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Competition Wins in Court

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Every so often, hard cases make good law. In one of the best antitrust opinions in years, a federal appeals court this week brought sudden clarity to the epic Microsoft case and delivered a ruling that will guide business practices in the shifting technology market.

The seven judges — including notable antitrust skeptics — held unanimously that Microsoft broke antitrust law to shore up its Windows operating system monopoly. No longer can Microsoft dismiss its antitrust problems as being caused by one idiosyncratic judge.

While the appeals court ruled for Microsoft on the claim that it attempted to monopolize the browser market, it did so on what amounted to a technicality. The court did not say Microsoft's conduct here was legal, but that the government failed to introduce sufficient proof to define the browser market.

On the claim that Microsoft illegally tied its browser to its operating system, the court ruled that the government must prove in a new trial that the browser market suffered an anticompetitive effect. However, Microsoft must then prove an actual technological benefit that outweighs this anticompetitive effect. As it stands, the court said Microsoft has so far failed to show any procompetitive justification for commingling its browser and operating system.

The court understood that the most serious anticompetitive harm committed by Microsoft was not to the browser market, but in preventing Netscape (and Sun Microsystems's Java) from becoming alternative applications platforms on enough PC's so that they might have

A sane approach to Microsoft's antitrust problems.

been able to challenge Microsoft's monopoly in the operating system market.

The cogency of the court's analysis makes Supreme Court review of the decision unlikely. So what's next? Absent settlement, a new trial will decide whether Microsoft illegally tied its browser to the Windows operating system, then determine an appropriate remedy. A breakup of Microsoft is unlikely absent proof either that Microsoft's monopoly was the result of illegal business practices or that its monopoly must be terminated to prevent future misconduct.

One reasonable remedy would be to order Microsoft to offer Netscape and Sun's Java on all its operating systems. Such a remedy would deprive Microsoft of what the court found was the real fruit of its illegal conduct: preventing PC's from having an alternative applications platform. Whether Microsoft's operating system monopoly would end would then be decided by market choice, not judicial fiat. The states could seek such a remedy with or without federal government consent, as could plaintiffs in private lawsuits, who may also seek billions in damages.

Even if a court-imposed penalty or settlement falls short of this remedy, the ruling's impact on Microsoft's basic business model will be substantial. Microsoft will no longer be able to require other participants in the PC market to favor its products over those of rivals. And the case will certainly affect Microsoft's plans to bundle instant messaging, video and music players, photo software, and other products into the new Windows XP.

Pursuing those plans will require proving that bundling creates a real technological benefit greater than any harm to the market. This case may not end efforts by Microsoft or others to take advantage of software's plasticity to hinder competition. But the court has now provided strong disincentives for engaging in such efforts. □

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