How to read and brief a case

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Develop a workflow for processing cases

- Read the case and highlight notable sentences

  - Also highlight the headings–those are useful guideposts

  - When you are done, go back and remove all non-essential highlights

  - Copy the essential highlights into a plaintext file ("case file"). The case file has two sections: excerpts and commentary.

- Separate excerpts from commentary

  - The excerpt section contains nothing but verbatim quotes with page numbers. Those can be pasted into briefs, memos, etc. without having to re-read the case

  - Attach your comments after the excerpt section

- Treat the case file as a living document

  - As you work with the case or re-read it later in different contexts, add (or remove) entries in the excerpts section

  - As your understanding of the case deepens (sometimes over a period of years) expand the commentary section

Having thus properly defined the relevant market, the District Court found that Windows accounts for a greater than 95% share. *Findings of Fact* ¶ 35. The court also found that even if Mac OS were included, Microsoft's share would exceed 80%. *Id.* Microsoft challenges neither finding, nor does it argue that such a market share is not predominant. *Cf. Grinnell*, 384 **U.S.** at 571, 86 S.Ct. 1698 (87% is predominant); *Eastman Kodak Co.* v. *Image Technical Servs., Inc.,* 504 **U.S.** 451, 481, 112 S.Ct. 2072, 119 L.Ed.2d 265 (1992) (80%); *du Pont*, 351 **U.S.** at 379, 391, 76 S.Ct. 994 (75%).
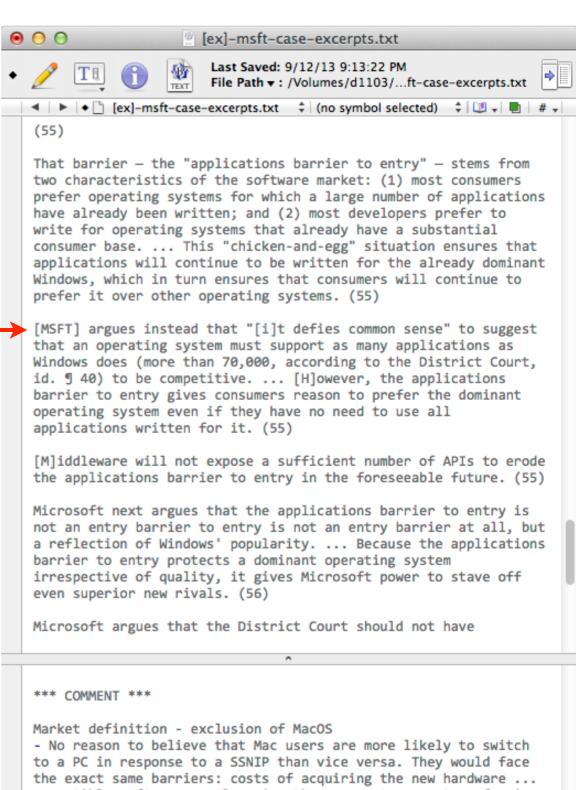
Instead, Microsoft claims that even a predominant market share does not by itself indicate monopoly power. Although the "existence of [monopoly] power ordinarily may be inferred from the predominant share of the market," *Grinnell*, 384 **U.S.** at 571, 86 S.Ct. 1698, we agree with Microsoft that because of the possibility of competition from new entrants, *see Ball Mem'l Hosp., Inc.,* 784 F.2d at 1336, looking to current market share alone can be "misleading." *Hunt-Wesson Foods, Inc.* v. *Ragu Foods, Inc.,* 627 F.2d 919, 924 (9th Cir.1980); *see also Ball Mem'l Hosp., Inc.,* 784 F.2d at 1336 ("Market share reflects current sales, but today's sales do not always indicate power over sales and price tomorrow.") In this case, however, the District Court was not misled. Considering the possibility of new rivals, the court focused not only on Microsoft's present market share, but also on the structural barrier that protects the company's future position. *Conclusions of Law*, at 36. That barrier — the "applications barrier to entry" — stems from two characteristics of the software market: (1) most consumers prefer operating systems for which a large number of applications have already been written; and (2) most developers prefer to write for operating systems that already have a substantial consumer base. *See Findings of Fact* ¶ ¶ 30, 36. This "chicken-and-egg" situation ensures that applications will continue to be written for the already dominant Windows, which in turn ensures that consumers will continue to prefer it over other operating systems. *Id.*

Challenging the existence of the applications barrier to entry, Microsoft observes that software developers do write applications for other operating systems, pointing out that at its peak IBM's OS/2 supported approximately 2,500 applications. *Id.* ¶ 46. This misses the point. That some developers write applications for other operating systems is not at all inconsistent with the finding that the applications barrier to entry discourages many from writing for these less popular platforms. Indeed, the District Court found that IBM's difficulty in attracting a larger number of software developers to write for its platform seriously impeded OS/2's success. *Id.* ¶ 46.

Microsoft does not dispute that Windows supports many more applications than any other operating system. It argues instead that "[i]t defies common sense" to suggest that an operating system must support as many applications as Windows does (more than 70,000, according to the District Court, *id.* ¶ 40) to be competitive. Appellant's Opening Br. at 96. Consumers, Microsoft points out, can only use a very small percentage of these applications. *Id.* As the District Court explained, however, the applications barrier to entry gives consumers reason to prefer the dominant operating system even if they have no need to use all applications written for it:

The consumer wants an operating system that runs not only types of applications that he knows he will want to use, but also those types in which he might develop an interest later. Also, the consumer knows that if he chooses an operating system with enough demand to support multiple applications in each product category, he will be less likely to find himself straitened later by having to use an application whose features disappoint him. Finally, the average user knows that, generally speaking, applications improve through successive versions. He thus wants an operating system for which successive generations of his favorite applications will be released — promptly at that. The fact that a

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That barrier — the "applications barrier to entry" — stems from
two characteristics of the software market: (1) most consumers
prefer operating systems for which a large number of applications
have already been written; and (2) most developers prefer to
write for operating systems that already have a substantial
consumer base. ... This "chicken-and-egg" situation ensures that
applications will continue to be written for the already dominant
Windows, which in turn ensures that consumers will continue to
prefer it over other operating systems. (55)

[MSFT] argues instead that "[i]t defies common sense" to suggest
that an operating system must support as many applications as
Windows does (more than 70,000, according to the District Court,
id. ¶ 40) to be competitive. ... [H]owever, the applications
barrier to entry gives consumers reason to prefer the dominant
operating system even if they have no need to use all
applications written for it. (55)

[M]iddleware will not expose a sufficient number of APIs to erode
the applications barrier to entry in the foreseeable future. (55)

Microsoft next argues that the applications barrier to entry is
not an entry barrier to entry is not an entry barrier at all, but
a reflection of Windows' popularity. ... Because the applications
barrier to entry protects a dominant operating system
irrespective of quality, it gives Microsoft power to stave off
even superior new rivals. (56)

Microsoft argues that the District Court should not have
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*** COMMENT ***

Market definition - exclusion of MacOS
- No reason to believe that Mac users are more likely to switch
to a PC in response to a SSNIP than vice versa. They would face
the exact same barriers: costs of acquiring the new hardware ...
compatible software ... learning the new system ... transferring
files. (52)
- The court's test would therefore exclude PC-OS from a MacOS
market; a MacOS monopoly is an implausible result.

Exclusionary conduct: Integration of IE and Windows
- Successful code gets absorbed into lower layers over time
- Spell checker: stand-alone app --> part of word processor -->
OS service
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