

The Victory Around the Corner May be Farther than Microsoft Thinks

by Jon Garon

Back in the heady days of the e-commerce boom, a litany of private complaints by Sun, Netscape and others, compelled the United States Justice Department to file the current civil antitrust lawsuit in May 1998. Microsoft weathered the storm, overcoming Special Master and noted scholar Larry Lessig, respected Judge Thomas Penfield Jackson, the Clinton administration, and the attorneys general of nineteen states.

Despite finding violations of antitrust laws, Judge Jackson's order that the company be split into multiple companies was rejected, and by the time settlement talks with the Justice Department began in earnest, the collapse of the "new economy" and the attack on the World Trade Center in New York had so altered the social landscape that the threat of Microsoft had been replaced with reliance on Microsoft as an island of economic success in a sea of failure and uncertainty. The Justice Department and most states agreed to a settlement that addressed only the most superficial of Microsoft's anticompetitive practices. While acknowledging that the case was a settlement, Microsoft essentially declared victory, having won the lawsuit despite the ruling that it was violating the law in its ongoing business conduct.

But victory is not quite at hand for Microsoft. Massachusetts has appealed the ruling along with West Virginia. These two states have also sought repayment of attorneys' fees totaling at least \$2.3 million. These two states are no longer alone in their appeal. The Computer & Communications Industry Association and the Software and Information Industry Association have also announced their intention to appeal. The trade associations have been critical of Microsoft before and throughout the lengthy trial, complaining of predatory practices, unfair tactics in licensing negotiations, and other improper conduct.

Nor does the Justice Department lawsuit represent the only flank under which Microsoft is under legal attack. The European Union began an antitrust investigation similar to that pending in the U.S. The three-year-old investigation is expected to be concluded in early 2003, but the E.U. Competition Commissioner pointed out that the two investigations were factually distinct, so that both the outcome and the remedies could be very different.

A different European outcome is quite likely. The Justice Department suffered in its investigation because the initial allegations of the lawsuit stemmed from the browser wars Microsoft fought with rival Netscape. Microsoft made it technologically and financially difficult for computer manufacturers to bundle Netscape as the default computer browser on preloaded PCs. The evidence gathered throughout the course of the trial, however, suggested that the company used a variety of strong-arm tactics to pressure manufacturers to promote Microsoft products over rival brands, to delay the release of software code to rival developers, and to target companies and business segments with crippling business practices. Judge Jackson heard all this evidence, but little of it was part of the proof needed to show that Windows Explorer was illegally tied to the Windows operating software.

As a result, these actions were never properly before the court, so Judge Jackson exceeded his authority when he based his break-up order on this broader evidence of misconduct. While an aggressive Justice Department could have used this evidence to seek a comprehensive settlement, the Justice Department focused on terrorism and its own internal reorganization was no longer committed to taming Microsoft; only to settling the case.

The European Union has no such limitations. The E.U. investigation began after the evidence in the U.S. case had been presented, so it can reach more of the predatory conduct. Second, the E.U. has no incentive – and perhaps a strong disincentive – to try and protect Microsoft for economic reasons. Finally, in the uneasy political alliance between the U.S. and her Allies against terrorism, the E.U.’s focus on Microsoft may send a political message that the E.U. must be taken more seriously as a partner or retaliation will occur in economic as well as political spheres.

While it would be unfair to have Microsoft unfairly punished as part of a political maneuver by the E.U. against Bush Administration policy, it is equally troubling that the Justice Department reversed its course against Microsoft to satisfy its own political agenda.

For Microsoft, predatory practices remain the standard operating procedure and the courts are beginning to respond. In a suit by Sun Microsystems, a Maryland District Court found that “though pretending to embrace the goal of compatibility” between Windows and Sun’s Java applets, “Microsoft intentionally took various steps to defeat that goal.” In response to Microsoft’s illegal attempts to control Java and repeated breaches of the Sun licensing agreement, the court ordered Microsoft install the most current and most compatible form of Java on any Microsoft .Net product, including Windows XP.

The injunction by the court is a rather remarkable remedy. Recognizing Microsoft’s dominance with over 90 percent of the operating system market, the court created a “must-carry” rule harkening back to the rules requiring cable companies to carry local television signals. Sun’s preliminary victory is particularly important because anticompetitive practices like these tend to stifle innovation, frustrate the entrepreneurial recovery needed for the economy and slow growth. When a company remains an industry leader by strangling its competition, the public suffers nearly as much as the competitors.

The innovative solution proposed by Sun and adopted by the court opens a new chapter in the judicial management of Microsoft. Unlike the Justice Department, the Maryland court understands that a delay in shipment of operating Java code is likely to drive Java out of the market even if Sun ultimately wins. Of course, the ruling will be vigorously attacked by Microsoft, which has shown exceptional resilience in its legal battles and remarkable success in appellate court.

Still, the euphoria at Microsoft over its victory over the Justice Department may have been premature. The appeal of that case, while not likely to succeed, may keep the pressure on the company. Combined with a harsh ruling by the E.U. and continued pressure from Sun, the end to Microsoft’s legal troubles may be just around the corner, but that corner is far ahead, at the end of a long, long road.

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