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法律界名人英语经典演说辞

项阳 编著

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丛书致读者

从蒙昧时代到文明社会，人类一直怀有一种根深蒂固的热望，那就是实现与他人的交流与沟通。尤其是在今天这样一个信息化时代，人与人之间的交流和沟通就变得更为迫切和重要了。然而，不管人们交流沟通的手段多么先进，但更真切、更生动、更直接、更便捷的方式之一还是演讲。

记得西方的一位哲人曾经说过：**尽管我不同意你的观点，但我愿意用生命维护你讲话的权利**——每个人都希望能够自由地表述自己的意见，阐明自己的观点，而且这种权利必须受到他人的尊重！由此，演讲，成为我们生活中须臾而不可离的一种生存手段。

而真正好的演讲，不只是一种思想的载体，一种交流沟通的手段，更重要的是它表现出了演讲者的道德品格、知识修养、气度风范，因此，从这套丛书中，你应该不仅仅是学习英语语言艺术，更重要的是你学到了英语语言之外的东西——怎样更好地传达你的思想，展示你的人格的独特魅力，与历史上直至今天几乎所有杰出的人物交流对话。——**在得到这套丛书的同时，这种交流和沟通便开始了。**

真诚地希望，你会有许多意想不到的收获！

范希春

2000 年 6 月 18 日

于中国社会科学院研究生院

目　录

U. S. VS. Microsoft

【作者简介】

查尔斯·F·儒勒(Charles F. Rule),反托拉斯集团首脑。本篇发表于1998年3月克莱弗兰。

【作品原文】

Thank you, Dick. It is an honor and a privilege to be invited to speak before the City Club. My subject this afternoon is Microsoft.

Though it may not be obvious, it is quite fitting that I am speaking in Cleveland about the antitrust suit that the U. S. Department of Justice and several states (including Ohio) have brought against Microsoft. After all, this city has seen its share of historic antitrust battles. However, this latest antitrust "megasuit" holds more than just "a spectator" interest or the heartland of America's industry. The stakes for the computer industry are enormous, and the outcome will affect every business and home with a computer. But of equal importance, if the government is able to achieve its goal of using this suit to expand the reach of the antiturst laws, the new, much more intrusive rules could dramatically increase the role of the antitrust enforcers and the courts throughout the economy.

MICROSOFT'S SUCCESS

Before examining the suit and its ramifications for American industry, let's revisit how Microsoft got itself in the position of

being the Justice Department's whipping boy. A mere two decades ago, few had even heard of Microsoft. Back then, the "threat" to competition was IBM. Even the biggest companies in the country, such as Xerox, seemed unable to compete with IBM. The Government and plaintiffs' attorneys had been obsessed for a decade trying to prove that IBM's success was due to antitrust violations. Yet in case after case — alleging, by the way, far more exclusionary conduct than anything Microsoft has been accused of — the courts found that, while it was an aggressive competitor, IBM had not violated the antitrust laws.

Despite IBM's ultimate success, the litigation was a serious distraction for the company. And it was slow to appreciate the importance of the technological advances that were making the dream of a computer on every desk and in every home a reality. Taking advantage of the new technology and IBM's slow reaction, a fledgling Microsoft published what became the standard operating system for IBM's PC. But it's not like "Uncle" Tom Watson bequeathed that position to Microsoft. At every step, Microsoft had to wage an aggressive competitive fight for the hearts and minds of consumers, often against much larger and better-heeled companies, including IBM itself. Microsoft's success came the old-fashioned way — Microsoft earned it.

All along, Microsoft has adhered to a four-part strategy. First, the prices for Microsoft's operating systems have always been the lowest in the market. The prices of its operating systems have remained roughly the same throughout the 90s, even as the complexity and functionality of those operating systems have grown exponentially.

Second, Microsoft has worked closely with third-party software developers to help them write applications that run on Microsoft's operating systems. Conversely, when software devel-

opers have expressed the need for operating system services — for example, the ability to interact with the Internet — Microsoft has responded by integrating that functionality into its operating systems. As a result, there are more applications written for Windows than any other operating system, making Windows even more valuable to consumers.

Third, Microsoft ensures that the "look, feel, and functionality" of its operating systems is consistent. As a result, when we consumers fire up a PC on which Windows is installed, we find all the familiar Windows features where we expect them. And, for the thousands of software developers, when they write applications for Windows, they can rest assured that the operating system services on which their programs rely will be on every version Windows.

Fourth, Microsoft never rests on its laurels — its motto is "innovate or die." It is constantly striving to upgrade its operating systems — to provide services demanded by software developers, to make the latest technologies available to consumers, and in gereral to make computing easier, more affordable, and more enjoyable for the masses.

THE GOVERNMENT'S CASE

Now that strategy sounds like the essence of competition on the merits. It may be the bane of Microsoft's competitors, but it certainly has been a boon to consumers. And if there is one thing that comes through the antitrust decisions of the last two decades, it is that the law protects competition and consumer welfare, not competitors.

Nonetheless, at bottom, the current antitrust suits are a direct challenge to Microsoft's strategy. Specifically, the government is challenging Microsoft's application of its strategy to respond to consumers' and software developers' demand that Win-

dows interact with the Internet.

You see one of the primary functions of Microsoft's operating systems has always been the ability to find, retrieve and display information wherever it is stored — for example, on a floppy disk, a PC's hard drive, or a local area network. Today, the Internet has become the world's leading warehouse of information, and it was inevitable that Microsoft — as well as every other publisher of operating systems — would extend that functionality to the web.

For software developers who rely on operating system services, it was crucial that Microsoft include Internet functionality in its operating systems. Increasingly, third — party applications are being written to take advantage of the Internet, for example, to provide regular up-dates to applications and to create and render documents in "hyper-text mark-up language" ("HTML"), the lingua franca of the Internet. If the operating system didn't provide that functionality, then each software developer would have to write its own version of such functionality into its application an obviously inefficient alternative.

As for PC users, their ability to launch the Internet functionality in Windows in order to perform stand-alone web browsing is an efficient way to meet a growing demand. And next month, Windows 98 will further increase the efficiency and consumer benefits of the operating system's Internet functionality by integrating that functionality even more tightly into the operating system and by employing a single paradigm for searching for information wherever it is stored (i. e. locally or on the Internet). That would seem to be a good thing for competition, innovation, and consumers, right?

Well, apparently, not through the looking glass in Wonderland, D. C. According to the antitrust complaints, integrating

Internet functionality into Windows makes it too easy for PC users to browse the web and is just too attractive to consumers. Strange, as it seems, when the rhetoric is stripped away, that's essentially the premise of the government's case.

The government acknowledges that there is already enormous innovation in computer markets and that Microsoft is a leading contributor to that innovation. However, the government apparently believes that the short-term consumer benefits of integrating Internet functionality into Windows threaten to lead the market in a different direction from the one that the "all-knowing, all-seeing" bureaucrats have decreed is in the long-term best interest of consumers. Because the antitrust enforces Netscape's technology rather than Microsoft's, the antitrust enforcers want the courts to intervene to "redirect" the market in Netscape's direction — by force and against the will of consumers if necessary.

No doubt the government will not like this characterization. After all, the emperor didn't want to hear that he had not clothes, either. And, just like in the fable, the government seems oblivious to fact that its case against Microsoft is naked. In this case, the "transparent" cloth covering the emperor's nakedness consists of first, some juicy excerpts from internal Microsoft documents; second, the allegation that in 1995 Micrsoft invited Netscape to divide the browser market and, after being rebuffed, set out to drive Netscape from the market; third, the fact that Microsoft "gives away" Internet Explorer; fourth, a few provisions (which Microsoft dropped several months ago) in certain cross-promotional agreements; and, fifth, Microsoft's license with PC manufacturers, which ensures that, on the first bootup, Microsoft's "desktop" or user interface will appear.

The MANIFEST WEAKNESSES OF THE CASE

I don't bore you with a detailed legal explanation of why the

allegations, separately or together, do not amount to an antitrust violation. Rather, let me make just a few observations concerning the weaknesses of the government's case. As the trial unfolds, those weaknesses will become increasingly clear.

First, as a threshold matter, the government must prove that Microsoft has "monopoly power." Even though Windows is installed on a large percentage of the PCs shipped today, the government's ability to prove this element of its case is hardly a sure thing; in fact, it is dubious. The rapid changes in computer technology, the number of actual and potential substitutes for Windows — for example, other PC operating systems, such as OS/2 and Linux, Apple's Macintosh, and "Net Computers" — and the large installed base of home computers all prevent Microsoft from "raising price or excluding competitors" — the definition of monopoly power.

Second, even if a company has monopoly power, that is not by itself illegal. Rather the law only condemns a monopolist's conduct when the conduct has no legitimate justification but is solely designed to harm competitors. In simple terms, it is lawful to build a better mousetrap even if consumers stop buying the competition's old models, but it is not lawful to blow up the competition's mousetrap factories. Under the relevant case law, even a monopolist is free to compete aggressively so long as it avoids conduct that, one, threatens to foreclose competition from the market and that, two, has no legitimate business (i. e. efficiency) justification.

Held up to this standard, the weakness of the allegations — the transparency of the emperor's clothes, if you will — is obvious. In the case of each alleged practice — at least for each one that has some basis in fact — the practice has manifest efficiency justifications, and little if any foreclosure effects. Briefly:

As I've already explained, the integration of Internet functionality into Windows is efficient and inevitable. Consumers and independent software developers demand it, and every publisher of commercial operating systems now ships its operating system with Internet functionality. Moreover, neither the integration of Internet functionality into Windows nor Microsoft's license of Windows to PC manufacturers prevents manufacturers or consumers from installing third-party web browsing software on PCs. Indeed, Microsoft works with independent devlopers of web browsing software, including Netscape, to ensure that their software runs well on Windows.

In the past, Microsoft's agreements with a select few Internet Service Providers and Internet Content Providers that Microsoft promotes on Windows required the providers to promote only Microsoft's web browsing software. The provisions were typical of cross-promotion agreements and were intended to protect Microsoft's goodwill. Given the limited number of providers subject to the provisions and the fact that the providers were free to distribute other web browsing software, the provisions had a de minimis impact on competition. Several months ago those provisions were dropped; currently, Microsoft's promotion partners are only obligated to promote IE no less favorably than they promote any competing software.

Giving away Internet Explorer is not predatory. Microsoft does not charge separately for any feature of Windows. Moreover, Netscape pioneered the practice of giving away web browsing software. The reason that virtually all browsing software is given away is that publishers expect to generate revenues on ancillary products, such as server software, and on related services, such as advertising.

The "desktop" or graphical user interface has been an inte-

gral part of Microsoft's operating system since the publication of Windows 95. That "desktop" is what consumers and software developers expect to find when they buy Windows 95. The "first screen" requirement simply preserves the integrity of the whole operating system. It prevents "middlemen" distributors, including PC manufacturers, from deleting, without Microsoft's consent, the Windows' desktop (or any other feature) or replacing it with some non-Windows interface. Can you imagine the New York Times allowing news stands to replace its front page with that of the Wall Street Journal? Of course you can't. If the manufacturers of consumer goods could not protect the integrity of products on their way to consumers, trademarks would be meaningless and our economy would be far less efficient.

Third, in an attempt to obscure the lack of proof that Microsoft has engaged in illegal "bad acts," the complaints quote several excerpts of colorful rhetoric culled from the millions of pages of internal Microsoft documents. When read in context, however, those excerpts are far more innocuous than the complaints make them out to be. Moreover, even out of context, the excerpts at worst suggest that Microsoft wanted to get consumers to use Microsoft's Internet functionality rather than Navigator's and that Microsoft was interested in "leveraging" its operating system to achieve that objective. But so what? Business people don't use words such as "leverage" in some technical, legal sense. Rather, in normal business parlance, the use of the word "leverage" connotes nothing more than a recognition that a company competes most effectively when it capitalizes on its inherent efficiency advantages.

Fortunately for Microsoft, the courts today are unlikely to be blinded by the rhetoric of aggressive business people. In the last several years, court after court has pointed out that competi-

tors tend to use the same aggressive rhetoric whether they are competing hard on the merits or engaging in unlawful exclusionary conduct. Trying to distinguish procompetitive from anticompetitive conduct based on snippets from documents is a fool's errand. Moreover, we want competitors to view each other as the enemy in the war for the hearts and minds of consumers.

Fourth, the complaint's most provocative allegation — that Microsoft tried to get Netscape to agree to divide the browser market — is simply belied by the facts. While Microsoft has acknowledged that it met with Netscape in mid-1995 to discuss a strategic alliance in which the companies would cooperate in some areas and compete in many others, the meeting was arranged by Netscape. In addition, although those meetings have been a matter of public record for some time, it was only within the last several months that it suddenly dawned on one of the Netscape participants that Microsoft had asked Netscape to divide the market. This insight seems suspiciously convenient, coming as it does from a principal of the one competitor. Netscape, that the government lawsuits are designed to benefit.

In the end, the weight of the evidence will refute the obviously self-serving testimony on which the allegation is based. However, for those of you who want a preview, you might read the account of the 1995 meetings in Speeding the Net — The Inside Story of netscape and How It Challenged Microsoft by Joshua Quittner and Michelle Slatalla. The authors, who are clearly biased in favor of Netscape and who had full access to Netscape personnel (including the source of the allegation), make it clear that the meetings in 1995 were at Netscape's suggestion and arose out of Netscape's desire to avoid competing with Microsoft. There is no indication in the account that Microsoft proposed dividing markets or that its participation in the meetings

was anything other than above board.

ANTITRUST AS INDUSTRIAL POLICY

Well then, are the suits against Microsoft just some horrific misunderstanding? Can we expect that, once the government realizes that Microsoft has legitimate justifications for all the alleged practices — at least those that actually occurred — the Justice Department and states will admit their mistake and turn to prosecuting conduct that actually threatens consumers? Don't count on it.

After all, the Justice Department has been investigating these allegations for years. No, I believe that in their heart of hearts the Department and the state attorneys general understand that Microsoft's conduct does not violate extant antitrust rules. Rather, their purpose is no use this case to create new law and, in the process, to expand the court's regulatory power under the antitrust laws. It's just not in their strategic interest to advertise that purpose.

The tip off to the true motivation is the government's unprecedented and legally unfounded prayer for relief. Three highly regulatory remedies are at the heart of that prayer. First, the Department wants the court to prevent Microsoft from using its intellectual property rights to prevent "any person" from "modify [ing]the screens, bootup sequence or functions of any Microsoft operating system." This is compulsory licensing at its worst. If the relief is granted, caveat emptor will be the consumer's only protection — it may say Windows on the box, but who knows what will be inside. The desire of consumers and software developers for a consistent operating system will be frustrated. PC manufacturers and competitors will be able to free ride on Microsoft's huge investment in creating great operating systems, and, as a result, incentives for investment in intellectual property

will be undermined.

Second, the requested relief would give PC manufacturers the right to remove the means by which consumers can launch the Internet functionality in Microsoft's operating systems, and Microsoft would have to give manufacturers that choose such an option a discount off the price of the operating system. Who will ultimately determine the size of that discount? The Department and the courts, of course, in effect, the government is asking for the power to regulate the price of software. If you thought that the regulation of telephone rates was costly and inefficient, just wait until courts start fixing the price of software!

Third and perhaps most remarkably, to the extent that Microsoft continues to include Internet functionality in its operating systems — and it must if it has any hope of getting consumers to buy the systems — "Microsoft also [must] include with such operating system[s] the most current version of the Netscape Internet browser." Never and I mean never — before has the government sought to require a company to distribute the product of a specific competitor for free. The exceedingly narrow essential-facility doctrine does provide a basis for relief requiring that the owner of an essential facility. Nevertheless, the Department has explicitly said it does not intend to prove that Microsoft's operating system is an essential facility, and the courts generally have avoided applying the doctrine to intellectual property. Moreover, even under the essential-facility doctrine, the owner of the facility is entitled to be compensated for providing access. Bill Baxter, a former head of the Antitrust Division and father of the AT&T decree, was recently quoted as saying "[p]icking out a private company as a beneficiary of [such] an antitrust remedy is borderline insane." I agree... except for the "borderline" part.

To me, this "insane" prayer for relief is symptomatic of the

fact that the Department and the states are proceeding on heretofore untested legal and economic theories. This is not a case where Microsoft has allegedly been engaged in some exclusionary or predatory practice that can be surgically enjoined. Rather, what this case is all about is eliminating the bright line tests that the courts have developed over the last quarter century to distinguish "exclusionary" or "predatory" conduct, which is illegal if engaged in by one with monopoly power, from all other conduct. If the government succeeds, the fact that the foreclosure effect of conduct is slight or that there are efficiency justifications for the conduct will no longer be enough to save conduct from judicial scrutiny and condemnation.

Quite frankly, the government's suit is an audacious attempt to convert the antitrust laws into a broad writ for pursuing industrial policy. If consumers are making choices — for example, to use integrated, technically superior Internet functionality in an operating system rather than using stand-alone web browsing software — that threaten to lead the market to adopt technology or standard that the government has decided is undesirable, the government wants to use the antitrust laws to redirect the market. This is simply not what the laws were written to do and not how they have been interpreted. In fact, less than two weeks before the Department and the states filed their complaints, the federal Court of Appeals for the D. C. Circuit rejected the notion that Microsoft's existing decree with the Justice Department could be read to require Microsoft to allow PC manufacturers to delete or hide Windows 98's Internet functionality. As the Court's order presciently noted, to impose such a requirement on Microsoft would "put judge[s] and jur[ies] in the unwelcome position of designing computers." Apparently, the government won't take "no" for an answer.