

Remedies for Monopolization and Abuse of Dominance:  
A Little History and Some Thoughts on Disclosure and Access

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**I. Introduction**

The hornbook law on remedies for monopolization and abuse of a dominant position is remarkably unhelpful. For example, the most recent edition of *Antitrust Law Developments* published by the Antitrust Section of the American Bar Association has no specific section dealing with this issue.<sup>1</sup> The Second Edition of the Areeda Hovenkamp treatise states:

No particular type of relief is “automatic” in a Sherman Act §2 case. The statutes contain no such warrant, and our observations elsewhere are particularly relevant to §2 – namely that remedies for the same statutory violation vary considerably, depending on the nature of the violation and the identity of the plaintiff. Thus, it never follows automatically from the finding of a §2 violation that dissolution or divestiture is in order, that criminal sanctions are appropriate, that the plaintiff is entitled to treble damages, or in some cases that an injunction against future conduct is justified.<sup>2</sup>

Most other antitrust treatises approaches the topic of remedies in monopolization cases by ignoring it as a separate category, treating it in a cursory manner in a shorter general discussion

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<sup>1</sup> The general topic of public and private remedies is discussed in other sections but not specifically in connection with Section 2 violations. This is the case with numerous other U.S. antitrust treatises as well.

<sup>2</sup> III PHILLIP E. AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW* ¶653a (2000).

of remedies, or offering unhelpful generalities. I suspect the same is true in EU treatises, but I have not surveyed the literature.

The most likelihood explanation is that monopolization cases and abuse of dominance cases (particularly successful ones) are relatively rare birds. While these cases are of great importance, they arise only episodically and rarely in the same industries, making comparisons between different industries and time periods not very helpful.

## II. **Logic and Experience**

We are left with experience and logic as the basis for an intelligent policy toward monopolization remedies.<sup>3</sup> Logic tells us that the point of a remedy should be some blend of punishment, deterrence, restitution, compensation, and restoration of the status quo ante, but does not tell what proportion of each item should be in the recipe.<sup>4</sup> Logic further tells us that the merits of any chosen remedy should not be markedly outweighed by its costs, its harm to innocent parties, and should be in the overall public interest.<sup>5</sup>

Experience tells us that judges in the U.S. system and the European Commission and the reviewing courts in the E.U. system must fashion relief in cases of extraordinary importance that are typically each monumental in scope and impact, but sui generis in nature. A brief tour of that experience can show us some guideposts, but cannot fully illuminate the path going forward.

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<sup>3</sup> *But cf.*, OLIVER WENDELL HOLMES, THE COMMON LAW 1 (1881) ("The life of the law has not been logic: it has been experience.").

<sup>4</sup> This is a fault in U.S. antitrust law generally. *See generally* Spencer Weber Waller, *The Incoherence of Punishment in US Antitrust Law*, 78 CHI-KENT L. REV. 207, 308 (2003).

<sup>5</sup> Jerrold Van Cise, *Limitations Upon Divestiture*, 19 GEO. WASH. L. REV. 147, 148-53 (1950).

## A. Common Law and State Practice

The earliest remedies for monopolization under American law can be found prior to the passage of the Sherman Act. Sadly, the founding fathers did not accept Thomas Jefferson's proposal for inclusion in the Bill of Rights of a freedom from monopoly.<sup>6</sup> However, even under the common law, monopolistic agreements were void,<sup>7</sup> although by its nature this pertained more to trust and cartel type agreements and not truly unilateral conduct. A majority of the states also had some combination of constitutional and/or statutory provisions prohibiting monopolies prior to or around the time of the passage of the Sherman Act.<sup>8</sup> These anti-monopoly provisions provided for prison terms, fines, recovery of damages, special fees for prosecutors, revocation of corporate charters, voiding of contracts, injunctions, and other equitable remedies that the court deemed just and proper. Despite this laundry list of impressive sanctions, state antitrust law proved to be of little use in restructuring or regulating the behavior of national corporations effectively beyond the reach of any single state government. Finally, there were federal

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<sup>6</sup> See Letter from Thomas Jefferson to James Madison (Dec. 20, 1787), available at <http://press-pubs.uchicago.edu/founders/>; Letter from Thomas Jefferson to James Madison (July 31, 1788), available at <http://press-pubs.uchicago.edu/founders/>.

<sup>7</sup> HANS B. THORELLI. THE FEDERAL ANTITRUST POLICY: ORIGINATION OF AN AMERICAN TRADITION 17 (1954)(surveying common law).

<sup>8</sup> THORELLI, *supra* note 7, at 155-59 (1954); James May, *Antitrust in the Formative Era: Political and Economic Theory in Constitutional and Antitrust Analysis, 1880-1918*, 50 OHIO ST. L.J. 257 (1989); James May, *Antitrust Practice and Procedure in the Formative Era: The Constitutional and Conceptual Reach of State Antitrust Law, 1880-1981*, 135 U. PA. L. REV. 495 (1987).

constitutional limitations on states granting monopolies that affected interstate commerce.<sup>9</sup>

## **B. Historical Remedies for Monopolization Under the Sherman Act**

Remedies for truly unilateral conduct were an afterthought in the passage of the federal Sherman Act. Although Section 1 and 2 of the Sherman Act are of equal import and contain identical remedies, the assumption appeared to be that monopolies would most often arise through trust-like arrangements or mergers. It was widely believed that monopolies could be prevented or remedied through preventing and punishing the trusts that had grown to dominate virtually all aspects of American economic life.

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<sup>9</sup> *Gibbons v. Odgen*, 22 U.S. 1 (1824).

In response, Congress criminalized agreements in restraint of trade, monopolization, attempts to monopolize, and conspiracies to monopolize; authorized the federal government to also seek injunctive relief; authorized persons injured in their business and property to sue for treble damages, attorneys fees, and costs; and then left the matter to the federal courts to work out the details on a common law basis. What follows is a brief survey of the remedies that have characterized US antitrust law at different times throughout our history.<sup>10</sup>

## **1. Criminal Penalties**

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<sup>10</sup> See also William E. Kovacic, *Designing Antitrust Remedies for Dominant Firm Misconduct*, 31 CONN. L. REV. 1285, 1287-1310 (1999)(discussing other approaches to monopolization remedies including industry specific statutes).

Section 2 contains identical criminal penalties to Section 1. Originally, these criminal penalties were only misdemeanors, as opposed to its current status as a felony. The government used these provisions to fine corporation modest amounts. No individuals were sentenced to jail under these provisions.<sup>11</sup> Criminal enforcement of Section 2 was also used extensively in the late 1930s and 1940s to leverage defendants into signing civil consent decrees agreeing to various structural and behavioral changes. There have been no criminal Section 2 cases since the late 1960s<sup>12</sup> and little prospect of this remedy being revived.

## 2. **Divestiture**

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<sup>11</sup> Robert W. Crandall, *The Failure of Structural Remedies in Sherman Act Monopolization Cases*, 80 OR. L. REV. 109, 116 (2001).

<sup>12</sup> The most recent criminal indictment based on Section 2 I have been able to find was in 1967. *United States v. Union Camp Corp. et. al.*, Crim. Action No. 4558 (E. D. Va. Nov. 30, 1967).

Because many of the early monopolies were accumulations of previously separate corporate enterprises, it is not surprising that the courts ordered the dissolution of the enterprise if found in violation of Section 2.<sup>13</sup> Under this theory, Standard Oil was dissolved into separate regional enterprises.<sup>14</sup> The courts have been reluctant to dissolve integrated entities because of the difficulties of such a procedure, the speculative nature of the benefits, and the harm to corporate, shareholder, labor, and other interests.<sup>15</sup> This is in marked contrast to the practice in merger cases where divestiture is the natural remedy for breaking apart what never should have been joined together in the first place.<sup>16</sup> One study found only four or five cases where the

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<sup>13</sup> There are technical distinctions between divestiture, dissolution and divorcement. S. Chesterfield Oppenheim, *Economic Background*, 19 GEO. WASH. L. REV. 120, 120-21 (1950)(defining and differentiating between the three). Like most commentators, I use these concepts interchangeably.

<sup>14</sup> *Standard Oil Co. v. U.S.*, 221 U.S. 1 (1911). See generally JAMES MAY, *STANDARD OIL CO. V. UNITED STATES: THE SUPREME COURT AND THE FOUNDATIONS OF A NEW AMERICAN SOCIETY* (University Press of Kansas forthcoming); James May, *The Story of Standard Oil Co. v. United States*, in *ANTITRUST STORIES* (Daniel A. Crane & Eleanor M. Fox, eds., 2007). See also *United States v. American Tobacco Co.*, 221 U.S. 106 (1911).

<sup>15</sup> See *United States v. United Shoe Machine Corp.*, 110 F. Supp. 295, 348 (D. Mass.1953).

<sup>16</sup> For the presumption that divestiture is the appropriate remedy in the merger context see *United States v. E.I. du Pont de Nemours & Co.*, 366 U.S. 316, 327 (1961). Although beyond the scope of this brief survey, divestiture in merger cases does provide important lessons that should be applied in structuring relief in Section 2 cases. See *Merger Remedies Study*, public version, DG Competition European Commission October 2005, available at [http://ec.europa.eu/comm/competition/mergers/studies\\_reports/remedies\\_study.pdf](http://ec.europa.eu/comm/competition/mergers/studies_reports/remedies_study.pdf); U.S. Dept. of Justice, Antitrust Division Policy Guide to Merger Remedies, 7-8 (2004), available at <http://www.usdoj.gov/atr/public/guidelines/205108.pdf>; Press Release, Competition Bureau, Competition Bureau Publishes Bulletin on Merger Remedies (Sept. 22, 2006), available at <http://www.competitionbureau.gc.ca/internet/index.cfm?itemID=2169&lg=e>. (Canadian Competition Bureau); Fed. Trade Comm'n, Statement of the FTC's Bureau of Competition on Negotiating Merger Remedies (2003), available at <http://www.ftc.gov/bc/bestpractices/bestpractices030401.htm> (Apr. 2, 2003).

defendant had not attained its market position through merger or through other types of agreement with other firms.<sup>17</sup>

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<sup>17</sup> Crandall, *supra* note 11, at 120-22.

The D.C. Circuit in *Microsoft* indicated that divestiture should be applied to unitary companies with great caution and “tailored to fit the wrong creating the occasion for the remedy.”<sup>18</sup> One of the greatest recent successes was the 1984 agreed divestiture of the Bell System into a series of regulated regional local telephone operating companies and a new unregulated AT&T consisting of long distance communications, equipment manufacturing, and research and development. While the law permits divestiture as a remedy in private antitrust suits, as a practical matter this remedy has only been applied, if at all, in public enforcement actions.<sup>19</sup>

### **3. Creation of New Competition**

Despite a venerable history of 19<sup>th</sup> and early 20<sup>th</sup> century populist fervor on questions of public ownership, there has been little use of governmental ownership to create new competition as a counter to private monopoly. The opposition to the creation of the Tennessee Valley Authority during the Great depression in the 1930s to bring electric power to underserved rural areas suggests the rarity of such a remedy and the political will necessary to pursue this strategy. Perhaps the closest approach in antitrust law at the Supreme Court level was the *Otter Tail*

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<sup>18</sup> United States v. Microsoft Corp., 253 F. 3d 34, 106 (D.C. Cir. 2001)(en banc)(per curiam). Note how far we have come from earlier generations where a noted commentator offered: “Divestiture is the indicated remedy, in my opinion, where the structure of the monopolizing defendant is such that failing to divest will mean a continuance of old monopolistic practices or a resurgence of new monopolistic practices.” Sigmund Timberg, *Some Justifications for Divestiture*, 19 GEO. WASH. L. REV. 132, 136 (1950).

<sup>19</sup> Comment, David S. Wise, *Divestiture as a Private Remedy*, 20 DUQ. L. REV. 613, 617-22 (1981-1982); Comment, *Private Divestiture: Antitrust’s Latest Problem Child*, 41 FORDHAM L. REV. 569 (1973).

decision of the 1970s where the Court affirmed liability under Section 2 and required a private electrical transmission company to sell power to competing publicly-owned municipal electrical distribution companies.<sup>20</sup>

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<sup>20</sup> Otter Tail Power Co. v. United States, 410 U.S. 366, 381-82 (1973).

The greatest success in the creation of competition where once there was none occurred in the long running *Alcoa* litigation, although the final remedy was the result of legislation rather than judicial opinion.<sup>21</sup> In *Alcoa*, the government established that Alcoa both enjoyed monopoly power and had unlawfully excluded competitors through a pattern of relentless expansion, exclusive supply contracts with hydroelectric power companies (a key input for the production of aluminum from bauxite), and benefitted from worldwide market division schemes with European producers.

However, the Court deferred the question of remedy until after the end of World War II. Congress then stepped in and created a statutory scheme through which government-owned aluminum production facilities were sold off at relatively bargain prices to the Reynolds and Kaiser companies, creating three U.S. producers rather than the literal monopoly Alcoa had enjoyed prior to that time. In subsequent judicial proceeding, the Court further required the separation of ownership and management links between Alcoa and its Canadian subsidiary Alcan, creating over time a fourth viable competitor serving the United States market. Finally, the Government created additional new competitors after the Korean War through the sale of additional publicly owned facilities.

Despite the success of the Alcoa experience, this proved to be a nearly sui generis

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<sup>21</sup> United States v. Aluminum Co. of America, 148 F.2d 416 , 437, 444 (1945). See generally Spencer Weber Waller, *The Story of Alcoa: The Enduring Questions of Market Power, Conduct, and Remedy in Monopolization Cases*, ANTITRUST STORIES ( Eleanor A. Fox & Daniel A. Crane, eds. 2007).

approach. The federal government simply does not own that much that can be sold, leased, or privatized to create competition in highly concentrated industries. In addition, even in war time, the modern federal government is content to rely on the private sector to supply its needs. Finally, the government appears to lack the ability or the inclination to use its purchasing power to achieve similar ends.

#### **4. Voiding of Contracts**

Continuing the approach under American common law, the Supreme Court held several contracts void as part of actual or attempted monopolization in a series of uncontroversial older cases.<sup>22</sup> Where the unlawful monopolization was accomplished by exclusive contracts or other anticompetitive agreements, the agreements will be voided or modified to permit competition to resume as before the unlawful conduct.<sup>23</sup> In the famous *U.S. Shoe Machinery* decision, the lower court initially refused to order the dissolution or divestiture of an integrated shoe machinery company. Instead it voided lease-only contracts with shoe manufacturers and issued a detailed injunction designed to create over time a viable sale or lease option for customers and the eventual development of a market for secondary shoe machinery.<sup>24</sup>

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<sup>22</sup> See e.g., *United States v. Reading Co.*, 226 U.S. 324 (1912)(cancellation of contracts and enjoining future executions of contracts); *Continental Wall Paper Co. v. Louis Voight & Sons Co.*, 212 U.S. 227, 261 (1909)(refusal to enforce contract as part of attempt to monopolize); *Shawnee Compress Co. v. Anderson*, 209 U.S. 423, 435 (1908)(lease in furtherance of a monopoly void).

<sup>23</sup> See e.g., *U.S. v. Dentsply Intern., Inc.*, 399 F.3d 181, 197 (3d Cir. 2005).

<sup>24</sup> *United States v. United Shoe Machine Corp.*, 110 F.Supp. 295, 348 (D.Mass.1953), *aff'd*, 347 U.S. 521 (1954). It was only later that the court further ordered the sale of certain assets to decrease the defendant's market share below specified thresholds.

## 5. Injunctions

The majority of monopolization cases in US history have ended with some sort of behavioral relief.<sup>25</sup> Under the general equitable power of the U.S. courts, both preliminary and final injunctions are available in antitrust cases like any other type of case.<sup>26</sup> On a case-by-case basis, US courts have issued both positive and negative injunctions to prevent violations of Section 2 of the Sherman Act, remedy past violations, and to restore the state of competition that existed prior to the violation.<sup>27</sup> Typically, the courts have issued injunctions against the continuation of the conduct found to be illegal and included provisions to eliminate the effects of the unlawful conduct in the marketplace.<sup>28</sup> Often, the injunctions have included the compulsory licensing of patents and other intellectual property for reasonable royalties and occasionally on a royalty free basis.<sup>29</sup> More recently, the DC Circuit in the *Microsoft* litigation affirmed the

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<sup>25</sup> Crandall, *supra* note 11, at 116 (2001)(of civil case through 1996, 51.2% had behavioral remedies, 20.5% compulsory licensing, and 28.3% structural relief).

<sup>26</sup> See generally John J. Flynn, *A Survey of Injunctive Relief Under State and Federal Antitrust Laws*, 1967 UTAH L. REV. 344 (discussing recurrent problems with injunctive relief).

<sup>27</sup> *United States v. United Shoe Machine Corp.*, 110 F.Supp. 295, 348 (D.Mass.1953), *aff'd*, 347 U.S. 521 (1954).

<sup>28</sup> *International Boxing Club v. United States*, 358 U.S. 242, 261-62 (1959); *Lorraine Journal v. United States*, 342 U.S. 143, 156-57 (1951); *Schine Chain Theatres v. United States*, 334 U.S. 110, 128-29 (1948); *Allen Bradley & Co. v. Local Union, No. 3.I.B of E.W.*, 325 U.S. 797, 812 (1945); *Swift & Co. v. United States*, 196 U.S. 375, 401 (1905); *Northern Securities v. United States*, 193 U.S. 197, 356-57 (1904). But see *United States v. Grinell Corp.*, 384 U.S. 563, 579 (1966)(limiting injunction barring employment of individual in the industry as unnecessary and unduly harsh).

<sup>29</sup> See Crandall, *supra* note 11, at 116 (compulsory licensing comprising 20.5% of relief

majority of the detailed injunctive relief granted by the trial court.<sup>30</sup> This will remain the weapon of choice for the foreseeable future despite lingering questions of administration and effectiveness.<sup>31</sup>

## **6. Private Treble Damage Suits**

Private parties injured in their business or property by reason of an antitrust violation may sue for treble damages, attorneys fees, and costs. The Supreme Court decision in *Eastman Kodak Co. v. Southern Photo Man. Co.*,<sup>32</sup> affirmed such a damage award in a monopolization case despite the impossibility of precisely ascertaining the exact damages suffered by the plaintiff. In more modern times, MCI won a private treble damage case based on its unlawful exclusion from the long distance market that preceded the conclusion of the government's

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granted in reported civil monopolization cases through 1996). *See e.g.* *Hartford-Empire Co. v. United States*, 323 U.S. 386, 413-18 (1945).

<sup>30</sup> *United States v. Microsoft Corp.*, 253 F. 3d 34 (D.D.C. 2001)(en banc)(per curiam).

<sup>31</sup> *See* Kevin J. O'Connor, *The Divestiture Remedy in Sherman Act §2 Cases*, 13 HARV J. ON LEGIS. 687 (1976)(arguing that conduct remedies are more costly to administer and less effective).

<sup>32</sup> 273 U.S. 359 (1927).

historic case against the old Bell System.<sup>33</sup> Such awards are easy to administer and do not involve any complex role for a reviewing court other than the usual appellate review of the facts and the law of the trial proceeding below.

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<sup>33</sup> MCI Communications Corp. v. American Tel. & Tel., 708 F. 2d 1081 (7<sup>th</sup> Cir. 1983).

Virtually all of the recent Supreme Court cases on monopolization have arisen in this context and thus the Court has had little opportunity (perhaps by design) to opine more generally on remedies for monopolization.<sup>34</sup> While the Supreme Court has held that a successful private plaintiff also can obtain the full array of equitable remedies,<sup>35</sup> no court to my knowledge has required divestiture or dissolution in a private monopolization case and has limited equitable relief to more narrowly drawn injunctions.

## **7. Restitution/Disgorgement**

In a small number of situations the United States Federal Trade Commission has required monopolists to provide restitution to consumers who were overcharged by reason of an antitrust violation. The FTC's restitution power is derived from Section 13(g) of the FTC Act and is often invoked in consumer fraud matters, but only recently has been invoked in a handful of competition cases. For example, the FTC and a coalition of states antitrust enforcers settled charges that a pharmaceutical company unlawfully monopolized the market for certain drugs by cornering the market on the raw ingredients for those medications.<sup>36</sup> This is an extremely useful approach in the proper case but it is largely untested in court and probably only available in

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<sup>34</sup> See e.g., *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004); *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447 (1993); *Eastman Kodak Co. v. Image Technical Services*, 504 U.S. 451 (1992); *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985).

<sup>35</sup> *California v. American Stores Co.*, 495 U.S. 271, 295-96 (1990).

<sup>36</sup> See generally United States Federal Trade Commission, *Policy Statement on Monetary Equitable Remedies in Competition Cases*, available at <http://www.ftc.gov/os/2003/07/disgorgementfrn.htm>; Robert Pitofsky, *Antitrust at the Turn of the Twenty-First Century: The Matter of Remedies*, 91 Geo. L.J. 169, 173-76 (2002).

cases brought under the FTC Act. By its very nature, it is limited to overcharge cases and not available in most cases of exclusionary conduct.

## **8. Doing Nothing**

The actor and philosopher of life, Peter Ustinov, is reported to have offered this advice on a number of topics: "Don't just do something, stand there!" This may strike some as an odd type of "remedy," but doing nothing is a viable option for a number of situations involving the unilateral conduct by dominant firms. First, if you are a believer in Schumpeterian waves of creative destruction you simply wait and sit back for the next big thing that will swamp the temporary monopoly power that arose from the last big thing. Second, a number of critics have suggested that inaction is also the proper strategy if the likelihood of erroneous conclusions, the lack of a viable remedy, or a quicker market response outweighs the alleged harms and potential gains to the litigation.<sup>37</sup> Third, sometimes market conditions change over the course of litigation such that what initially looked like a good idea no longer appears to be. This was the basis for the United States abandoning its thirteen year effort against IBM for unlawful monopolization of the main frame computer industry as it existed in the late 1960s and early 1970s.<sup>38</sup> Finally, antitrust agencies (and private parties) simply do not win every case and cannot pursue every complaint, so at least some allegedly monopolistic abuses will never be successfully challenged

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<sup>37</sup> WILLIAM H. PAGE & JOHN E. LOPATKA, *THE MICROSOFT CASE* (2007); Crandall, *supra* note 11, at 112.

<sup>38</sup> In fairness to the government, IBM's scorched earth defense was a significant contributing factor to the length of the proceedings.

in court and any relief will have to come from outside the legal system.<sup>39</sup>

### **III. A Future More About Access and Information (and Why That Might be a Good Thing)**

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<sup>39</sup> An example may be U.S. Steel which prevailed in the United States Supreme Court in 1920 against a government monopolization challenge, but whose market power was ultimately (if slowly) was constrained and then reduced by the development of new metals and later foreign imports.

All of this suggests that the future will look much like the past with two prominent exceptions relating to access and information.<sup>40</sup> Public monopolization cases will remain the primary enforcement, but episodic in nature, and with relief almost sui generis in each case. Despite lip service to the importance of divestiture as a remedy, it will be limited to three main situations. First, where the monopoly was illegally acquired, divestiture will be looked to first in order to restore the competitive situation that existed before the illegal acts if other forms of relief will be ineffective. Second, divestiture will be more likely where the monopoly power arose out of merger or other combinations and the transactions can be relatively easily unwound drawing on the accumulated wisdom from relief in Section 7 Clayton Act cases. Third, divestiture will be implemented when the defendant can be separated into separate parts relatively painlessly either horizontally, vertically, or through the separation of regulated versus unregulated operations.

One is therefore likely to see an increasingly complex series of behavioral remedies and

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<sup>40</sup> Some approaches that you will not see anytime soon in the United States include criminal prosecution, civil fines, and forfeitures. Criminal prosecution is the only current means by which the United States can impose fines on an antitrust defendant. In the monopolization area, this approach has been abandoned and there is no support for its return any time soon. Even the most egregious hypothetical criminal conduct by a monopolist could be more profitably prosecuted under other criminal laws. Similarly, statutory amendments to permit the imposition of civil fines as a remedy for monopolization (or other antitrust violations) has been debated from time to time but has been rejected by the recent Antitrust Modernization Commission and stands little chance of adoption. ANTITRUST MODERNIZATION COMMISSION, REPORT AND RECOMMENDATIONS 285-291 (April 2007)(recommending against creating civil fine remedy); Stephen Calkins, *Civil Monetary Remedies Available to Antitrust Enforcers*, 40 U. SAN. FRAN. L. REV. 567 (2006)(discussing the Antitrust Modernization Commission report). For better or worse, the U.S. will not pursue the path of the E.U. and others where a defendant enterprise can be fined up to 10% of its annual turnover as a tool in abuse cases. Finally, U.S. law permits forfeiture of a defendant's property under certain circumstances, but this too has is a matter of ancient history and only rarely enforced. 15 U.S.C. § 6. *See generally* Michael A. Duggan, *Some Lesser Penalties of Antitrust*, 8 AM. BUS. L.J. 247 (1971).

injunctions that require innovative monitoring and compliance obligations that strain the capabilities of courts alone to administer. Courts are likely to turn to special masters, alternative dispute resolution mechanisms, compliance committees, and private bargaining in the shadow of the law to enforce these obligations to avoid the experience of the court acting as a de facto regulator as it did under the Modified Final Judgment in the ATT case in the 1980s and 1990s.<sup>41</sup>

Future monopolization cases and their remedies are likely to feature an increased emphasis on information disclosure and non-discriminatory access. Simply put, disclosure is divestiture when it comes to our high-tech information-based IP economy. Cases like the FTC's consent decree with Intel shows the importance of information and disclosure as a remedy for allege exclusionary conduct in connection with the ongoing relationship between licensors and licensees.<sup>42</sup> The essence of the relief and compliance in the Microsoft case in both the U.S. and the EU is whether Microsoft has or has not disclosed sufficient information to create a more competitive environment in the creation of competing software applications to work with Windows and on competing operating systems. Although not seriously pursued in either jurisdiction, the licensing of the Windows source code would have constituted just such divestiture by disclosure.

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<sup>41</sup> United States v. Am. Tel. & Tel. Co., 552 F. Supp. 131 (D.D.C. 1982).

<sup>42</sup> In re Intel Corp., 1999 WL 701835 (F.T.C.)(No. 9288)(consent to cease and desist).

In addition to information and disclosure, access and interoperability will be the other key component of monopolization litigation and remedies for the foreseeable future. While I do not go as far as some commentators in suggesting access is the only issue to matter,<sup>43</sup> access to networks, platforms, and other forms of infrastructure is already the focus of the debate in antitrust, telecommunications, and in most regulated industries. Antitrust needs new and old tools to determine when access is required, when non-discriminatory access is necessary, when antitrust liability ensues for denial of access without legitimate business justification, and how to create effective remedies to remedy such violations. As I have argued elsewhere,<sup>44</sup> U.S. antitrust needs a revitalized form of the essential facilities doctrine to address these questions at precisely the time when we appear to be on the verge of jettisoning this traditional tool altogether. Similarly, the EU needs a sounder foundation for its increasing use of its version of the essential facilities doctrine so its decisions and remedies are applied and enforced in a sound and consistent basis.

Think for a moment about the important monopolization issues that have arisen but have not yet been litigated. They include 1) access to iTunes and its compatibility with other

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<sup>43</sup> Kevin D. Werbach, *Only Connect* (February 20, 2007), available at <http://ssrn.com/abstract=964991>.

<sup>44</sup> Brett Frischmann & Spencer Weber Waller, *Revitalizing Essential Facilities*, 75 ANTITRUST L.J. 1 (2008); Spencer Weber Waller, *Areeda, Epithets, and Essential Facilities*, 2008 Wisc. L. Rev. 360.

hardware to play downloaded audio and video; 2) access to the Google book project as it becomes a vital tool for basic research; and 3) more generally whether a defendant ever has the obligation to license intellectual property. Non-discriminatory access to the new infrastructure and the required information disclosures to make it happen are likely to be the new battleground when these rare, but dramatic, public monopolization cases arise and a violation is found.

As the focus of monopolization remedies shifts from physical to virtual divestiture and access/interconnection, I also anticipate an increased focus on innovative compliance mechanisms to assist the court or tribunal in monitoring disclosure, pricing, and non-discriminatory access. The United States is just beginning to come to grips with the best combination of judicial supervision and options such as special masters, private monitors, compliance committees and trustees, use of expert public regulatory bodies, and alternative dispute mechanisms to ensure compliance without overburdening the courts. As far as I can tell, these issues are just a glimmer in E.U. competition jurisprudence at this point, but similarly should be the critical remedy issues as long as the Commission remains committed to the enforcement of Article 82 and private rights of action increase in importance.