleged by the government in *Microsoft*, but the D.C. Circuit discussed it in various contexts. *United States v. Microsoft Corp.*, 253 F.3d 34, 58, 68, 75 (D.C. Cir. 2001) (*per curiam*) (*en banc*). This would mean Netscape might have to establish what the variable cost of an OS and browser were, perhaps based on the costs over a browser's product life-cycle. While most jurisdictions use a tough average variable cost benchmark for predatory pricing claims, others appear to use a more lenient average total cost benchmark. In California, pricing below average total cost with anticompetitive intent may be illegal. *William Inglis & Sons Baking Co. v. ITT Cont'l Baking Co., Inc.*, 668 F.2d 1014, 1038 (9th Cir. 1981); James R. McCall, *Private Enforcement of Predatory Price Laws Under the California Unlawful Practices Act and the Federal Antitrust Acts*, 28 PAC. L.J. 311 (1997). Private plaintiffs would have an easier time in jurisdictions like California than in many others.

⁵¹ *United States v. Microsoft Corp.*, 87 F. Supp. 2d 30, 45-46 (D.D.C. 2000) (Conclusions of Law), *aff'd in part, rev'd in part per curiam, en banc*, 253 F.3d 34 (D.C. Cir. 2001).

⁵² *Id.*

⁵³ Netscape might have earned monopoly level advertising rates, or monopoly rates for first and second screen placements charges.

⁵⁴ *See Microsoft*, 84 F. Supp. 2d at 103.

⁵⁵ "Microsoft forced those consumers who otherwise would have elected Navigator as their browser to either pay a substantial price (in the form of downloading, installation, confusion, degraded system performance, and diminished memory capacity) or content themselves with Internet Explorer." *Id.* at 111.

simply gave up and used IE.⁵⁶ Moreover, IE is an extremely good product, so it could be difficult for aggrieved plaintiffs to prove significant damages from their lack of choice. Thus, plaintiffs would have to develop new evidence on these issues. Surveys may be able to get at some of these issues, and there may be additional evidence from company files that has not been revealed. It may also be possible to statistically study data on sales before and after Microsoft's anticompetitive actions. However, this analysis would indeed be challenging.

Even if these types of data were available, estimating consumer damages would not be easy. Netscape chief executive officer James Barksdale testified that overall browser innovation had been delayed by one to two years as a result of Microsoft's predatory conduct.⁵⁷ Assuming that a court believes him, how could it calculate the damages from this loss of consumer welfare? That is, what is the loss to society from the loss of the next Netscape Navigator, or the Navigator 9.0 or 10.0 that will never come into being, or will come into being two years later? Also, suppose that competition from Netscape 10.0 would have spurred Microsoft to make an even better IE in 2003 or 2006? What benchmarks could be used to determine the world "but for" any anticompetitive acts?

III. Private Damages Resulting from the Specific Conduct that Constituted the Illegal Maintenance of Microsoft's OS Monopoly

The third category of damages is composed of specific items of illegal Microsoft conduct that might give rise to damages. Most of the factual record concerning these actions is not well developed. The government generally just proved that the harms occurred, but it did not attempt to quantify the relevant damages. For each item, a significant amount of additional evidence would presumably have to be gathered by plaintiffs. For example:

1. Microsoft did not permit OEMs to install shell "tutorial" programs.⁵⁸ There was testimony from IBM and Hewlett-Packard that when Microsoft forced them to remove their tutorials from their boot-up sequence, it made their PCs "harder to use," caused customer confusion and led to increased service calls.⁵⁹ Could an OEM use this as the basis of a claim for lost profits? Could an OEM reliably prove how many PCs they would have sold if they had been able to install a "Windows for Dummies" shell tutorial? The record is not well developed as to how many additional units IBM or Hewlett-Packard or other OEMs would have sold. They might well be able to introduce

⁵⁶ We know of no specific findings on this issue. *See id.* at 45-46.

⁵⁷ Transcript of Testimony of James Barksdale (Oct. 21, 1998), *Microsoft*.

⁵⁸ *Microsoft*, 84 F. Supp. 2d. at 60-62.

⁵⁹ Transcript of Testimony of Garry Norris (June 7, 1999), *Microsoft*; *see also* Trial Transcript (deposition excerpt of John Romano) (Dec. 16, 1998), *Microsoft*; Memorandum from John Romano, Hewlett-Packard, to Dave Wright, Microsoft (undated), Gov't Ex. 309, *Microsoft* ("Microsoft's mandatory removal of all OEM boot-sequence and auto-start program for OEM licensed systems has resulted in significant and costly problems for the HP-Pavilion line of retail PCs.").

reliable evidence since their shell tutorials had been developed, at least documenting their costs of developing programs they could not use. The harms to consumers from never being able to purchase "Windows for Dummies" and other tutorial products, moreover, could be large. However, these damages may be impossible to quantify.

2. Microsoft's version of Java was illegally "intended to deceive Java developers, and [Microsoft] predicted that the effect of its actions would be to generate Windows-dependent Java applications that their developers believed would be cross-platform."⁶⁰ Could Java developers who made products or in other ways lost money due to Microsoft's apparent deception be able to prove damages? Perhaps, but many might not sue for fear of retaliation from Microsoft.

3. Some corporate PC purchasers wanted a browserless Windows so that employees would not surf the Internet, thus wasting the employees' time and risking the import of viruses.⁶¹ The government provided evidence that this occurred,⁶² but offered nothing as to its frequency. Could any private plaintiffs calculate the resulting damages? Business users could perhaps examine employee time logs and PC records for the relevant period and attempt to figure out how much time their employees were wasting surfing the Internet. They might also be able to document the cost of lost time from viruses. Will plaintiff lawyers or expert economists be able to do this with any degree of accuracy? Again, surveys and creative economic or statistical analysis might be able to arrive at some estimates, but it is unclear whether these analyses would be reliable.

4. An OEM paid a lower amount for a Windows license if it agreed to install IE exclusively.⁶³ The firms who paid more might be able to recover these overcharges in a damages action. Some of these claims could be relatively easy to document. However, if the exclusivity provisions mirror legitimate volume discounts, disaggregating the effects of exclusivity from normal pricing could be complex. Also, these OEMs might be reluctant to sue Microsoft in the interest of future business relationships. Moreover, if Microsoft's primary method of inducing OEMs to install IE and only IE was not through differential charges, but rather through some form of harassment, then proving quantifiable damages could be even more difficult.

5. The D.C. Circuit also found that Microsoft acted illegally "with respect to Java by using its monopoly power to prevent firms such as Intel from aiding in the creation of cross-platform interfaces. . . . [Intel] had been in the process of developing a high performance Windows-compatible JVM [java virtual machine]. Microsoft wanted Intel to abandon that effort."⁶⁴ Could Intel have profited from supporting cross-platform Java? Would this support

⁶⁰ *United States v. Microsoft Corp.*, 253 F.3d 34, 41 (D.C. Cir. 2001) (per curiam) (en banc).

⁶¹ *Microsoft*, 84 F. Supp. 2d at 111.

⁶² *Id.*

⁶³ *Id.* at 27.

⁶⁴ *Id.* at 56-58. See also the testimony of Steven D. McGeady of Intel that, had it not been for Microsoft's illegal behavior, Intel's new technology "would have allowed a lot more innovation in both software and hardware that would have . . . brought new media capabilities to the

have aided the sale of other Intel products? Intel presumably would be entitled to attempt to prove that it lost profits due to such actions using some of the methods discussed above, but it would not be easy. The harm to consumers from these forgone products would, as usual, be even more difficult to quantify.⁶⁵

6. The D.C. Circuit gave the government the opportunity to try the tying issue on remand under a rule of reason analysis⁶⁶ and the Department of Justice has decided not to pursue this claim.⁶⁷ Private plaintiffs, however, can still pursue this theory of the case. Essentially, the government's theory was that Microsoft implemented an anticompetitive tie between its OS and the IE web browser.⁶⁸ Such a tie would enable Microsoft to take sales away from Netscape and obtain a percentage of Internet commerce through, for example, the biased placement of links on first or second screens.⁶⁹ Assume that Netscape, advertisers, or consumers succeed in proving that this tie is anticompetitive. How much would the potential "kickbacks" from travel agents, insurance companies, banks, phone companies, and others for preferred first or second screen placement be worth, and how much Microsoft revenue is due to the tie rather than legitimate services from IE? A court could first examine the amounts of money that Microsoft is already getting for this type of preferential placement from its affiliates. As before, disaggregating damage estimates would be difficult. However, the amounts involved could be quite large.

IV. *Conclusions and Policy Considerations*

It is useful to step back and consider the overall impact of the actions of Microsoft that the Court found illegal. Consider Judge Jackson's Finding of Fact 214, which the D.C. Circuit adopted⁷⁰:

The several OEMs that in the aggregate represented over ninety percent of Intel-compatible PC sales believed that the new restrictions would make their PC systems more difficult and more confusing to use, and thus less acceptable to consumers. They also anticipated that the restrictions would increase product returns and support costs and generally lower the value of their machines. Those OEMs that had already spent millions of dollars developing and implementing tutorial and registration programs and/or auto-

PC more quickly over time." Transcript of Testimony of Steven D. McGeedy, Intel (Nov. 9, 1998), *Microsoft*.

⁶⁵ Finding of Fact 410 describes how Microsoft's conduct towards Intel "deprived consumers of software innovation that they very well may have found valuable, had the innovation been allowed to reach the marketplace." *Microsoft*, 84 F. Supp. 2d at 111 (Findings of Fact ¶ 410).

⁶⁶ *United States v. Microsoft Corp.*, 253 F.3d 34, 84 (D.C. Cir. 2001) (per curiam) (en banc).

⁶⁷ *Supra* note 16.

⁶⁸ *Id.*

⁶⁹ The alleged behavior appears to be a classic tie to price discriminate. See, e.g., LYNNE PEPALL, ET AL., *INDUSTRIAL ORGANIZATION: CONTEMPORARY THEORY AND PRACTICE* 119-142 (1999).

⁷⁰ The Court accepted Judge Jackson's findings of fact under the normal "clearly erroneous" standard. *Microsoft*, 253 F.3d at 118.

matically-loading graphical interfaces in the Windows boot sequence lamented that their investment would, as a result of Microsoft's policy, be largely wasted.⁷¹

Is it impossible to think that plaintiffs could recover a portion of such damages? If Lopatka and Page's arguments are taken to their logical conclusions, there would not only be difficulties in proving damages in the Microsoft case, but there will be very few instances where an antitrust plaintiff would be able to collect any damages.⁷²

At this time we cannot predict whether any private plaintiffs will be able to overcome the formidable proof problems associated with potential private damages actions arising from this case.⁷³ Most private antitrust cases are largely about money, and that is likely to be true for private cases brought against Microsoft.⁷⁴ Even in straightforward price fixing cases there is always an issue of disaggregation between price increases due to collusion and price increases due to cost increases and other exogenous shocks. Any monopolization, exclusion, tying, or exclusive dealing case will always have a mixture of motives that could lead to precisely the kinds of complications that Professors Page and Lopatka identify.⁷⁵ Moreover, the damages in many cartel cases consist not only of the overcharges caused by the collusion, but also the cartel's other anticompetitive effects on efficiency, innovation, quality, and variety. To an even larger degree, the main harm to consumer welfare from Microsoft's behavior may not be higher prices, but reduced innovation and diminished consumer choice.⁷⁶ While many of these nonprice harms are difficult or impossible to quantify, at least the quantifiable claims can help compensate victims and deter future anticompetitive behavior.⁷⁷ The amount of

⁷¹ *Microsoft*, 84 F. Supp. 2d at 61.

⁷² Lopatka and Page's symposium article in many ways reads like a defense lawyer's brief. If we accept their arguments it seems difficult to imagine that a plaintiff would ever be able to win damages in any antitrust case other than a straightforward price fixing case.

⁷³ One of the best private antitrust cases against Microsoft was brought by Caldera, and it settled. *Caldera, Inc. v. Microsoft Corp.*, 72 F. Supp. 2d 1295, 1323 (D. Utah 1999), *cert. denied*, 70 U.S.L.W. 3107 (U.S. Aug 7, 2001).

⁷⁴ *But see* Complaint, *Netscape Comm. Corp. v. Microsoft Corp.* (D.D.C. filed Jan. 22, 2002) (Nos. 98-1232, 98-1233).

⁷⁵ If the harm had to be proven with certainty, it is doubtful that plaintiffs in any of these kinds of cases would be able to collect. "Certainty" is not, however, the legal standard. Roger D. Blair & William H. Page, "Speculative" *Antitrust Damages*, 70 WASH. L. REV. 423, 425-27 (1995) and cases cited therein. The question is whether plaintiffs will be able to convince a trier of fact that they have proven that any of the damages that we discuss in this article are likely, or reasonably probable, as opposed to speculative.

⁷⁶ *Microsoft*, 84 F. Supp. 2d at 112 (Findings of Fact ¶ 412).

Most harmful of all is the message that Microsoft's actions have conveyed to every enterprise with the potential to innovate in the computer industry . . . [Microsoft has repeatedly] demonstrated that it will use its prodigious market power and immense profits to harm any firm that insists on pursuing initiatives that could intensify competition against one of Microsoft's core products. . . . The ultimate result is that some innovations that would truly benefit consumers never occur for the sole reason that they do not coincide with Microsoft's self-interest.

Id.

⁷⁷ *See generally* Robert H. Lande, *Are Antitrust "Treble" Damages Really Single Damages?*, 54 OHIO ST. L.J. 115, 122-29 (1993).

deterrence or compensation that would result from private cases will of course depend upon the magnitude of quantifiable damages that can be proven.

In crime novels it is usually the clever private detective who protects society and forces the bad guys to lose their ill-gotten gains. The proof of private damages in the *Microsoft* case appears more challenging than in most antitrust cases, similar to evidence in the more complex detective novels. It is doubtful that anyone will break down and confess to any wrongdoing in *Microsoft*, as often happens in these detective novels, so judges or juries will have the last word in weighing the evidence. Under these circumstances, society may have to rely to a large extent on the antitrust police, rather than the antitrust equivalent of Sam Spade. Nevertheless, Sam may still have something to contribute.