

MICROSOFT ON APPEAL: “MONOPOLIES” IN A COMPLEX SOCIETY

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EXECUTIVE SUMMARY

In issuing his *U.S. v. Microsoft* ruling last year, Judge Thomas Penfield Jackson was called upon to examine the interrelationship between America’s antitrust laws and the essential commercial prerequisite for accepted standards in the ongoing information revolution. By failing to accept that he was dealing with an entirely different economic paradigm and trying to apply old labels to new businesses, Judge Jackson went badly off track in his ruling.

Judge Jackson held that Microsoft maintained a monopoly in the narrowly defined market of Intel-powered personal computers, and that their conduct aimed at keeping such market share was anti-competitive. That Microsoft dominates the operating system market for PCs does not by itself make them a monopolist in the legal sense. Such an achievement came after a fair, consumer-driven competition over which computer operating system would become the standard. The setting of such a standard in the software and computer industries is essential to innovation and consumers’ ease of use. What the judge refused to consider is that because of the speed of development in these industries, Microsoft’s “monopoly” is a momentary one at best. The company is far from impervious to competitive pressure, an integral aspect of illegal monopolies.

The District Court’s opinion was also off base in concluding that Microsoft’s monopoly maintenance conduct was illegal. The judge’s conclusion that Microsoft’s integration of its Internet Explorer browser with Windows 98 was illegal “tying” is contrary to appellate court precedent and common sense. The products are distinct and at any rate, consumers benefit, not suffer, from such an innovation. The other conduct found to be anti-competitive, such as foregoing short-term profits, restricting OEMs from competition to protect intellectual property rights, and concluding cross-marketing deals, have been upheld as legal at various times by the U.S. Supreme Court. Also, the judge failed to conclusively show that this allegedly illegal conduct foreclosed competition or injured consumers.

The nature of the software industry and the existence of Windows as a pro-competitive computer standard also dictate that the court’s breakup order would be quite counterproductive. Splitting Microsoft into two entities would impair and distort the industry standard which emerged from purely competitive forces, and substitute an artificial and inefficient model which was tested and rejected by the company and others. Because market forces created one Microsoft, Judge Jackson’s decree can never be the remedy which best returns the market to a competitive state of equilibrium. It is essential that any doubt in the remedies process be resolved against a breakup when anything less might suffice.