

The Many Flaws in the Case Against Microsoft

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Introduction

A federal appeals court in Washington D.C. will soon decide whether, as the federal government contends, Microsoft is an illegal monopoly. The court is reviewing the ruling of trial judge Thomas Penfield Jackson that Microsoft violated federal anti-trust laws. He has determined Microsoft should suffer the severest penalty possible: the break-up of the company.

In a companion Policy Note we point out a number of serious procedural errors that occurred during the trial that on their own should be enough to induce the appeals court to overturn Judge Jackson's ruling. Here we will examine the merits of the case itself and the claims that were made against Microsoft that prompted the government to pursue Microsoft in the first place. Our research finds that events since the case started show that the most dire predictions made about Microsoft's supposed dominance of the market are entirely unfounded.

What is striking about Judge Jackson's assertions, given in his Findings of Fact and Conclusions of Law, is how closely they parallel the charges made by the government. Even when specific accusations were refuted or given no support during the trial, the Judge still included them

in his Findings. In essence, he often says that when a specific allegation turned out to be inaccurate he included it anyway because, if true, it would be a serious violation of the law.

Such reasoning overlooks a simple principle of fairness. Regardless of how serious a legal charge might be, under our system of justice it is irrelevant unless proven in court.

The government accused Microsoft of holding a monopoly in Internet browser software, which then supposedly gave the company control over consumer access to the Internet. In court, though, the term "browser market" was defined so narrowly it excluded Internet-access technologies available through Java, Linux, Unix, Apple Mac, Palm and other software products that Microsoft does not control.

The government claimed that Microsoft's browser software, Internet Explorer, is not an integral part of the Windows operating system, as Microsoft claimed. But when a government technical witness attempted to remove Internet Explorer and still operate Windows, Microsoft's witness demonstrated that Internet Explorer was still integrated and that the two could not be separated. The government failed to prove that Internet Explorer could be divorced from Windows,

and was therefore being forced on unwilling customers.

The government declared Microsoft unfairly blocked competitors by controlling what appears on the opening screen of the Windows program. But other companies – like AOL, which holds a larger share of the market than Microsoft’s competing MSN product – have no trouble reaching new customers through any number of means, such as “carpet bombing” households with mailings of free Internet-access software.

The competing Netscape Internet browser is also free. It can be downloaded at no cost from the Internet, even if the operator’s computer is already using Microsoft’s browser.

No Harm to Consumers

Over the course of the trial the government was unable to show how Microsoft’s purported monopoly harmed consumers. All of the non-expert witnesses brought forward by the government represented Microsoft’s competitors. None of them represented aggrieved consumers.

A number of dire predictions were made by Microsoft opponents to encourage the government to take up the case. In the years the case has been underway, however, *none* of these gloomy prognostications has materialized, even though no legal restraints have been placed on the company. A brief review of these predictions and a comparison with reality shows the shaky ground on which the case was originally built.

The most prominent predictions made about Microsoft are listed below, along with a comparison of each with the actual outcome. The number after each

prediction indicates its source, which is listed on the last page.

- Prediction: Microsoft will cause half the newspapers in America to go out of business. (1)

Reality: It hasn’t happened. No newspaper has gone out of business because of Microsoft.

- Prediction: Microsoft will control on-line commerce and the Internet. (2)

Reality: No company controls the Internet, and the variety of content and sites available on the Web grows daily.

- Prediction: Microsoft will eliminate competition for computer servers. (3)

Reality: The server market remains robust as sales by competitors such as Linux and Sun Microsystems continue to grow.

- Prediction: Microsoft will collect a “vig” (fee) from every Internet transaction. (4)

Reality: This has not happened, and doesn’t seem likely to ever happen.

- Prediction: Microsoft will exert control over information on the Internet. (5)

Reality: The Internet remains the freest form of communication in the modern era. No entity controls what appears on the Internet. For example, criticism of Microsoft is a daily occurrence on the Web.

- Prediction: Microsoft will exert control over access to the Internet. (6)

Reality: Internet access remains entirely open and is expanding by thousands of users every day. Access to the Internet is beyond the control of Microsoft or any other company.

These predictions were made early on, but the dark portents about Microsoft products continue to this day, and they are proving to be equally inaccurate. A recent

one about Microsoft's new HailStorm initiative asserts:

- Prediction: Microsoft will use HailStorm to supplant the Internet with its own proprietary system. (7)

Reality: HailStorm, which is still in development, will allow computer users to gain access to Microsoft's Internet services through *any* operating system, whether it is a Microsoft product or not. The Internet will not be "supplanted."

The day-to-day experience of consumers shows that far from being a harmful monopoly, Microsoft has brought countless benefits to our economy, lower prices, a standard operating platform and quality products. The damage to the market predicted by Microsoft's competitors has not been proven by this trial.

Conclusion

What is striking about the government's anti-trust case is that it has sparked no mass consumer movement against Microsoft. On the contrary, consumers continue to demand Microsoft products in record numbers. The company is simply following the strategy that has always been the key to business success in America's free and dynamic economy: offer high-quality, reliable products that people want at prices they can afford.

It would be wrong to assume that the mistakes Judge Jackson made during the trial prevented the government from presenting an otherwise strong case. Instead, it was the Judge's errors that have allowed a fundamentally weak case to proceed as far as it has. None of the important legal claims brought by the government against Microsoft were proved. After a reasonable weighing of the case and how it was tried, the judges on the D.C. appeals court should find ample grounds for reversal.

Source notes for Predictions vs. Reality section:

1) "Microsoft has not gone into the newspaper business directly. However, it has set up a service called "Sidewalk," and what it's doing by that service is competing directly with the entertainment guide that daily newspapers publish for the weekend. The ad revenue that newspapers get from that is really what keeps many of them afloat. And Microsoft's plan is to siphon off that ad revenue. What's the consequence of that? We've been told by newspaper people that newspaper revenue will decrease 10 percent to 20 percent, and that that will be enough to put half the newspapers out of business." Gary Reback, "A Conversation with Gary Reback," *The National Law Journal*, February 1998, <http://www.ljx.com/reback/>.

2) "The company [Microsoft] is hard at work developing technology to dominate the multimedia and entertainment industries...The firms [Intel and Microsoft] that dominate the PC market -- the most important point of contact for consumers to the network -- might still be able to use their market power to achieve their goals of controlling on-line commerce and entertainment." Ed Black, President of CCIA, testimony before U.S. Senate Judiciary Committee, November 11, 1997, <http://www.ccianet.org/views/an1.htm>.

"The company will soon be in a position to close the open system upon which the Internet has flourished as a platform for new innovation. If Microsoft monopolizes the user interface for the Internet, it can bias the selection of content and services, which will create new opportunities for Microsoft to partner with various industry sectors, while rendering Internet commerce less competitive, thus harming

consumers.” Ralph Nader and Jamie Love, “What to do about Microsoft?,” *Le Monde Diplomatique*, November 1997, <http://www.monde-diplomatique.fr/en/1997/11/nader>.

3) “Unless competition authorities pursue balance in this market [NT] equally aggressively, Microsoft is on a course to eliminate competition in the enterprise markets as quickly as it did on the desktop,” Software Publishing Association, “Competition in the Network Market: The Network Challenge,” June 1998.

4) “This is a company whose strategy is to become a tollgate collector at every toll and a chokepoint at every juncture,” Ralph Nader, interviewed in *The New York Times*, December 21, 1997.

5) “Microsoft will likely be able to dominate the entire server network and exert tremendous power over all information transmission,” Gary Reback, white paper issued November 14, 1994, published in *Upside*, February 1995, <http://www.upside.com/taxis/mvm/story?id=34712c0e38>.

6) “By owning the entry points to the Internet and electronic marketplace, Microsoft has the power to exercise predatory and exclusionary control over the very means for people to access the Internet and all it represents. This is like GM having the power to dictate what type of gasoline you put in your car or what interstate you can drive on, and even controlling the on-ramps to get on the highway,” Scott McNealy, CEO, Sun Microsystems, testimony before U.S. Senate Judiciary Committee, March 3, 1998, <http://www.sun.com/980224/testimony/>.

7) “Microsoft would then be in a position of supplanting the Internet as we know it today with an Internet proprietary to Microsoft.” Mitchell Pettit, executive director of ProComp, a trade group made up exclusively of Microsoft’s competitors, in a white paper on the HailStorm initiative, issued March 2001.