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A Brief History of "Silicon Valley Antitrust"

Antitrust and Silicon Valley: New Themes and Direction in Competition Law and Policy

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From Apple Orchards to Apple Park

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Since My Graduation…

1980: Apple Computer goes public	1982: Sun Microsystems founded	1983: First portable PC (Compaq)
1984: Cisco Systems founded, Apple Macintosh and first ink-jet printer introduced	1985: Microsoft releases Windows 1.0 for MS-DOS	1989: Adobe releases Photoshop
1990: The Human Genome Project is launched; Intel has 90% market share in microprocessors	1991: World Wide Web debuts	1994: Yahoo! is founded
1995: Netscape Navigator 2.0 released	1997: Steve Jobs returns to Apple	1999: Microsoft becomes the most valued company in the world
2001: PayPal is formed—and acquired by eBay in 2002	2004: Google goes public; Facebook moves to Silicon Valley	2006: Tesla Motors introduces the Tesla Roadster
2007: Apple releases the iPhone	2012: Facebook goes public	2018: Apple is valued at $1 trillion

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A Natural Antitrust Hotbed

- Silicon Valley antitrust issues are important because of the outsized influence that this small area has on the worldwide economy.
- Tech markets lend themselves to “lock-out” strategies—that lend themselves to competitor-driven antitrust litigation.
- Many tech industries are consumer-facing, lending themselves to consumer class actions.
- Tech is cool.

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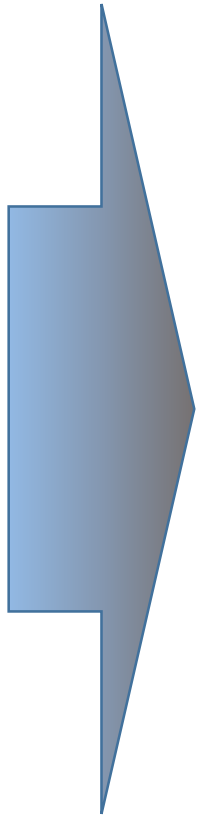
Government Scrutiny



Microsoft

intel

Google

Qualcomm

Rambus

ORACLE

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So What is “Silicon Valley Antitrust”?

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Some Defining Cases and Moments

Not all of which appear to be "high-tech" cases

Kodak
(SCOTUS 1992)

IP Guidelines
(1995)

Microsoft II
(1998 DOJ action)

EC Microsoft
(2004)

***FTC v. Rambus* &**
DOJ VITA Bus. Rev.

USTR iPhone
(2013)

Microsoft/LinkedIn
(EC 2016)

EC Google Shopping Case

***Cartes Bancaires* &**
American Express

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Some Defining Issues and Concepts

- Antitrust Limits on Intellectual Property Rights
- Standard Setting and its Potential Abuse
- Interoperability, Technological Tying
- Closed Systems and System Competition
- Network Effects as a Source of Durable Market Power
- Innovation in Market Power and Effects Analysis
- User Data in Antitrust Analysis

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Antitrust and IP

Are IP rights really "just another form of personal property"?

- The 1995 IP Guidelines – most IP licensing is procompetitive.
- *Illinois Tool* eliminates the inference of market power from IP rights.
- *Kodak*, *Xerox* and *Data General* debate refusals to share IP rights – but then are mooted by *Trinko.*
- Convergence around the principle that conduct ***within*** the IP grant is not an antitrust violation, but leveraging IP beyond IP grant may be.

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Anticompetitive Standard Setting

Rambus Set Limits; VITA Opens Door to Ex Ante License Terms

- Broad consensus that standard setting is ordinarily procompetitive.
- But, patents that read on mandatory standards become much more powerful.
- FTC holds in *Dell* and *Rambus* that concealment of patent right to an SSO, depriving a “design around” opportunity, is exclusionary conduct.
- DOJ VITA Business Review letter OK’s *ex ante* agreements on most restrictive terms in FRAND licenses.

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Misusing Standard Essential Patents

The near-worldwide rule against injunctions based on SEPs

- In 2013, Apple convinces the DOJ Antitrust Division and then the USTR that injunctions based on FRAND-encumbered SEPs are anticompetitive.
  - The USTR declines to enforce an exclusion order Samsung obtained on iPhones.
- In 2015, the EU's High Court's *Huawei v. ZTE* decision finds that seeking injunctions with SEPs may constitute abuse of dominance.
- The DOJ now says this is not an antitrust issue, and *hold-out* is a more serious issue than *hold-up.*

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Interoperability and Technological Tying

From IBM *to* Microsoft *and* Tyco Health

- The 1970s *IBM* cases were the legal prelude to a cases concerning refusals to provide interfaces, integrating previously separate products, and creating deliberate incompatibilities.
- The EC's 2004 *Microsoft* decision holds that declining to supply previously available interface information is an abuse of dominance.
- US law remains skeptical of such claims because of "forced sharing."
  - *E.g., Allied Orthopedic Appliances v. Tyco Health Care Group* (9th Cir. 2010), which makes an improved (but not shared) interface a defense.

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Closed Systems and Systems Competition

Kodak, *yes, but what else?*

- Commentators such as Tim Wu and Jonathan Zittrain would says that "closed systems" present the most important antitrust issue in the New Economy.
- Yet "systems competition" is commonplace in high-tech markets, *e.g.*, iOS v. Android, competing cellular networks.
- *Kodak* (1992) accepted the possibility of "aftermarket monopolies" by closing-down product system (*e.g.*, copiers and parts), but these case rarely succeed.
- Save for *U.S. v. AT&T* (1980), antitrust has never forced open an originally closed system.

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Network Effects and Market Power

An enduring legacy of Microsoft II

- *Microsoft II* rested largely on the idea that, due to network effects, the "applications barrier to entry" protected Microsoft's OS monopoly.
- This is now a standard consideration in many high-tech markets, *e.g.:*
  - Platforms (*e.g.,* operating systems and video game consoles)
  - Social media (*e.g.,* Facebook, Instagram, Twitter, Reddit, LinkedIn)
  - Communication networks (*e.g.,* WhatsApp, Facebook Messenger, iMessage
  - Formats and protocols (*e.g.,* video and optical disc formats)
  - Marketplaces (e.g., Amazon, Uber, Airbnb, OpenTable)

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Innovation in Assessing Market Power

Neither "disruptive competition" nor "innovation markets" take flight

- 25 years ago, economists argued that Schumpeterian "dynamic competition" models were more suited to high-tech markets than prevailing static models.
  - In practice, this counseled for markets to "police themselves."
  - Dynamic competition as a market power defense hardly ever works.
- In 1995, the *IP Guidelines* introduced "innovation markets" encompassing "the research and development directed to particular new or improved goods."
  - Innovation concerns and future products are important in many merger reviews, but there has never been a "pure" innovation market challenge.

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User Data in Antitrust Analysis

A key issue that may come to define Silicon Valley antitrust

- A defining feature of many new markets is the amassing of huge stores of consumer information that can be "mined" for various purposes.
- So far, the key antitrust cases on "Big Data" have voiced concerns, but cleared the deals, *e.g., Google/DoubleClick* and *Microsoft/LinkedIn.*
- The German FCO's Facebook case is a milestone:
  - *Charge*: Facebook's practice of collecting, using and ***merging*** data in user accounts constituted an abuse of dominance.
  - Clear intrusion into data privacy law, which (especially under GDPR) normally determines what firms can do with user data.

Looking Forward

- How will the German FCO's Facebook case come out?
- Will there ever be a direct, gov't challenge to a "closed system"?
  - Highly unlikely in the U.S., but in Europe or Asia?
- Will we ever see an enforcement action that must stand or fall in innovation markets or on innovation effects?
- What do we make of the current populist attack on Silicon Valley power?

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Thank you