nature of Gates and his company are searching desperately for an illegal reason why Microsoft can be so dominant, and those who understand this nature all too well are trying to kill it. Meanwhile, the most odious aspect of what little real debate that occurs is the way that Gates, and by association Microsoft, are depicted by both the company's mainstream defenders and its attackers, as ruthlessly obsessed with the defeat of competitors -- in a dog-eat-dog caricature of capitalism.

Speaking of *Atlas Shrugged*, the attack on Microsoft may very well be the clearest example of the book in action. The very same elements of altruist economics and the worship of the mediocre are at play in both the industry's private and the government's public attacks. Unlike *Atlas Shrugged*, the protagonist is not the perfect symbol, but as noted earlier Bill Gates and Microsoft have come as close to such a symbol as any individual business person or company has today. And they are both paying the price for the success that comes from a dedication to productivity in a world where success is not rewarded, but instead is suspected or despised.

A Review of Recent Events

Anne Bingaman, U.S. Assistant Attorney General and the woman behind the Department of Justice's (DOJ's) investigation into Microsoft's alleged "monopolistic" and antitrust practices, summed up the nature of the government's case in an interview in *Computer Reseller News* on July 25, 1994. When asked to comment on why the DOJ refrained from "breaking up Microsoft," she replied, "We did what was there to do under the law with facts as they were presented to us. It has taken four and a half years of *hand-to-hand combat* with Microsoft to achieve this." [Emphasis added.]

"This" is the consent decree signed by Gates, in which the software manufacturer agreed to end certain licensing and other practices alleged to be "anti-competitive" and in violation of antitrust law. The consent decree ended for the moment the case brought by the DOJ after an earlier Federal Trade Commission (FTC) investigation was dropped before any action was brought. That Ms. Bingaman considered her department's investigation "hand-to-hand combat" is very telling--note that the case has never proceeded beyond the investigative stage, let alone to trial, where the warfare theme might have been at least marginally appropriate.

Ms. Bingaman made other statements following the consent decree that imply ignorance in addition to a predatory nature. In the same interview, she said regarding the impact of the decree on the software market, "We hope it will have a profound impact in opening up the operating systems that are put on computers by OEMs [original equipment manufacturers]." As reported by various media, the DOJ has stated that the decree will improve choice and decrease the cost of operating systems for consumers.

The press has been quick to join in with the government in attacking Microsoft. Numerous editorials lambaste Microsoft for everything from dominating the software market, while explicitly comparing Bill Gates to Hitler and commonly issuing such trite phrases as "Microsoft Uber Alles" to attempting to control America's financial institutions. **The attacks are so commonplace that a new term has been coined by a few rational souls-- Microsoft-bashing** --to reflect the common unruly theme running through them. Some of the worst cases of Microsoft-bashing have even gone so far as to imply that the failure of Microsoft's products would be in and of itself a good thing, regardless of a given product's merit.

Microsoft's response to the attacks has been both an unfortunate acceptance and a welcome rejection of both the government's alleged authority and the principles behind it. On the one hand, it appeared to acquiesce to government pressure by signing the consent decree, arguing in essence that although monopolies as defined today are indeed possible and unattractive, Microsoft doesn't have one. On the other, it has lately been even bolder in its attempts to dominate various specific markets, leveraging its most controversial strengths to increase its presence in everything from financial management software to on-line services. While one can respect Bill Gates for acting aggressively in the face of government threats, the company appears duplicitous without issuing strong, formal statements denouncing the industry and the government for attacking it.

Meanwhile, Microsoft's actions since the announcement of the consent decree lend credibility to the proposition that Gates acted only to end the diversion the investigation represented. Rather than tread lightly on the software market, Microsoft has become in some areas even more aggressive.

For example, Gates selected Intuit, maker of the most popular home and small business financial software, for acquisition, placing the software manufacturer in a potentially dominating position in the growing electronic finances market. In addition, Microsoft is creating an on-line service--the Microsoft Network--that will eventually compete with the likes of CompuServe, America On-Line and Prodigy, the largest on-line service providers. By including access software for the Microsoft Network with the newest version of Windows--Windows 95--Microsoft will likely create an almost instant user base of some significant percentage of the millions of Windows users, thus quickly penetrating this market segment as well. Microsoft's foray into financial services was intended to combine with its on-line service to create a new mechanism for businesses and consumers to conduct financial transactions, with Microsoft serving as an electronic broker between traditional financial enterprises and the consumer.

Unfortunately, while Microsoft may have succeeded in appeasing government for a brief moment, **they opened the floodgates for even stronger government attacks**. As with silicon breast implant manufacturers, who through their own settlements conferred more credibility upon the claims of damages by their products, **Microsoft has granted the government an otherwise illegitimate power.**

The Justice Department moved to block Microsoft's acquisition of Intuit on the grounds that Microsoft's domination of the personal finance market would result in increased prices and reduced innovation. Citing the difficulties that a legal battle with the DOJ would have represented, Microsoft announced that it was not going to pursue the merger--severely hampering Microsoft's goal to create the means for electronic financial services and denying Intuit stockholders a great deal of profit.

In addition, an amicus brief was filed with the DOJ on behalf of a number of Microsoft's competitors, all unnamed, claiming that the consent decree was too narrow and provides no remedy to those "harmed" by Microsoft's business practices. The brief was filed directly following another that sought, successfully, to block Justice approval of the Intuit merger.

In an odd twist, the government jumped to Microsoft's defense. Anne Bingaman contested the brief and continued to support the consent decree, saying that the DOJ had "sweated blood" in developing the case against Microsoft. In response to the opposition, however, the U.S. District Court, with Judge Stanley Sporkin presiding, denied the consent decree, thus opening up the possibility of further DOJ proceedings against Microsoft or the requirement to renegotiate a new consent decree. Microsoft has filed a request for an expedited appeal, and in mid-June Judge Sporkin was removed from the case and the ruling was returned to the District Court with orders to approve the consent decree.

Additionally, America On-Line and other on-line service providers are complaining loudly against the Microsoft Network. They argue that because the software for accessing the Microsoft Network will be included with and tightly integrated into Windows 95, the on-line service will "unfairly" leverage Microsoft's dominance of the operating system market to create a service that will be instantly "anti-competitive." To date, there has been no action against Microsoft's entry into the on-line service market, but the Department of Justice has very recently begun to solicit documents from Microsoft and testimony from Microsoft's on-line service competitors in a brand-new investigation. Many in the industry are speculating that Microsoft may choose or be forced to offer access software for The Microsoft Network in a separate add-in product.

It remains to be seen what will happen now that the consent decree is approved and the Intuit acquisition threatened out of existence. What follows this brief review is a discussion of the attacks on one of the most successful companies in American history and some of the principles underlying them.

(End of part 1 of a 3 part series.)

AOB Offers Membership Directory Via E-Mail

The AOB Membership Directory is now available as a database in a text (ASCII) file. The file contains an up to the minute version of the AOB Directory and is only available to AOB members. If you wish to receive this file, please send a check for $20 to AOB, PO Box 370, Beverly, MA 01915.

Michael J. Mazzone
Attorney at Law 713 940-6001
Vice Pres., The Association for Objective Law
E-Mail: MMazzone@counsel.com
9 Greenway Plaza, Suite 2300
Houston, Texas 77046 Fax: 713 940-6099