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Fit to Be Tied: How United States v. Microsoft Corp. Incorrectly Changed the Standard for Sherman Act Tying Violations Involving Software

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NOTES & COMMENTS

FIT TO BE TIED: HOW *UNITED STATES V. MICROSOFT CORP.* INCORRECTLY CHANGED THE STANDARD FOR SHERMAN ACT TYING VIOLATIONS INVOLVING SOFTWARE

I. INTRODUCTION

Being forced to purchase two things when you only want one seems inherently wrong. On the other hand, receiving something additional, like jelly when you buy peanut butter, sounds like a good deal. But what happens when you do not particularly care for the brand or flavor of bonus jelly being given to you with the peanut butter? Or, what if you would rather have something different altogether? Suppose even further that the store from which you bought the peanut butter would not let you leave without taking the brand of jelly you despise. Would you still want the peanut butter?

Fair and open competition is the driving force of America's capitalist economy.[1] Through competition, consumers benefit from lower costs, superior quality, and greater selection.[2] In turn, businesses benefit from an open market and an equal playing field because demand drives down the overhead costs of production.[3] Antitrust laws and their enforcement aim to promote and protect that competitive process, and the many facets of antitrust legislation aim to ensure free trade and healthy competition.[4]

1. Robert Hulse, Note, *Patentability of Computer Software After* State Street Bank & Trust Co. v. Signature Financial Group, Inc.*: Evisceration of the Subject Matter Requirement*, 33 U.C. DAVIS L. REV. 491, 494 & n.16 (2000); *see also* Sherman Act, 15 U.S.C. § 2 (1994 & Supp. V 1999) (outlawing monopolies that hinder free trade).

2. ANTITRUST DIVISION, U.S. DEP'T OF JUSTICE, OVERVIEW, *at* http://www.usdoj.gov/atr/overview.html (last visited Mar. 19, 2002).

3. *See id.*

4. *Id.*

One area of antitrust law deals with the "tying"[5] of products together to force the purchaser of one product to acquire an additional product, whether beneficial or not.[6] Until July 2001, courts held that tying arrangements by a dominant market player were per se invalid if the tying arrangements hindered free competition in any manner.[7] The United States Court of Appeals for the District of Columbia modified that rule with respect to platform software and computer technology (the "*Microsoft Appeal*").[8]

Not all tying arrangements are illegal or wrong.[9] Firms like Microsoft frequently tie products together to benefit consumers and achieve more competitive results.[10] Similarly, monopolies and monopoly power (if lawfully acquired) are not per se illegal as violations of antitrust laws.[11] It is only when a monopolist uses such acquired power to "prevent or impede"[12] *natural* competition via tying or other similar restraints that an antitrust violation occurs.[13]

This Note proposes that the United States Court of Appeals for the District of Columbia incorrectly changed the tying analysis of antitrust law, presumably with the intention of protecting the innovative technology market.[14] However, the change was unnecessary and, in remanding the case for determination under the new standard, the court essentially let Microsoft off without penalty.[15] The district court's break-up order for Microsoft was invalidated and thus overturned because the appeals court

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5. 54 AM. JUR. 2D *Monopolies, Restraints of Trade, and Unfair Trade Practices* § 90 (2000) [hereinafter *Monopolies*]. A tying arrangement exists when a seller requires a buyer to purchase another, less desired product in addition to the desired product, with the potential effect of hindering competition in the tied product market. *Id.*

6. *Id.*

7. *See, e.g.*, Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 15–18 (1984).

8. *See* United States v. Microsoft Corp., 253 F.3d 34, 92–95 (D.C. Cir. 2001). The court found the traditional, four-pronged, per se test for tying claims inapplicable when applied to platform software because of the potential efficiencies of bundling such software together. *Id.* To date, the Supreme Court has not considered the issue. *Id.* at 95.

9. *See, e.g., Jefferson Parish*, 466 U.S. at 26–29; *see* Eastman Kodak Co. v. Image Technical Servs., 504 U.S. 451, 461–62 (1992); *see also Monopolies*, *supra* note 5, § 91 (noting that tying arrangements in concentrated markets can have procompetitive functions).

10. *See* Todd J. Anlauf, Comment, *Severing Ties with the Strained Per Se Test for Antitrust Tying Liability: The Economic and Legal Rationale for a Rule of Reason*, 23 HAMLINE L. REV. 476, 496–97 (2000).

11. *See* Northeastern Tel. Co. v. AT&T, 651 F.2d 76, 84–85 (2d Cir. 1981).

12. Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 274 (2d Cir. 1979).

13. *Id.*

14. *See* United States v. Microsoft Corp., 253 F.3d 34, 94 (D.C. Cir. 2001).

15. *See id.* at 95–97.

failed to apply the new rule of reason test to the district court's findings.[16] Other possible remedies—namely consent decrees—are often ineffective and more costly than continued litigation.[17] Thus, when the Court of Appeals for the District of Columbia held that Microsoft violated antitrust laws and engaged in anticompetitive practices, but did not use this power to tie products together,[18] Microsoft was merely branded with a bad name and nothing more.

This Note demonstrates why a rule of reason analysis for tying allegations in the software market is unnecessary in light of existing economic safeguards. Part II provides a background on the tying law as it has existed to date. Part III analyzes the opinions of the district court and the court of appeals. Part IV examines how the change in tying law to a rule of reason analysis with respect to platform software was unnecessary, overbroad, and let Microsoft escape harsh penalty.

II. THE FOUNDATIONS OF CURRENT TYING LAW

Section 1 of the Sherman Act[19] was adopted to prevent businesses from tying products together.[20] Based on this legislation, a per se test was adopted to handle claims of tying illegality.[21] In 1984, the Supreme Court in *Jefferson Parish Hospital District No. 2 v. Hyde*[22] clarified that a per se finding of tying illegality should focus on the market in which the product(s) in question are sold.[23] The test remained in effect until the United States Court of Appeals for the District of Columbia addressed Microsoft's appeal.[24]

A. Section 1 of the Sherman Act

Congress passed the Sherman Act in 1890, codifying laws created by judges against unfair competition.[25] Section 1 of the Sherman Act prohibits

16. *Id.* at 103.

17. Stephen Labaton, *U.S. vs. Microsoft: Going Back to Square One*, N.Y. TIMES, Sept. 9, 2001, 4:3.

18. United States v. Microsoft Corp., 253 F.3d 34, 94–95 (D.C. Cir. 2001).

19. 15 U.S.C. § 1 (1994 & Supp. V 1999).

20. *Id.* § 1.

21. *See generally* Int'l Salt Co. v. United States, 332 U.S. 392 (1947) (affirming the use of the Sherman Act per se test).

22. 466 U.S. 2 (1984).

23. *Id.* at 14–15.

24. *See* United States v. Microsoft Corp., 253 F.3d 34, 92–95 (D.C. Cir. 2001).

25. Thomas C. Arthur, *Farewell to the Sea of Doubt: Jettisoning the Constitutional*

"[e]very contract, combination . . . or conspiracy, in restraint of trade or commerce," irrespective of whether or not the violating party has a monopoly in the relevant market.[26] Businesses violate this section of the Sherman Act most often.[27] When faced with trade restraint questions, courts have repeatedly condemned commercial strategies that hinder competition.[28] Among such sanctionable strategies are "tying arrangements" and "exclusive dealing" contracts.[29] A tying situation arises where a seller agrees to sell one product to a buyer, but only on condition that the buyer either purchase an additional product (the tied product), or at a minimum, "agrees that he will not purchase that [or a similar] product from any other supplier."[30] The contract for sale need not explicitly embody these arrangements.[31] Further, conditions need not be implicitly embodied in a contract for sale or physical agreement, "but may be deduced from a course of conduct."[32]

Anticompetitive arrangements disregard the policy of the Sherman Act by denying competitors free access to the market for a tied product.[33] Because the defendant seller in question usually has sufficient power or leverage in another market to gain access in the tied product market, any competition is seriously hindered when a business ties its products.[34]

Under established tying law, a tying arrangement violates section 1 of the Sherman Act *only* if the seller has significant market power *and* the tying arrangement presents a strong hindrance to free competition.[35] Tying arrangements are per se illegal when several factors are satisfied: (1) the tying and tied good are two separate products; (2) the tying product's seller has conditioned the sale upon the purchase of the tied product, thereby affording consumers no choice but to purchase the tied product; (3) the seller holds significant power in the market of the tying product; and (4) the seller's practices have a substantial impact on competition in the relevant

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Sherman Act, 74 CAL. L. REV. 266, 279 (1986).

26. 15 U.S.C. § 1 (1994 & Supp. V 1999).

27. U.S. DEP'T OF JUSTICE, ANTITRUST DIVISION, WORKLOAD STATISTICS FY 1991–2000, *at* http://www.usdoj.gov/atr/public/7344.htm (last visited Feb. 18, 2002).

28. *See, e.g.*, Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 275 (2d Cir. 1979).

29. United States v. Microsoft Corp., 87 F. Supp. 2d 30, 46 (D.D.C. 2000).

30. N. Pac. Ry. Co. v. United States, 356 U.S. 1, 5–6 (1958).

31. *Monopolies*, *supra* note 5, § 90.

32. *Id.*

33. *Id.*

34. *Id.*

35. *See* Eastman Kodak Co. v. Image Technical Servs., 504 U.S. 451, 462 (1992).

market.[36]

The per se test for illegal tying was first introduced in *International Salt Co. v. United States*,[37] where the Court stated that, "it is unreasonable, *per se*, to foreclose competitors from any substantial market."[38] Five years later, the court reaffirmed that per se position in *Northern Pacific Railway Co. v. United States*.[39] At the time of *Northern Pacific*, new economic developments cast doubt on the assumption that tying arrangements had no purpose other than the mere suppression of competition.[40]

This established, per se test will not apply in every tying situation. In a case where the defendant seller lacks a dominant position in the market of the tying product, courts employ more economic analysis, weighing and examining the potential benefits of integration over hindrances to competition by applying a rule of reason test.[41] These situations are exceptional and thus, "tying arrangements [that hinder competition] can rarely be harmonized with the strictures of the antitrust laws."[42]

B. Jefferson Parish Hospital District No. 2 v. Hyde[43] *and the Separate Products Requirement*

Jefferson Parish was the first case to give substance to the four-part, per se test from *Northern Pacific*, particularly the separate products inquiry.[44] *Jefferson Parish* applied a rule of reason approach in examining the tying allegations—surgical services to listed anesthesiologists.[45] At the same time, the court refused to abolish the long standing per se analysis.[46] In doing so, the court asked whether the "character of the *demand*" is for *two* items rather than the mere functional relationship between the items.[47] Because there was consumer demand for both surgical services and

36. *Id.* at 461–62; *see also* Anlauf, *supra* note 10, at 480–81.

37. 332 U.S. 392 (1947).

38. *Id.* at 396.

39. 356 U.S. 1, 7 (1958).

40. *See id.* at 6 (quoting Standard Oil Co. v. United States, 337 U.S. 293, 305–06 (1949)).

41. *See Monopolies*, *supra* note 5, § 90 (noting that without the requisite economic power to *force* the consumer to buy the tied product in all cases, further inquiry must be made into the economics of such a decision to see if the benefits of the tying arrangement outweigh its costs to competition).

42. *Id.*

43. 466 U.S. 2 (1984).

44. *Id.* at 21–22.

45. *Id.*

46. Anlauf, *supra* note 10, at 492–93 (citing *Jefferson Parish*, 466 U.S. at 15–16).

47. *Jefferson Parish*, 466 U.S. at 19 (emphasis added).

anesthesiology, the hospital was tying two separate products by including its own anesthesiology services with its surgical services.[48] Nonetheless, the court determined that the hospital lacked sufficient market power in the tying product (hospital and surgical services) to adversely impact competition in the tied product (anesthesiology) marketplace.[49] Therefore, even though there had been separate consumer demand, the tying involved was legal, as it did not hinder competition.[50]

By focusing on demand for the different products in question, as opposed to "the functional relation between them,"[51] *Jefferson Parish* effectively concluded that even if two items are compliments, or "one . . . is useless without the other,"[52] they are not necessarily a single product for purposes of tying law.[53] Adhering to the traditional per se analysis approach, the court pushed for a case by case analysis by focusing on economic factors such as price, quality, supply, and demand of both the tying and tied products.[54] Although *Jefferson Parish* was the high water mark for per se illegality of tying claims brought under the Sherman Act, the decision was mindful of the potential economic benefits that courts should consider when faced with illegal tying allegations.[55]

C. A Change in Tying Analysis for an Innovative Market

In a case so heavily laden with technological definitions and advancements, the D.C. Circuit was troubled in applying a strict *Jefferson Parish* per se standard for the tying claims lodged against Microsoft by the Department of Justice ("D.O.J.").[56] The court in *Jefferson Parish* proposed a rule of reason analysis that would enable courts to delve into the

48. *Id.* at 21–24.

49. *Id.* at 26–27 (finding that the thirty percent service usage rate of patients in Jefferson Parish's local area did not constitute a substantial presence in the marketplace).

50. *Id.* at 32.

51. *Id.* at 19.

52. *Id.* at 19 n.30.

53. *Jefferson Parish*, 466 U.S. at 19.

54. *See id.* at 35 (O'Connor, J., concurring); *see also* Anlauf, *supra* note 10, at 493–94 (citing *Jefferson Parish*, 466 U.S. at 31).

55. *Jefferson Parish*, 466 U.S. at 34–35 (O'Connor, J., concurring).

56. *See* United States v. Microsoft Corp., 147 F.3d 935, 946–50 (D.C. Cir. 1998). "Courts are ill equipped to evaluate the benefits of high-tech product design, and even could they place such an evaluation on one side of the balance, the strength of the 'evidence of distinct markets,' proposed for the other side of the scale, seems quite incommensurable." *Id.* at 952–53 (citation omitted); *see also* Anlauf, *supra* note 10, at 497–98 (explaining the difficulties the court faced when analyzing the integration of Microsoft bundling).

economics behind tying decisions,[57] and the circuit court implemented that suggestion.[58]

The tying claim against Microsoft arose from its practice of integrating Internet Explorer (IE), its Internet browser, into Windows, its operating system software.[59] Though it seems minor, the fact that Microsoft controlled more than ninety percent of the Intel-based computer market caused such "bundling" to have a severe effect on competition, forcing all competitors to offer their Internet browsers free of charge like Microsoft.[60] Nonetheless, the D.C. Circuit was also aware that tying benefited the market, the consumer, and even the industry.[61] Therefore, upon the case's return to the court of appeals, the *Microsoft Appeal* court was willing to change the rule because Microsoft's situation "offer[ed] the first up-close look at the technological integration of added functionality into software that serves as a platform for third-party applications."[62]

III. THE CASE AGAINST MICROSOFT

A. Factual Background

In 1998, the D.O.J. filed a tying claim against Microsoft,[63] alleging that the bundling of IE 3.0 and IE 4.0 with Windows 95 and Windows 98 violated section 1 of the Sherman Act.[64] The allegations claimed that

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57. *Jefferson Parish*, 466 U.S. at 35 (O'Connor, J., concurring).

58. United States v. Microsoft Corp., 253 F.3d 34, 94 (D.C. Cir. 2001).

59. *Id.* at 58.

60. United States v. Microsoft Corp., 84 F. Supp. 2d 9, 19–20 (D.D.C. 1999) ("For the last couple of years, the [market share] figure has been at least ninety-five percent, and analysts project that the share will climb even higher over the next few years."); *see also* United States v. Microsoft Corp., 253 F.3d 34, 68 (D.C. Cir. 2001) (explaining that in certain circumstances, the Supreme Court has held that a price could be "unlawfully low" or predatory).

61. *See* United States v. Microsoft Corp., 147 F.3d 935, 950–51 (D.C. Cir. 1998).

> Incorporating browsing functionality into the operating system allows applications to avail themselves of that functionality without starting up a separate browser application. Further, components of IE 3.0 and even more IE 4 . . . provide system services not directly related to Web browsing, *enhancing the functionality of a wide variety of applications.*

Id. (emphasis added) (citation omitted).

62. United States v. Microsoft Corp., 253 F.3d 34, 84 (D.C. Cir. 2001) ("[S]implistic application of per se tying rules carries a serious risk of harm.").

63. Complaint at 6–7, United States v. Microsoft, 253 F.3d 34 (D.C. Cir. 2001) (No. 98–1232), *available at* http://www.usdoj.gov/atr/cases/f1700/1763.pdf.

64. *Id.* at 48.

Microsoft's tying arrangements violated a previous consent decree settling similar antitrust claims against Microsoft.[65] The litigation arose from the D.O.J.'s claim that Microsoft violated a 1994 order, pursuant to that consent decree, "by continuing to tie Windows and IE in its sale [licensing] to both OEMs [Original Equipment Manufacturers] and consumers."[66] By 1998, Microsoft's Internet browser market share doubled from thirty percent at the release of Windows 95 to sixty percent after the release of Windows 98.[67]

The district court scheduled the case on a "fast track"[68] as technology and the relevant market is ever changing.[69] After a seventy-six day bench trial, the district court found that Microsoft had a substantial hold on the operating system and Internet browser market, and had acted in a monopolistic manner by bundling its software to OEMs.[70] Subsequently, the parties engaged in settlement talks before a mediator.[71] With no settlement after four months of negotiations, the district court issued its conclusions of law on April 3, 2000.[72] Those conclusions led to the appeal at issue in this Note.

B. The District Court Decision in United States v. Microsoft Corp.[73]

The district court held that Microsoft violated section 1 of the Sherman Act by unlawfully tying its Web browser (IE) to its operating system (Windows).[74] The court based its decision on the per se analysis

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65. *Id.* at 17.

66. Anlauf, *supra* note 10, at 496–97. "Specifically, the Windows 95 and Internet Explorer 3.0 software was bundled by a contract which required Original Equipment Manufacturers (OEMs) to purchase and install Internet Explorer, the tied product, in order to receive the ubiquitous Windows product." *Id.* at 496 (citing United States v. Microsoft Corp., 84 F. Supp. 2d 9, 98 (D.D.C. 1999)).

67. *Id.* at 497.

68. United States v. Microsoft Corp., 253 F.3d 34, 47 (D.C. Cir. 2001). The district court consolidated the preliminary injunction hearing and trial on the merits and then set a trial date only four months away from the time complaints had been filed. *Id.* In addition, the district court planned to limit each side to a maximum of twelve witnesses whose direct testimony was to come from written declarations. *Id.*

69. *See* United States v. Microsoft Corp., 253 F.3d 34, 47 (D.C. Cir. 2001).

70. *Id.*; United States v. Microsoft Corp., 84 F. Supp. 2d 9, 19 (D.D.C. 1999).

71. United States v. Microsoft Corp., 253 F.3d 34, 47–48 (D.C. Cir. 2001) ("The Honorable Richard A. Posner, Chief Judge of the United States Court of Appeals for the Seventh Circuit, was appointed to serve as mediator.").

72. *Id.* at 48.

73. 87 F. Supp. 2d 30 (D.D.C. 2000).

74. United States v. Microsoft Corp., 253 F.3d 34, 35 (D.C. Cir. 2001).

adopted and modified by the Supreme Court in the *Jefferson Parish Hospital District No. 2 v. Hyde*[75] and *Northern Pacific Railway Co. v. United States*[76] decisions.[77]

1. IE and Windows as Two Separate Products

Microsoft asserted that the tied and tying products, the operating system and browser respectively, were really just a single product.[78] Citing *Jefferson Parish*, the district court held that consumer demand would be the appropriate test and, as opposed to Microsoft's perception, "consumers today perceive operating systems and browsers as separate 'products,' for which there is separate *demand*."[79] Keeping with *Eastman Kodak Co. v. Image Technical Services*[80] and *Jefferson Parish*, the court was unwilling to allow Microsoft's "valid business reasons" to stand in the way of liability.[81] Thus, the D.O.J. satisfied the first element of the test—that the tied and tying products be two distinct products in the eyes of consumers as evidenced by separate consumer demand.[82]

2. The Conditioned Sale of IE with Windows Afforded the Consumer No Choice

The district court found that Microsoft mandated OEMs install IE on all new computers pursuant to the licensing agreement for Windows.[83] Microsoft was also found to have refused licenses to OEMs for Windows distribution unless they agreed not to remove IE icons from the Windows

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75. 466 U.S. 2 (1984).

76. 356 U.S. 1 (1958).

77. *See generally Jefferson Parish*, 466 U.S. 2 (formulating the idea that per se analysis is appropriate only in cases where the defendant has established market dominance); N. Pac. Ry. Co. v. United States, 356 U.S. 1 (1958).

78. United States v. Microsoft Corp., 87 F. Supp. 2d 30, 48 (D.D.C. 2000).

79. *Id.* at 49 (emphasis added).

80. 504 U.S. 451 (1992).

81. United States v. Microsoft Corp., 87 F. Supp. 2d 30, 48 (D.D.C. 2000).

> Thus, at a minimum, the admonition of the D.C. Circuit in *Microsoft II* [*Microsoft Appeal* for purposes of this Note] to refrain from any product design assessment as to whether the "integration" of Windows and Internet Explorer is a "net plus," deferring to Microsoft's "plausible claim" that it is of "some advantage" to consumers, is at odds with the Supreme Court's own approach.

Id. at 48–49.

82. *See id.* at 49.

83. *Id.* at 50; *see also* United States v. Microsoft Corp., 84 F. Supp. 2d 9, 49–51 (D.D.C. 1999).

desktop.[84] Relating the issue directly to customers, the district court held that Microsoft had forced consumers to acquire IE with the purchase of Windows.[85] When consumers received computers with Windows and IE already installed from OEMs, they were unable to remove IE, even if they so desired.[86] In this regard, irrespective of Microsoft's claims that IE was included at no charge, the court held that Microsoft forced customers to "pay" for the tied product.[87]

3. Microsoft Holds Significant Power in the Browser Market

The court defined the market in question as that of Intel-compatible personal computer ("PC") operating systems.[88] Searching for "appreciable economic power in the tying market," the district court followed the analysis of *Fortner Enterprises, Inc. v. United States Steel Corp.*[89] and *Jefferson Parish.*[90] After holding Microsoft had a monopoly in the operating system market, the court applied the conclusion in *Fortner* that market power is the ability to tie products together.[91] The court held, *a fortiori*, that Microsoft had significant power in the browser market for purposes of the third prong of per se tying analysis.[92] The court was therefore unwilling to consider the argument that Microsoft did not have a monopoly over the Internet browser market.

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84. United States v. Microsoft Corp., 87 F. Supp. 2d 30, 50 (D.D.C. 2000).

85. *See* United States v. Microsoft Corp., 84 F. Supp. 2d 9, 49–51 (D.D.C. 1999).

86. United States v. Microsoft Corp., 87 F. Supp. 2d 30, 50 (D.D.C. 2000).

87. *Id.* (holding that, even though there is no additional cost for IE over Windows, "licensees, including consumers, are forced to take, and pay for, the entire package of software and . . . any value to be ascribed to Internet Explorer is built into this single price"); *see also* United States v. Microsoft Corp., 253 F.3d 34, 84–85 (D.C. Cir. 2001) (citing United States v. Microsoft Corp., 84 F. Supp. 2d 9 (D.D.C. 1999)) (In certain circumstances, "Microsoft designed Windows 98 to override the user's choice of default web browser . . . .").

88. United States v. Microsoft Corp., 87 F. Supp. 2d 30, 49 (D.D.C. 2000).

89. 394 U.S. 495 (1969).

90. *Id. See generally Jefferson Parish*, 466 U.S. at 14 (defining market power as the ability "to force a purchaser to do something that he would not do in a competitive market"); *Fortner*, 394 U.S. at 504 (holding the ability to raise prices or *merely impose tie-ins* on any appreciable number of buyers within the relevant market as significant for market power analysis).

91. *See* United States v. Microsoft Corp., 87 F. Supp. 2d 30, 37 (D.D.C. 2000) (holding that Microsoft had a persistent market share "protected by a substantial barrier to entry" and a failure to rebut evidence that effectively showed "indicia of monopoly power" compelled a finding of monopoly power).

92. *Id.* at 49.

4. Microsoft's Bundling Actions Foreclosed a Substantial Amount of Commerce

Citing the *Fortner* decision, the district court applied a substantiality test, based on a "'total amount of business' that is 'substantial enough in terms of dollar-volume so as not to be merely *de minimis* . . . .'"[93] The court, looking to its findings of fact,[94] held that although there was no specified dollar amount of foreclosed business, Microsoft's bundling practices caused Netscape Navigator's "usage share to drop substantially from 1995 to 1998."[95] As such, it was "obvious" to the district court that Microsoft's refusal to offer IE separate from Windows exceeded the *de minimis* threshold laid down by the Supreme Court in *Fortner*.[96]

5. The Result of a Tying Conclusion

Having satisfied the four prongs of the *Northern Pacific Railway Co.* and *Jefferson Parish* per se tying test, the district court held that Microsoft continuously and illegally tied IE to Windows, in violation of section 1 of the Sherman Act.[97] However, the court remained mindful that such a test might be inappropriate for the technology-based subject matter, yet found itself bound to follow Supreme Court precedent.[98]

These conclusions, coupled with the holding that Microsoft established and maintained a monopoly power, led the district court to order the software giant to break into two separate businesses.[99] Microsoft was supposed to separate into an Operating Systems Business to handle the Windows operating systems, and an Applications Business to handle all other applications, including IE.[100] The idea was that splitting Microsoft

93. *Id.* (quoting *Fortner*, 394 U.S. at 501).

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

95. United States v. Microsoft Corp., 87 F. Supp. 2d 30, 49 (D.D.C. 2000) ("[A]s a direct result [of the usage drop] Netscape suffered a severe drop in revenues from lost advertisers, Web traffic and purchases of server products.").

96. *Id.* at 49–50.

97. *Id.* at 51, 56 (holding that "Microsoft's decision to offer only the bundled—'integrated'—version of Windows and Internet Explorer derived not from technical necessity or business efficiencies [but rather from] the result of a deliberate and purposeful choice to quell incipient competition before it reached truly minatory proportions," violated section 1).

98. *Id.* "A court mechanically applying a strict 'separate demand' test could improvidently wind up condemning 'integrations' that represent genuine improvements to software that are benign from the standpoint of consumer welfare and a competitive market." *Id.*

99. United States v. Microsoft Corp., 97 F. Supp. 2d 59, 63–64 (D.D.C. 2000).

100. *Id.* at 64.

would force it to license with itself to obtain an Internet browser for Windows. Accordingly, the corporation would be unable to tie the products together, allowing other Internet browsers to compete with the Applications Business to be included in Windows.[101] However, this result only worked in theory.

C. The D.C. Circuit Decision in United States v. Microsoft Corp.[102]

The circuit court reversed the district court's decision that Microsoft violated section 1 of the Sherman Act, holding that the district court inaccurately applied the per se test.[103] The court first reviewed the district court's application of the per se test, determining that some of the elements were not as easily satisfied as the district court had found.[104] The court then held that a per se test was inapplicable to the technological subject matter at issue.[105]

1. The District Court Misapplied the Separate Products Prong of the Per Se Test to Microsoft's Bundling Practices

Although the district court applied all four prongs of the per se test from *Northern Pacific Railway Co.*,[106] the circuit court focused its objection on the application of the second prong: separate product analysis.[107] The core concern behind the *Jefferson Parish* consumer demand test for the "two distinct products" prong of the per se test was that "tying prevents goods from competing directly for consumer choice on their merits."[108] As there are potential benefits from tying/bundling,

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101. *See id.* at 65–66. Microsoft was to maintain these as entirely separate businesses whereby the Operating Systems Business would have to license applications from the Applications Business or from competitors, as if it had no ties with the Applications Business. *Id.*

102. 253 F.3d 34 (D.C. Cir. 2001).

103. *Id.* at 84 (vacating the district court's finding of a per se tying violation).

104. *Id.* at 84–89.

105. *Id.* at 89–90. "[T]here are strong reasons to doubt that the integration of additional software functionality into an [operating system] falls among these [per se invalid tying] arrangements." *Id.* at 89.

106. *See* United States v. Microsoft Corp., 87 F. Supp. 2d 30, 49–50 (D.D.C. 2000).

107. United States v. Microsoft Corp., 253 F.3d 34, 85–89 (D.C. Cir. 2001).

108. *Id.* at 87.

> Direct competition on the merits of the tied product is foreclosed when the tying product either is sold only in a bundle with the tied product or, though offered separately, is sold at a bundled price, so that the buyer pays the same price whether he takes the tied product or not.

Id.

Jefferson Parish developed a separate products test as a rough guideline "to screen out false positives."[109] By not focusing on consumer demand, a court would only look at whether two products were involved, thereby ignoring any potential benefit of bundling.[110]

Though the district court found that many consumers, if given the option, would choose to purchase or acquire Internet browsers separately from operating systems,[111] the court did not discuss any evidence of whether other operating system vendors sold browsers and their systems at bundled prices.[112] Indeed, if all competing operating system vendors bundled Internet browsers with their software, or vice-versa, then the goods would be known as a "single product" under the *Jefferson Parish* test.[113] However, Microsoft's argument failed because there were no operating systems on the market to which a browser could be tied that would have been strong enough to compete with Windows.[114]

The circuit court emphasized that perceivable separate demand by consumers was "inversely proportional to net efficiencies" of tying.[115] Hence, bundling by all competitive firms within a certain market suggested that there were strong net efficiencies for the process, outweighing any noticeable separate demand.[116] Therefore, Microsoft's practices would have been consistent with any competition (as the entire "competitive fringe" was engaging in the same behavior) and, thus, not in violation of section 1, even though consumer demand was for two separate products.[117] The circuit court decided that the district court inappropriately applied the "separate products" prong of the per se test because it failed to take the potential economic efficiencies of Microsoft's bundling practices into account.[118]

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109. *Id.* ("The consumer demand test is a rough proxy for whether a tying arrangement may, on balance, be welfare-enhancing, and unsuited to per se condemnation.").

110. *Id.* at 87–88.

111. United States v. Microsoft Corp., 84 F. Supp. 2d 9, 48 (D.D.C. 1999).

112. United States v. Microsoft Corp., 253 F.3d 34, 88 (D.C. Cir. 2001).

113. *Id.* at 86. This is true because there would be no separate demand.

114. *See* United States v. Microsoft Corp., 84 F. Supp. 2d 9, 19 (D.D.C. 1999) (finding that Microsoft established and maintained a monopoly in the computer operating systems market for Intel-based computers).

115. United States v. Microsoft Corp., 253 F.3d 34, 88 (D.C. Cir. 2001). "Only when the efficiencies from bundling are dominated by the benefits [of] choice for enough consumers, however, will we actually observe consumers making independent purchases." *Id.* at 87.

116. *Id.* at 88.

117. *Id.*

118. *Id.* at 87–89.

2. The Per Se Tying Test Was the Wrong Test Because It Was Inapplicable to the Subject Matter

The circuit court was convinced that specific situations required a per se tying test to invalidate unreasonable actions that posed an undesirable danger of encumbering competition.[119] The court was also aware that integration of additional software into operating systems on compatible platforms was most likely not one of those situations.[120] Thus, the court held that applying a per se test "off the shelf" was inappropriate given the content of the products at issue.[121]

The circuit court's major concern was the speed of the technology markets and the possibility that bundling would accomplish efficiencies and benefits that courts had never seen before.[122] Microsoft argued that integration of IE into Windows was not only beneficial and innovative because no other company invested the resources to incorporate a web browser as deeply into its operating system as Microsoft, but also that such integration *required* the non-removal of IE.[123] Mindful that, unlike monopoly maintenance claims, a separate products inquiry under *Jefferson Parish* is supposed to proceed without an efficiency analysis, the court held that "looking to a competitive fringe is inadequate to evaluate fully its potentially innovative technological integration . . . ."[124] Because the *Jefferson Parish* separate products test was not suited to an efficiency/benefit analysis, the court held that applying such a test to Microsoft's situation would be detrimental to consumers by chilling innovation.[125]

Recognizing that most computer tying and bundling cases dealt with bundling software with hardware,[126] the circuit court noted that the

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119. *Id.* at 89.

120. *Id.* at 89–90 ("Applying per se analysis to such an amalgamation creates undue risks of error and of deterring welfare-enhancing innovation.").

121. United States v. Microsoft Corp., 253 F.3d 34, 89–90 (D.C. Cir. 2001). "[T]he paucity of cases examining software bundling suggests a high risk that per se analysis may produce inaccurate results . . ." *Id.* at 92.

122. *Id.* at 90–91.

123. *Id.* at 88–89.

124. *Id.* at 89 (noting that such a comparison is "between apples and oranges").

125. *Id.* at 89 ("The per se rule's direct consumer demand and indirect industry custom inquiries are, as a general matter, backward-looking and therefore systematically poor proxies for overall efficiency in the presence of new and innovative integration.").

126. *Id.* at 91–92 (noting that there were merely four cases—one of which was the D.C. Circuit opinion in United States v. Microsoft Corp., 147 F.3d 935 (D.C. Cir. 1998)—that involved an arrangement in which "a software program is tied to the purchase of a software

Supreme Court had not applied the per se test to the growing software market.[127] Accordingly, the circuit court was careful not to discard Microsoft's arguments without consideration.[128] Microsoft conceded that IE was fully integrated and non-removable from Windows, but the company proposed that integration was necessary to foster innovation instead of hindering growth.[129] Taking this argument into account, the D.C. Circuit chose to abandon the rigid per se test under section 1 of the Sherman Act in cases of "platform software."[130]

The court held that in technology cases, such as those involving platform software, a rule of reason analysis would afford the most opportunity for a defendant, like Microsoft, to demonstrate the efficiency gain from its tie or bundle.[131] A rule of reason analysis was particularly important in the platform software market because integration is common in such markets, even among firms without market power.[132] Unfortunately, the court said little on what such a test should entail beyond an inquiry into the individual costs and benefits in each case.[133]

The circuit court did not want to apply a rule of reason test in lieu of the standard *Jefferson Parish* per se rule in all cases where an efficiency justification for tying arrangements exists.[134] However, the court clarified that when the product in question is platform software, the per se test will not work to better the economy.[135] Therefore, even though the circuit court

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platform").

127. *See* United States v. Microsoft Corp., 253 F.3d 34, 90 (D.C. Cir. 2001).

128. *See id.*

129. *Id.* (noting that Microsoft argued that the "bundling of [IE] APIs with Windows makes the latter a better applications platform for third-party software").

130. *Id.* at 94.

131. *Id.* at 92 (holding that "the nature of the platform software market affirmatively suggests that per se rules might stunt valuable innovation."). Additionally, the court felt that there may be many real efficiencies "common in technologically dynamic markets where product development is especially unlikely to follow an easily foreseen linear pattern," which may be ignored by a rigid application of a per se rule for tying. *Id.* at 94.

132. *Id.* at 92–93. This point bolstered the court's argument for looking at the economics behind integration in such a market in that firms without market power could not possibly have any incentive to bundle their products "unless there are efficiency gains from doing so." *Id.*

133. United States v. Microsoft Corp., 253 F.3d 34, 94 (D.C. Cir. 2001). The court hinted elsewhere in the opinion that the inquiry into the business excuse and redeeming virtues put forward by one accused of "tying" in violation of section 1 of the Sherman Act should be "elaborate." *See id.* at 90–91.

134. *Id.* at 94.

135. *Id.* at 94–95. "[I]ntegration of new functionality into platform software is a common practice and . . . wooden application of per se rules in this litigation may cast a cloud over platform innovation in the market for PCs, network computers and information appliances." *Id.* at 95.

upheld the district court's finding that Microsoft illegally acquired and maintained monopoly power, it ultimately reversed the finding of an illegal tie based on the fact that the per se test was inapplicable.[136]

3. Remand of the Tying Claim

In remanding the tying claim back to the district court for consideration under the revised rule of reason standard, the circuit court gave three guidelines as to what the D.O.J. needed to show.[137]

First, the D.O.J. would bear the burden of proving that the "actual effect" of Microsoft's conduct unreasonably restrained competition by inquiring into the "actual effect"[138] of Microsoft's conduct on rivals in the tied good market that unreasonably restrained competition.[139] In order to prove this, the D.O.J. would have to provide a definition of the browser market and barriers to entry into that market other than the tying arrangement itself.[140] However, the court held that the D.O.J. failed to provide such a definition or show these barriers in their section 2 Sherman Act monopolization claim. Therefore, on remand, the D.O.J. could not argue any theory of harm that depended on a clear-cut definition of browsers or barriers to entry other than what may have been implicit in Microsoft's tying arrangement.[141] The court further held that any efficiency argument proffered by Microsoft for the bundling was the D.O.J.'s burden to disprove.[142]

Second, the court maintained that Microsoft's violations of section 2 of the Sherman Act did not bear on the tying claim even though some of the behavior in support of that finding alleged tying violations.[143] For this behavior to constitute a section 1 tying violation, the D.O.J.—should it have chosen to pursue the tying claim—would have needed to show that

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136. *Id.*

137. *Id.* at 95–96.

138. *Id.* at 95.

139. United States v. Microsoft Corp., 253 F.3d 34, 95–96 (D.C. Cir. 2001) (citing *Jefferson Parish*, 466 U.S. at 29).

140. *Id.*

141. *Id.* at 95. This had the effect of telling the D.O.J. that the only way it could show a barrier was to show that the products were tied, a fact already established by the trial court. *See* United States v. Microsoft Corp., 84 F. Supp. 2d 9, 49 (D.D.C. 1999).

142. United States v. Microsoft Corp., 253 F.3d 34, 96 (D.C. Cir. 2001).

143. *Id.* (holding that those findings of including IE with Windows and not allowing manufacturers or consumers to remove IE were the "basis for liability under plaintiffs' § 2 monopoly maintenance claim," but could not be used to show restraint of competition or barrier to entry in the tied product market, namely Internet browsers).

the benefits of bundling and permanence of IE on the computer, if any, were wholly "outweighed by the harms in the *tied product* market."[144]

Finally, the circuit court held that to find a section 1 tying violation, the district court, on remand, would have to consider whether Microsoft "price bundl[ed]"[145] IE and Windows, and whether this price bundling had any impact on the browser market.[146] This last requirement involves first finding that Microsoft charged more for Windows and IE together than it charged for Windows alone.[147] If the court finds a price increase in Windows as bundled with IE, then the D.O.J. bears the burden of proving that the anticompetitive effects of such price bundling outweighs any of Microsoft's justifications.[148] The circuit court made clear that in applying the rule of reason test, lower courts were free to look at both direct and indirect evidence stemming from a tie.[149]

IV. THE DISTRICT COURT PROPERLY APPLIED THE PER SE TEST IN *UNITED STATES V. MICROSOFT CORP.*[150]

A. Mandating the Rule of Reason Analysis in All Software Tying Allegations Is Unnecessary

1. Rule of Reason Analysis

The circuit court formulated a rule of reason analysis to replace the per se tying test—specifically the separate-products prong—when faced with tying allegations involving platform software.[151] This type of analysis was necessary because the per se method announced in *Jefferson Parish Hospital District No. 2 v. Hyde*[152] failed to fully account for the economics

144. *Id.* at 96.

145. *Id.*

146. *Id.*

147. *Id.*

148. United States v. Microsoft Corp., 253 F.3d 34, 96 (D.C. Cir. 2001). The circuit court went on to declare that if price bundling were proven by competitive operating system makers, this would "tend to exonerate Microsoft only if the sellers in question sold their browser/OS [operating system] combinations *exclusively* at a bundled price." *Id.* at 97.

149. *Id.* at 96 (noting that a separate-products analysis would merely serve as a screening device to classify arrangements as subject to tying law, but not to find liability thereunder).

150. 87 F. Supp. 2d 30 (D.D.C. 2000).

151. United States v. Microsoft Corp., 253 F.3d 34, 89, 92 (D.C. Cir. 2001).

152. 466 U.S. 2 (1984).

potentially associated with the bundling of such software.[153] Though the per se tying test has had its share of criticism,[154] this change by the circuit court was unwarranted, and has actually hurt the consumer more than it has helped.

A rule of reason analysis of a tying allegation is proper when "the defendant seller does not possess sufficient market power to force customers to purchase a second, unwanted product in order to obtain the tying product . . . ."[155] In this situation, courts emphasize the purposes and effects of the bundling practices involved, given that the defendant seller is without the standard market power required for the per se test.[156]

Jefferson Parish helped distinguish between the per se and rule of reason analyses.[157] In a situation where a defendant charged with illegal tying has a great deal of leverage in a market, making an inquiry into actual market conditions unnecessary, per se analysis is appropriate because the existence of forcing by the defendant is more than likely.[158] Therefore, in circumstances where the defendant seller is clearly in a dominant position to engage in "anticompetitive conduct,"[159] a court can avoid the burdensome costs of analyzing market conditions.[160] On the other hand, a rule of reason inquiry into tying allegations allows a court to examine the potential benefits of certain bundling agreements by investigating the economic market, but at the expense of increased litigation inherent in a case-by-case inquiry.[161] Judges are able to further develop the pro and anticompetitive effects of a tying allegation under a rule of reason inquiry.[162]

2. Per Se Analysis Is Generally a Misnomer

Courts do not apply the per se analysis under section 1 of the Sherman Act[163] in a typical per se manner. Rather, they simply avoid

153. United States v. Microsoft Corp., 253 F.3d 34, 93–94 (D.C. Cir. 2001).

154. *See, e.g.*, Anlauf, *supra* note 10, at 479, 499–509.

155. *Monopolies*, *supra* note 5, § 92.

156. *Id.*

157. *Jefferson Parish*, 466 U.S. at 14–18.

158. *Id.* at 15–16 ("[A]s a threshold matter there must be a substantial potential for impact on competition in order to justify *per se* condemnation.").

159. *Id.* at 15–16 & n.25.

160. *Id.* at 15 n.25.

161. *See* Anlauf, *supra* note 10, at 508–09.

162. *Id.* at 509.

163. 15 U.S.C. § 1 (1994 & Supp. V 1999).

inquiry into market conditions and label this a per se test.[164] The majority of typical per se rules in other areas of antitrust law simply avoid inquiry into market structure altogether, "because the challenged conduct has so little chance of being economically beneficial and so great a likelihood of being economically harmful . . . ."[165] However, in the context of illegal tying allegations, courts examine the tying-product market structure, because tying arrangements in competitive markets are not necessarily dangerous and unlawful themselves.[166] Courts focus their inquiries on the relevant marketplace to ensure that legitimate tying or bundling conduct is not condemned as illegal.[167]

As mentioned above,[168] the threshold for application of a *Jefferson Parish* per se analysis is market dominance.[169] Even so, once a plaintiff establishes market dominance and per se analysis is proper, the court must still look into the tying product's market structure.[170] Per se illegality of tying practices is truly "per se" only when the defendant corporation truly dominates the marketplace, making lengthy inquiry into market conditions, on balance, unnecessary.[171]

Courts should always question market structure and explore potential economic benefits, even if their analysis is minimal.[172] Therefore, further inquiry into potential economic benefits under a rule of reason analysis is justified only when the defendant corporation—alleged to have tied products illegally—has no market power.[173]

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164. *Monopolies*, *supra* note 5, § 91.

165. *Id.*

166. *Id.*; *see also* Town Sound & Custom Tops, Inc. v. Chrysler Motors Corp., 959 F.2d 468, 495–96 (3d Cir. 1992) (holding that without anticompetitive conduct, a tying arrangement in a competitive marketplace is not illegal in and of itself), *cert. denied*, 506 U.S. 868 (1992).

167. *See Monopolies*, *supra* note 5, § 91. Without inquiry into the relevant market structure, a true per se test would overlook those "tying arrangements in concentrated markets [that] may serve procompetitive purposes, such as quality control, production and sales efficiencies, and the facilitation of indirect price competition." *Id.*

168. See discussion supra Part IV.A.1.

169. *See Jefferson Parish*, 466 U.S. at 15–18.

170. *Monopolies*, *supra* note 5, § 91.

171. *See id.* § 92; *see also Jefferson Parish*, 466 U.S. at 15–18.

172. *Monopolies*, *supra* note 5, § 91 (noting that there must, at the very least, be an inquiry as to whether the corporate defendant possesses sufficient market power to warrant application of the *Jefferson Parish* per se test).

173. *See id.* § 92.

3. Rule of Reason Is Therefore Appropriate in Very Limited Circumstances

The rule of reason allows a court the opportunity to delve into the economic market and explore the potential benefits bundling may provide the industry and consumers in a case where market dominance is not clear and anticompetitive elements are not established.[174] As previously mentioned, even the per se test incorporates some economic analysis in an investigation of tying allegations. However, courts limit their inquiry where a plaintiff establishes market dominance.[175] Thus, the difference between the tests is that under the rule of reason test, a plaintiff is not required to show that the seller of a tied product has sufficient market power.[176]

The rule of reason test gives more deference to the defendant seller who is not a dominant force because he lacks leverage in the market in question.[177] On the other hand, the per se inquiry looks to the economic benefit of product integration, but is wary of any benefit a dominant seller could provide the consumer or industry.[178] After all, section 1 of the Sherman Act does not criminalize tying arrangements themselves, but only those that impose restraints on trade.[179]

The fact that there are so many new software companies with multiple innovative products[180] means that relatively few will have the necessary market power to require a per se analysis of any bundling practice.[181] Because of their lack of market dominance, the majority of software companies will be subject to a rule of reason inquiry with special attention paid to the unfamiliar platform software market.[182] Therefore, the *Microsoft Appeal* court correctly pushed for a rule of reason investigation in a typical platform software context.[183] The *Jefferson Parish* per se rule,

174. *See id.*

175. *See* discussion *supra* Part IV.A.1–2; *Jefferson Parish*, 466 U.S. at 34 n.1 (O'Connor, J., concurring). "The '*per se*' doctrine in tying cases has thus always required an elaborate inquiry into the economic effects of the tying arrangement." *Jefferson Parish*, 466 U.S. at 34.

176. *Monopolies*, *supra* note 5, § 92.

177. *See id.*

178. *See Monopolies*, *supra* note 5, § 91.

179. *See Jefferson Parish*, 466 U.S. at 27 ("Tying arrangements need only be condemned if they restrain competition on the merits by forcing purchases that would not otherwise be made.").

180. *See* United States v. Microsoft Corp., 253 F.3d 34, 93 (D.C. Cir. 2001).

181. *See Monopolies*, *supra* note 5, § 92 (where the defendant seller is without the dominant market power as required by the per se test, further inquiry will be made into the relevant product markets to see if, in fact, tying of the products is beneficial to consumers rather than hurtful).

182. *See id.*

183. *Id.* at 92.

if applied to the majority of these companies, would condemn innovative and efficient behavior all too often.[184]

However, the *Microsoft Appeal* proposal that rule of reason was appropriate across the board[185] was incorrect. Though the platform software market is relatively new and uncharted by the Supreme Court,[186] a holding that rule of reason analysis is necessary in *all* tying allegations in that market is too broad.[187] The rule of reason approach in all claims of tying illegality suffers from many problems, including ambiguity, increased litigation costs, and unpredictability.[188] Due to these shortcomings, courts should only apply a rule of reason survey in situations where a lengthy inquiry into market structure and market conditions is warranted.[189] The *Microsoft Appeal* conclusion will only cause confusion and unnecessary litigation in cases that courts should swiftly resolve under the per se rule.

B. Per Se Analysis was Appropriate for Microsoft

1. The Circuit Court Incorrectly Applied Rule of Reason Analysis in *United States v. Microsoft Corp.*[190]

The circuit court correctly proposed that in some cases—especially in the growing software market, where technology constantly evolves—courts should examine tying claims under a rule of reason inquiry.[191] However, Microsoft cannot and should not benefit from further economic inquiry into potential benefits of its integration of Windows and IE. Microsoft established market dominance and further maintained that dominance by barring competitors' entrance into the relevant markets, namely operating systems and Internet browsers.[192] As such, the court should have applied

184. *Id.*; *see also Monopolies*, *supra* note 5, § 90 (The per se test would ignore any offered market efficiency arguments and note only that these groundbreaking companies had a dominant position in a new marketplace.); *Monopolies*, *supra* note 5, § 92.

185. United States v. Microsoft Corp., 253 F.3d 34, 92 (D.C. Cir. 2001).

186. *Id.* at 93.

187. *See id.* at 92 ("The nature of the platform software market affirmatively suggests that per se rules might stunt valuable innovation.").

188. Donald F. Turner, *The Durability, Relevance, and Future of American Antitrust Policy*, 75 CAL. L. REV. 797, 800 (1987).

189. *See Monopolies*, *supra* note 5, § 92 (explaining that if no one seller possesses sufficient market power, it is too difficult to utilize a per se approach).

190. 253 F.3d 34 (D.C. Cir. 2001).

191. *Id.* at 92.

192. *See* United States v. Microsoft Corp., 84 F. Supp. 2d 9, 19 (D.D.C. 1999).

the per se test, as laid out in *Jefferson Parish*, requiring the court to be mindful yet skeptical of any benefits Microsoft proposed for its bundling practices.[193]

Beyond mere market power, the district court found that Microsoft had an established monopoly in both the operating system and web browser markets.[194] The circuit court incorrectly reversed the per se tying violation and remanded the case to the district court to apply a rule of reason inquiry.[195] Microsoft is neither a new corporation nor one creating a new marketplace.[196] Microsoft holds a firm grasp over the operating system market with Windows.[197] The fact that there is virtually no alternative to Windows suggests that Microsoft has cornered the operating systems market.[198] In doing so, Microsoft used its dominance and leverage to push new products onto consumers through anticompetitive means.[199]

The threshold question as to whether the court should apply the rule of reason or the per se analysis turns on the defendant's dominance in the tying product market.[200] The D.O.J. centered its illegal tying allegations against Microsoft on Microsoft's bundling of IE with Windows.[201] Given Microsoft's dominance in the operating system market, there is no question that per se analysis is the correct approach. As stated above, the district court found that Microsoft had and maintained a monopoly position in the operating systems market with Windows.[202] Therefore, under *Jefferson Parish*, the district court's per se inquiry was proper for Microsoft because the corporation held a dominant position in the Windows market and used that dominance to move "economic power from one market [operating systems] to another [Internet browsers] . . . ."[203]

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193. *See Jefferson Parish*, 466 U.S. at 15–18 (laying out a four-prong per se test when courts are faced with a tying allegation).

194. *See* United States v. Microsoft Corp., 87 F. Supp. 2d 30, 47–48 (D.D.C. 2000).

195. *See* United States v. Microsoft Corp., 253 F.3d 34, 94 (D.C. Cir. 2001).

196. *See* United States v. Microsoft Corp., 84 F. Supp. 2d 9, 19 (D.D.C. 1999) (explaining that "[e]very year for the last decade, Microsoft's share of the market for Intel-compatible PC operating systems has stood above ninety percent").

197. *Id.*

198. *Id.* at 24.

199. United States v. Microsoft Corp., 253 F.3d 34, 64–65 (D.C. Cir. 2001) (requiring that OEMs install IE on every Windows system as default browser).

200. *See Monopolies*, *supra* note 5, § 92.

201. *See* United States v. Microsoft Corp., 253 F.3d 34, 85 (D.C. Cir. 2001).

202. United States v. Microsoft Corp., 84 F. Supp. 2d 9, 19 (D.D.C. 1999).

203. *Monopolies*, *supra* note 5, § 90 (Leverage of power is the focus of per se inquiry as tying arrangements are not by themselves anticompetitive or illegal.).

The circuit court incorrectly held that rule of reason is the preferred method of analysis for *all* tying claims dealing with platform software products.[204] The court couched its holding on the theory that because the technology was "pervasively innovative,"[205] courts would be unable to effectively inquire into the potential benefits of software bundling.[206] This rationale downplays judicial ability and gives monopolist corporations, like Microsoft, a windfall. Certainly, the court should have more deeply explored the potential efficiencies of bundling IE with Windows, but this could have been accomplished under the per se test as applied by the district court.[207] The circuit court was therefore wrong in holding that rule of reason was the appropriate test.

2. Microsoft's Bundling Practices Are a Per Se Violation of the Sherman Act

Under a per se analysis, the district court properly found Microsoft's bundling of Windows and IE to be a violation of the Sherman Act.[208] The circuit court was wrong in holding that a rule of reason test should have been applied.[209] The district court properly scrutinized Microsoft's actions under a per se approach because Microsoft had established and maintained a monopoly position in the operating systems market and then used this leverage to push IE onto consumers.[210]

a. Microsoft Had Dominant Power in the Operating System Market

The district court correctly concluded that Microsoft had "'market power' in the tying product [operating systems] market."[211] Microsoft controlled the Intel-compatible PC operating systems market, leaving very little room, if any, for competition.[212] Relying on *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*,[213] the district court held that the definition of

204. *See* United States v. Microsoft Corp., 253 F.3d 34, 84 (D.C. Cir. 2001).
205. *Id.* at 93.
206. *Id.*
207. *See id.* at 84–85 (concluding that the district court's per se analysis was incorrect).
208. United States v. Microsoft Corp., 87 F. Supp. 2d 30, 47–48 (D.D.C. 2000).
209. *See* United States v. Microsoft Corp., 253 F.3d 34, 94 (D.C. Cir. 2001).
210. United States v. Microsoft Corp., 84 F. Supp. 2d 9, 44 (D.D.C. 1999).
211. United States v. Microsoft Corp., 87 F. Supp. 2d 30, 47–51 (D.D.C. 2000).
212. *Id.* at 36.
213. 792 F.2d 210, 218 (D.C.C. 1986).

relevant market turns on available substitutes.[214] Finding no current products that consumers could effectively substitute for Windows, nor any potential substitutes for Microsoft's dominant operating system, the district court held that Microsoft had significant market power on which to base per se liability.[215] Having established Microsoft's market power in the tying product market (Windows),[216] the district court then moved to the remaining elements of the per se test.

b. Windows and IE Are Two Distinct Products

The district court properly held that Microsoft's tying and tied goods were two separate products under the first prong of the *Jefferson Parish* inquiry.[217] Under *Jefferson Parish*, a plaintiff proves the separate products element by showing that there was distinct consumer demand for each of the products or services, independent of one another.[218] Consumer demand is a rough means of looking into the market structure of the tied product to determine whether or not there is a benefit to the bundling practice.[219] Examining the Internet browser market, the district court found that most consumers, if given the option, would choose their browser separately from their operating system.[220] The court's finding is further evidenced by the fact that apart from the Windows operating system, there is virtually no other operating system to which other browsers could be tied.[221]

The circuit court, however, stated that the consumer demand inquiry—because of its backward-looking nature—ignored possible efficiencies that may have resulted from "innovative integration."[222] Nonetheless, the fact that Microsoft made IE irremovable from Windows justified the district court's application of the separate consumer demand inquiry for browsers and operating systems.[223] Though Microsoft argued that irremovability was necessary because no other company invested the

214. United States v. Microsoft Corp., 87 F. Supp. 2d 30, 36 (D.D.C. 2000).

215. *Id.*

216. *Id.* at 37.

217. *Id.*; *see also* Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451, 461–62 (1992) (applying the first prong of the *Jefferson Parish* test).

218. *Jefferson Parish*, 466 U.S. at 21–22.

219. United States v. Microsoft Corp., 253 F.3d 34, 87 (D.C. Cir. 2001).

220. United States v. Microsoft Corp., 84 F. Supp. 2d 9, 48 (D.D.C. 1999).

221. *See id.* at 13–14 (finding that Windows enjoyed ninety-five percent popularity for Intel-compatible computers in 1998 and that no products exist that a "significant percentage of consumers" could substitute for Windows).

222. United States v. Microsoft Corp., 253 F.3d 34, 89 (D.C. Cir. 2001).

223. *See id.* at 88.

same amount of resources into integration, the argument failed to reflect the fact that Microsoft dominated the operating system market.[224] Indeed, Microsoft used the fact that it had a monopoly in operating systems to push its own Internet browser on consumers and attempt to drive competitors such as Sun Microsystems and Netscape out of business.[225]

"*Jefferson Parish* proxies" would not, as the circuit court supposed, ignore integration efficiencies.[226] However, given its dominance in the operating system market, Microsoft carried more of a burden to prove these efficiencies than would a non-monopolist corporation.[227] Similarly, even if Microsoft argued that integration of IE into Windows was necessary for functional purposes, both *Jefferson Parish* and *Eastman Kodak Co. v. Image Technical Services*[228] rejected this "functional linkage" argument.[229] In fact, *Jefferson Parish* stated that two distinct products could exist even if one was completely "useless without the other."[230]

The *Jefferson Parish* per se approach thus allows the court to reach the same results as with the rule of reason, namely that Microsoft had a monopoly in operating systems and was using that power to push its Internet browser on consumers.[231] However, the per se inquest eliminates excessive amounts of time and money required by the market examination under a rule of reason investigation.

c. Consumers Are Forced to Purchase the Tied and Tying Products Together

Microsoft's bundling of IE to Windows is per se invalid under the second prong of the *Jefferson Parish* analysis[232] in that consumers have no choice but to purchase the tied product along with Windows.[233] Through

224. *Id.* at 88–89.

225. United States v. Microsoft Corp., 84 F. Supp. 2d 9, 17–19 (D.D.C. 1999).

226. United States v. Microsoft Corp., 253 F.3d 34, 89 (D.C. Cir. 2001).

227. *Id.*

228. 504 U.S. 451 (1992).

229. Norman W. Hawker, *Consistently Wrong: The Single Product Issue and the Tying Claims Against Microsoft*, 35 CAL. W. L. REV. 1, 14–15 (1998).

230. *Jefferson Parish*, 466 U.S. at 19 & n.30.

231. United States v. Microsoft Corp., 84 F. Supp. 2d 9, 19 (D.D.C. 1999) ("Microsoft enjoys so much power in the market for Intel-compatible PC operating systems that if it wished to exercise this power solely in terms of price, it could charge a price for Windows substantially above that which could be charged in a competitive market.").

232. *See Eastman Kodak*, 504 U.S. at 461–62 (discussing each prong of the *Jefferson Parish* four-prong per se test); *see also* discussion *supra* Part II.A–B.

233. *Id.*

its licensing agreements with OEMs such as Dell and Compaq, Microsoft required that IE be installed with Windows.[234] Moreover, in writing the code for Windows, Microsoft made IE permanent on all of its operating systems.[235] The mandatory integration of irremovable browser software, coupled with the fact that Microsoft maintained a monopoly in the operating system market for virtually all Intel-based personal computers, means that anyone who bought such a system—irrespective of the OEM involved—received IE already installed as the Internet browser, regardless of the buyer's browser preference.[236] Whether consumers were forced to pay additional money for the installation of IE is arguably irrelevant because they did not *choose* the software in the first place.

d. Microsoft's Bundling of IE with Windows Was Not Beneficial

Any market benefit from Microsoft's bundling practices was overshadowed by the corporation's complete dominance of the operating systems marketplace.[237] Under the third prong of the *Jefferson Parish* per se analysis, courts should inquire into the relevant market structure to determine if there are situations in which strong benefits associated with bundling outweigh its costs to competition.[238] The court should look first to see whether the tying arrangement hindered a substantial amount of commerce, then see if any benefit could outweigh this hindrance.[239] Under this third prong, Microsoft, or a similarly situated corporation, could argue that the benefits of the tying arrangement justify the conduct, though the inquiry under this test is more limited than in the rule of reason approach.[240] Nevertheless, the court should be wary of any benefit when the defendant is such a dominant market player.

Microsoft argued that integration was the industry custom, that non-removal of IE from Windows was required because of its significant investment in the integration, and that Windows would lose its platform

234. *See* United States v. Microsoft Corp., 253 F.3d 34, 60–61 (D.C. Cir. 2001) (stating that Microsoft prohibited OEMs from "removing any desktop icons, folders, or 'Start' menu entries").

235. *See id.* at 64–89.

236. *See* United States v. Microsoft Corp., 84 F. Supp. 2d 9, 19 (D.D.C. 1999).

237. *See id.*

238. *Jefferson Parish*, 466 U.S. at 16; *see also* United States v. Microsoft Corp., 87 F. Supp. 2d 30, 50–51 (D.D.C. 2000).

239. *Jefferson Parish*, 466 U.S. at 16; *Eastman Kodak*, 504 U.S. at 462.

240. *See Monopolies*, *supra* note 5, § 92 (explaining that a rule of reason approach allows plaintiffs the room to more thoroughly justify bundling based on "the purposes and effects of the practices involved").

functionality for third-party software without this bundling.[241] When looking at the benefits offered, the court must consider Microsoft's dominant position in the operating systems marketplace, as well as the fact that Netscape charged licensing fees for its browser up until Microsoft integrated IE.[242] From a skeptical viewpoint, it appears that Microsoft merely used its leverage to foreclose on competition in the Internet browser market. Though integration may have been "industry custom,"[243] Microsoft still held a ninety-five percent share of the operating system market, leaving a miniscule portion of the industry to which the court could compare its practices.[244] Similarly, Microsoft's argument that investment of resources into integration justified its software bundling also fails because Microsoft is one of the few corporations expending resources on such projects.[245] What company would independently expend resources investigating integration into Microsoft's proprietary product?

Microsoft failed to meet its burden to establish that the benefit for the bundling practices outweighed the adverse effects to consumers, competitors, and an efficient market.[246] In rejecting the *Jefferson Parish* per se analysis in favor of a rule of reason approach, the circuit court held that more economic efficiency analysis was necessary, especially in the platform software market.[247] Microsoft, as the dominant player in the tying product market with Windows, was only entitled to a minimal analysis under the per se rule.[248] A mandated rule of reason in every similar case will increase judicial confusion and expenditures of time and money while failing to probe for economic efficiencies.[249] Giant corporations, like Microsoft, have other ways—namely advertising—of getting their innovations across without requiring the tying of products like IE to Windows.[250]

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241. United States v. Microsoft Corp., 253 F.3d 34, 88–90 (D.C. Cir. 2001).

242. *See* United States v. Microsoft Corp., 84 F. Supp. 2d 9, 44 (D.D.C. 1999) ("Netscape charged customers to license Navigator, and that Netscape derived a significant portion of its revenue from selling browser licenses.").

243. United States v. Microsoft Corp., 253 F.3d 34, 88 (D.C. Cir. 2001).

244. United States v. Microsoft Corp., 84 F. Supp. 2d 9, 19 (D.D.C. 1999).

245. United States v. Microsoft Corp., 253 F.3d 34, 88 (D.C. Cir. 2001).

246. *See* United States v. Microsoft Corp., 87 F. Supp. 2d 30, 50 (D.D.C. 2000).

247. United States v. Microsoft Corp., 253 F.3d 34, 94 (D.C. Cir. 2001).

248. *See* United States v. Microsoft Corp., 84 F. Supp. 2d 9, 19 (D.D.C. 1999).

249. *See* Turner, *supra* note 188.

250. *See* Greg Johnson, *New Microsoft Ad Campaign Targets AOL*, L.A. TIMES, Feb. 14, 2000, at C4 (discussing Microsoft's $150 million expenditure to push its online service, Microsoft Network, as an alternative to America Online); *see also* Diane Seo, *With Lather of Ads, Gillette Seeks Sharper Edge*, L.A. TIMES, Apr. 15, 1998, at D1 ("Microsoft set the record for

C. Recent Developments in the Wake of the Circuit Court Decision

The circuit court ultimately reversed the section 1 violation against Microsoft and remanded that claim back to the district court.[251] The court rejected the *Jefferson Parish* per se rule in favor of a rule of reason inquiry for tying allegations involving platform software.[252] However, two months after the circuit court decision, the D.O.J. announced that it would not seek to pursue its tying claim.[253] Additionally, the D.O.J. said it would no longer push for a breakup of the software giant.[254]

Though some called the D.O.J.'s decision "sensible" to end the long-running antitrust litigation that would have resulted on remand,[255] opponents voiced strong sentiment against the D.O.J.'s decisions, claiming that the government gave away its trump card for purposes of settlement.[256] Because the D.O.J. backed down from its central argument, it was rather limited in the remedies it could seek in settlement. Having lost all prospects of Microsoft's breakup into two corporations, the government was left with ineffective conduct remedies.[257] The parties ultimately settled the antitrust claims in November 2001,[258] but the remedies obtained left states and competing software vendors feeling as though they had been cheated.[259]

The tying law analysis that has existed since *International Salt Co. v. United States*[260] was designed to take potential economic efficiencies into account.[261] Therefore, where it was clear that a corporation's leverage was being used for anti-competitive purposes, little deference would be given

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promotional spending, shelling out an estimated $1 billion to tout Windows 95 software . . . .").

251. United States v. Microsoft Corp., 253 F.3d 34, 84 (D.C. Cir. 2001).

252. *Id.*

253. *See* Einer Elhauge, *A Smart Move on Microsoft*, BOSTON GLOBE, Sept. 11, 2001, at C4.

254. *Id.*

255. *Id.*

256. *See, e.g.*, Labaton, *supra* note 17.

257. *See id.* ("Microsoft has flaunted conduct remedies for years.").

258. Edmund Sanders, *Microsoft Settlement Stirs Debate*, L.A. TIMES, Nov. 3, 2001, at C1 (outlining the settlement agreement between Microsoft and the D.O.J.). The agreement imposes an affirmative duty on Microsoft to let independent software vendors develop competing Internet browsers. *Id.* Furthermore, Microsoft is required to provide the Windows code so that its competitors can design their software to emulate Windows. *Id.*

259. *Id.* ("AOL Time Warner Inc. said the settlement will do little to promote competition or rein in Microsoft's anti-competitive conduct.").

260. 332 U.S. 392 (1947).

261. *See Jefferson Parish*, 466 U.S. at 14; *see also* Turner, *supra* note 188.

and minimal inquiry made into market structure.[262] It was only when a corporation lacked market power that it received a lengthy inquiry.[263]

Whether a Republican administration that favors big business and "never really cared for the breakup order," or a "president who has voiced impatience over protracted lawsuits"[264] had any bearing on the circuit court's determination is beyond the scope of this Note. What is clear, however, is that had the D.O.J. not dropped the claim, a rule of reason analysis would have dragged this case out even farther than the four plus years of its life.

V. CONCLUSION

The *Microsoft Appeal* court erred by concluding that a rule of reason analysis was necessary in all tying allegations within the growing platform software market.[265] The court's overbroad generalization of cases will only lead to confusion among lower courts and great time and expense to determine the proper application of the standards set forth under that approach. Moreover, the *Microsoft Appeal* decision allows software giants to escape liability for using their leverage to push software onto consumers, and to drive competitors out of business.[266]

The *Jefferson Parish Hospital District No. 2 v. Hyde*[267] decision laid out effective guidelines for courts applying the per se tying test. This four-prong analysis is not a truly per se analysis because a court faced with tying allegations must inquire into any benefits that bundling practices might create.[268] However, unlike the rule of reason test, per se inquiry is limited and is applied with a skeptical eye because the defendant corporation is likely to have used its market power illegally to promote its tied product.[269]

Because of the *Microsoft Appeal* decision and the D.O.J.'s failure to proceed in the case, Microsoft gained a significant windfall at the expense of its consumers.[270] On remand, the district court may have been forced to look deeper into the market conditions to decide if the benefits proposed

262. *See Monopolies*, *supra* note 5, § 91.

263. *See id.* § 90.

264. Labaton, *supra* note 17.

265. United States v. Microsoft Corp., 253 F.3d 34, 84 (D.C. Cir. 2001).

266. *See* United States v. Microsoft Corp., 87 F. Supp. 2d 30, 47–51 (D.D.C. 2000) (explaining how Microsoft used leverage to hinder competition).

267. 466 U.S. 2, 18 (1984).

268. *See Monopolies*, *supra* note 5, § 91.

269. *See id.*

270. *See generally*, United States v. Microsoft Corp., 87 F. Supp. 2d 30 (D.D.C. 2000).

actually outweighed any detriment to competition. However, because the D.O.J. chose not to proceed with the case, it is hard to say whether Microsoft will ever be put in its proper place by the courts.

*Christopher P. Campbell**

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