

U.S. v. Microsoft Corp., 253 F.3d 34 (D.C.Cir.2001)

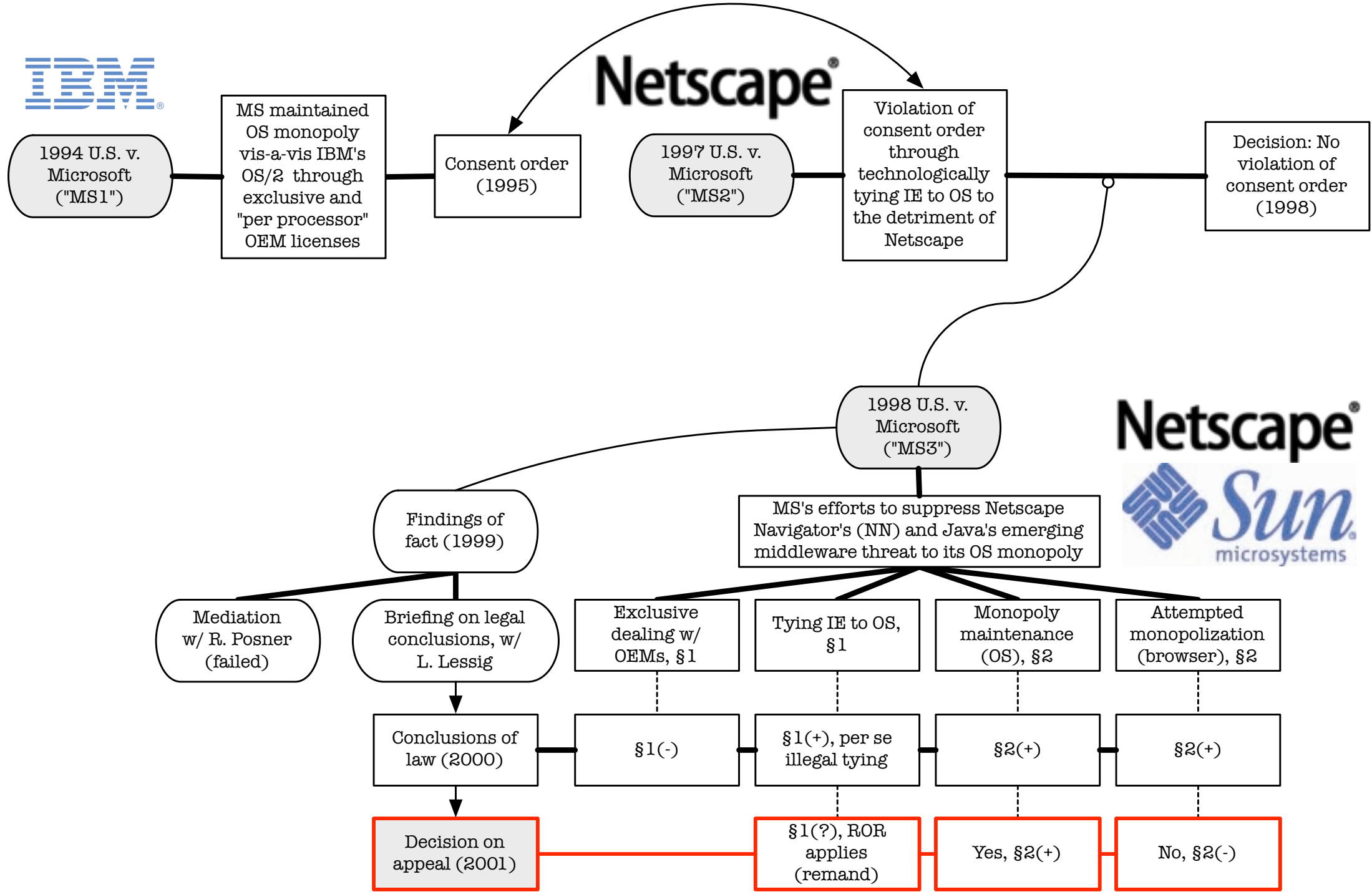
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From Microsoft I to Microsoft III



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US v. Microsoft Scorecard

	Claim	Market	Who won?
1	Monopolization	PC OS	DOJ
2	Attempted monopolization	Browser	MSFT
3a	Tying to leverage PC OS power into browser market	Browser	MSFT
3b	Tying to protect PC OS market against entrants	PC OS	DOJ

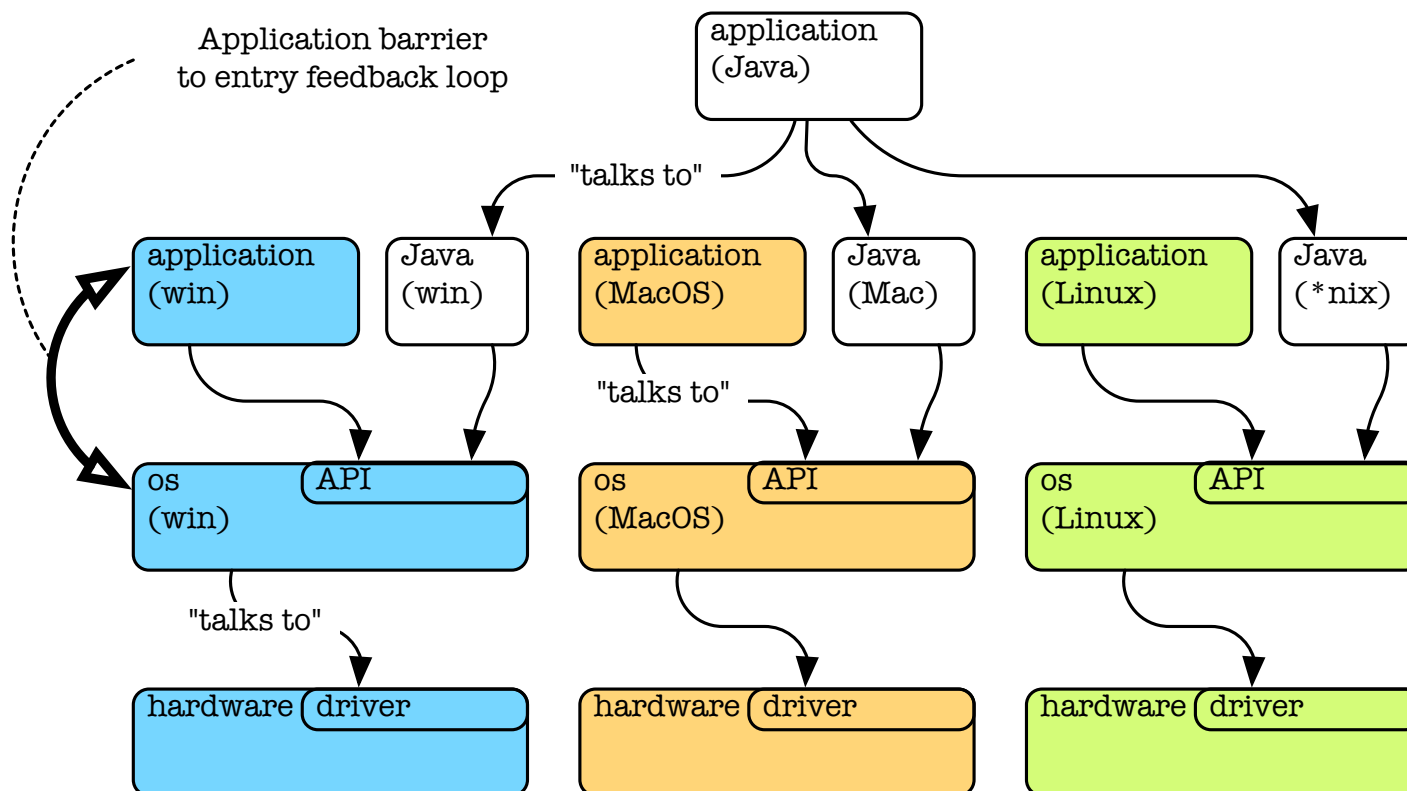
Plaintiffs should focus on the market in which there already is monopoly power

- The U.S. v. MSFT case is about MSFT’s various actions to defend its PC OS monopoly against the emergence of interoperability layers.
 - MSFT had a stable PC OS monopoly as a result of indirect network effects (“application barrier to entry”)
 - Netscape (NN) and Sun (Java) threatened to erode the entry barrier through middleware
 - MSFT used contracts, threats, deception, technological tying, etc. to keep NN and Java from gaining critical mass
- Who won? As a legal matter DOJ.
 - But in practice, MSFT avoided harsh remedies under the Bush administration.
- Why is MSFT so important?
 - Network effects are important barriers to entry
 - “Nascent threats” are placed under the antitrust equivalent of the endangered species act
 - IP is not an absolute defense (“baseball bat analogy”)
 - *Per se* tying does not apply to platform technologies

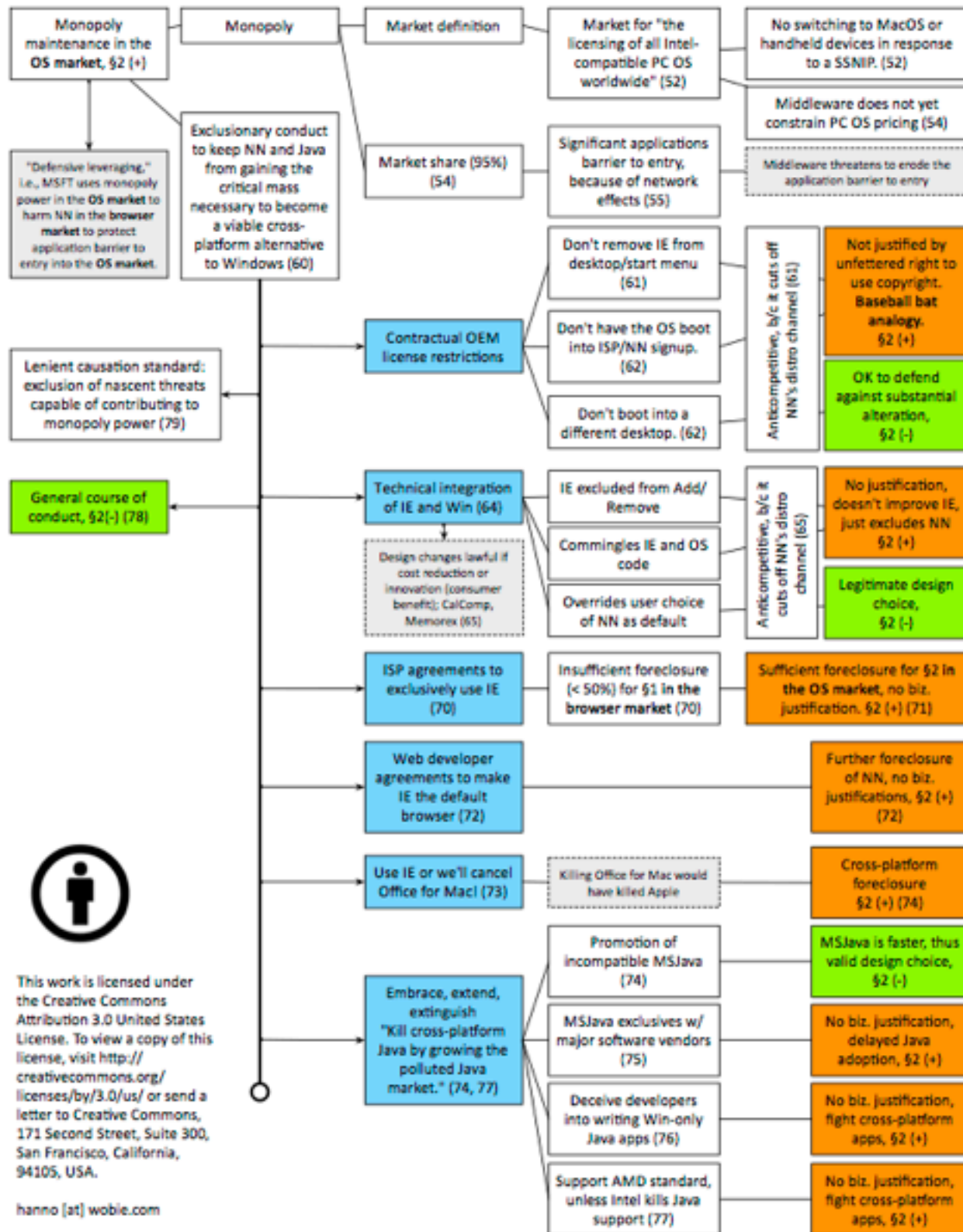
A first look at direct and indirect network effects

- Direct network effects: The more users join a network, the more valuable the network becomes for each user. (E.g., telephone, IM). (Same-side effects)
- Indirect network effects: The more users there are on one side of a platform (e.g., users of an OS), the greater the value of the platform to another constituency (e.g., application developers for the OS). And vice versa. (Other-side effects).
- A multi-sided platforms often has both direct and indirect network effects, e.g., Facebook. Direct effects = deeper pool of friends. Indirect effects = greater advertiser value.

Why is middleware such as Java a threat to MSFT's OS monopoly?



- All else equal, developers want to develop for *all* users, irrespective of their OS
- That's where Java comes in. It provides a common layer of abstraction on top of otherwise incompatible OSs
- **OS-agnostic, cross-platform apps break the OS-apps positive feedback loop**
 - Why buy Windows if your Java app runs on Linux, OSX, FreeBSD, etc.?
- Today's OS-agnostic apps are primarily Java (e.g., ERP) and/or browser based (e.g., Google Docs, Facebook)



Claim 1: Monopolization

1. Licenses to OEMs ("don't bundle NN with Windows")
2. Technological integration of IE and Windows ("scrambling the IE and Windows eggs")
3. Agreements with Internet Access Providers ("don't include NN on the AOL CDs")
4. Dealings with Apple ("drop NN or we will kill Office for Mac")
5. Java ("embrace, extend, extinguish")
6. Course of conduct ("all of the above and more")
7. Download the full-size version of the MSFT overview here: http://hannokaiser.com/other/2007_msft_exclusion.pdf

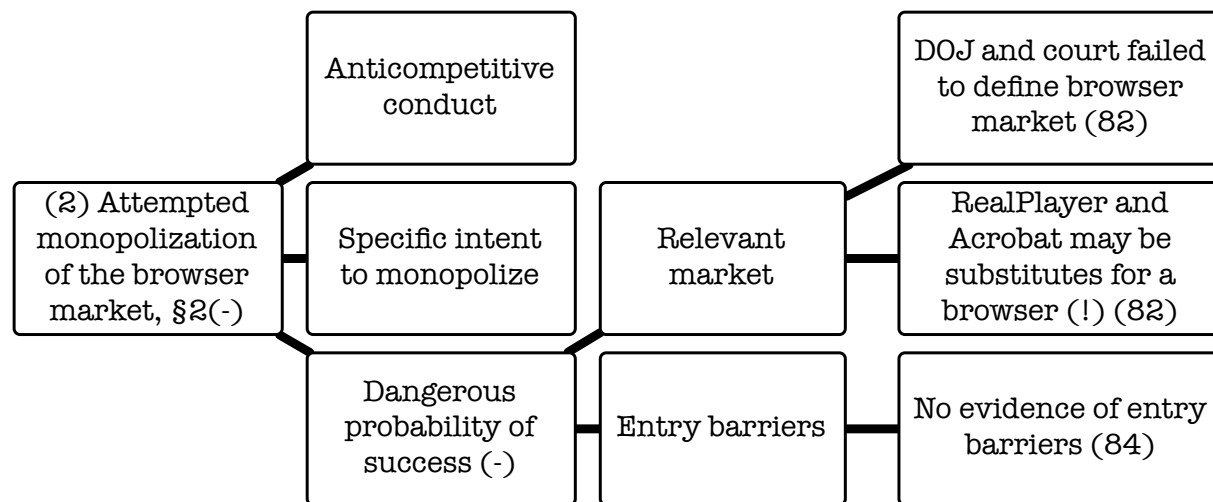
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Weak “contributing factor” causation requirement to protect nascent threats

- Causation may be inferred “when exclusionary conduct is aimed at producers of nascent competitive technologies.” In that case, the question is not whether the nascent technology “would actually have developed into viable” competition but whether they “reasonably constituted nascent threats.” *US v. Microsoft Corp.*, 253 F. 3d 34, 79 (D.C. Cir. 2001).
- Put differently, once the exclusionary effect is established (“power to exclude”), the effect on the consumer (“power over price”) may be inferred.
- Danger of a freewheeling “biodiversity approach” to antitrust where potential competition is involved, i.e., protection of technological possibilities spaces, not necessarily potential competition.

Claim 2: Attempted monopolization of the browser market (-)



- The court makes short work of the attempted monopolization claim, finding no dangerous probability of success.
- Is there an inconsistency?
 - Microsoft monopolized the OS market by way of stunting the growth of NN and Java
 - As to NN, MSFT pushed IE into the browser market before it could tip in NN's favor
- How come that MSFT was able to achieve that goal without a “dangerous probability of success” in monopolizing the browser market?