The court failed my test

By Einer Elhauge

Should Windows 95 be deemed a separate product from Internet Explorer under antitrust law? Intuition and metaphysical musings about the inherent nature of products prove of no use in answering such questions. Product definitions change with time, technology and market demand. People used to buy cars and bumpers separately; now everyone understands "a car" to include bumpers. In order to judge what constitutes "one" product, we need legal tests that track antitrust caselaw and policy concerns.

The D.C. Circuit adopted one such legal test to reach its recent conclusion that Windows 95 and Internet Explorer form a single integrated product, and that Microsoft could thus force buyers of one to take both. Its legal test happened to be the test I proposed in my chapters of a co-authored antitrust treatise. Under this test, two items form a new integrated product only if their combination by the seller offers advantages that would be unavailable if the items were "bought separately and combined by the purchaser."

My initial reaction was pleasure in seeing my test adopted. Unfortunately, closer reading convinced me that the court misinterpreted my test. I do not by this mean to "slam" the court. The opinion was authored by one of America's ablest judges, Judge Williams, and this is one of antitrust's trickiest issues. The misinterpretation was subtle and well-intentioned, driven by a sensible desire to avoid problems the court saw with alternative interpretations. But I hope to show that, correctly interpreted, the test would not have raised these problems.

All legal tests have some purpose, and the purpose of this one is to prevent interference with beneficial technological innovation without unnecessarily constricting market choice. (There are also five other tests for finding one product with different purposes). Thus, the test does not prevent sellers from combining items before sale to produce technological benefits as long as such seller combination is really necessary to achieve those benefits. Nor does the test prevent sellers from designing two (separately available) products to be technologically interdependent in some way that improves performance when buyers use both together. But when any benefits of technological interdependence could equally be obtained if the buyer combined the two items, then the decision whether to combine them should be left to the free market choice of buyers rather than imposed on them by sellers.

The D.C. Circuit thus correctly cited my chapter for the point that one does not prove a new integrated product simply by showing that two items work better together than with rival items. As the court noted, even if Windows 95 works better with a Microsoft mouse than with other mice, buyers can always obtain Windows 95 and a Microsoft mouse separately and combine them. They thus remain separate products. To show a new integrated product, the court rightly stressed, one must prove that the bundle "worked better if combined by Microsoft than it would if combined by" its buyers. Proving mere technological interdependence is not enough.

Where the D.C. Circuit made its subtle error was in defining "what counts as the combination that brings together" two pieces of software. Microsoft provided Windows 95 and Internet Explorer on separate disks to its main buyers, computer manufacturers, who then combined the two by loading them onto the computers they sold. The court concluded that nonetheless the two formed an integrated product because "the act of combination" is not the loading of separate disks but rather "the creation of the design that knits the two together." And how can one determine whether a design "knits" two pieces of software together? The court's ultimate answer was that Windows 95 and Internet Explorer were designed to work better together than with rival products like Netscape Navigator. In particular, Internet Explorer improved the operating system functions of Windows 95 in various ways.

But this definition of "the act of combination" contradicted the point the court had earlier (and correctly) stressed from my writings: that two items are not an integrated product just because they work better together. It also flatly contradicted a passage from my treatise chapters that the court omitted, which clearly stated that two items of software are not one product if the defendant "can show only that his brands of software operate better in conjunction with each other than with other software. To find a new product, the items of software must operate better when bundled together by the seller than they

would if they were distributed on different diskettes and installed by the buyer."

Now, as I said, the court had some entirely reasonable concerns driving it to its misinterpretation of my test. The court was perplexed about how else the test could be consistent with three conclusions with which all judges and litigants agreed.

The first was that Windows 95 would not become three separate products if Microsoft happened to distribute it on three separate diskettes for installation by buyers. Unable to distinguish this hypothetical from the present case, the court concluded that installation from multiple disks could not be "the act of combination." [What the court forgot was that my test was premised on plaintiffs first making a threshold showing detailed some 30 pages before the test the court adopted.] The plaintiff must show that some buyers would want the items in a separated form that was feasible to produce. No one would want to buy one of three Windows 95 disks standing alone because it has no value without the other disks. The three disks thus fail the threshold test for separate products. There are buyers who would want Windows 95 even if it came without Internet Explorer.

The second and third conclusions that everyone agreed with were that DOS and Windows 3.11 were separate products - an operating system and graphical interface - but that Windows 95 was one integrated product rather than a tie of separate operating system and graphical interface products. But again both conclusions are perfectly consistent with a correct interpretation of my test. DOS and Windows 3.11 were separate pieces of valuable software distributed on separate disks and combined by buyer installation to achieve the desired joint effect. In contrast, Windows 95 is not a shell that sits on top of DOS like Windows 3.11 did. It is a thoroughly intertwined program that could not feasibly be separated into separate operating system and graphical interface disks with independent value. Or, to be more precise, if it were so separated, it would simply be DOS and Windows 3.11, and would thus lose the functional advantage that comes only if the codes are intertwined into one combined program, no piece of which has value without the other.

An opposing reasonable concern drove Judge Wald to adopt an open- ended balancing test. Namely, she feared that my test (at least as interpreted by the majority) would allow any software producer to tie separate software products by simply putting them on one disk or writing code that disabled each product if operated or purchased separately. If so, the plasticity of software would create a de facto license to tie. But this concern could have been addressed by the other part of the threshold inquiry: whether buyers would want what the seller could feasibly separate. If two pieces of software really were separate products, then it should be feasible to distribute them on separate disks, each of which has independent value to buyers, without losing any advantage that might come from their combination.

Finally, the majority stressed that one could not separate Internet Explorer's upgrade of operating system functions from its browsing capability. But this merely means that Internet Explorer is a single product rather than a tie of separate upgrade and browser products. It does not mean Internet Explorer and Windows 95 form a single product. It does mean that Internet Explorer and Windows 95 exhibit real product interdependence, rather than an artificial one created by putting pure operating system upgrade code on the Internet Explorer disc. But proving product interdependence is not the same thing as proving one product.

In the end, Windows 95 and Internet Explorer prove to be a relatively simple case. We know it is feasible to put them on separate disks with independent value because Microsoft in fact did precisely that. And we know that their combination by Microsoft did not confer advantages unobtainable by their combination by buyers because Microsoft actually had its buyers combine the separate disks. Windows 95 / Internet Explorer should thus not have been deemed a single integrated product.

The D.C. Circuit's contrary interpretation may yet be revisited in further appeals or when the court decides whether Windows 98 and Internet Explorer constitute separate products. If it does, the issue should be whether Windows 98 and Internet Explorer feasibly could be distributed on separate, independently valuable disks and then combined by buyers without losing some functionality available only if Microsoft integrates the two into one piece of software before sale.

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