Forum

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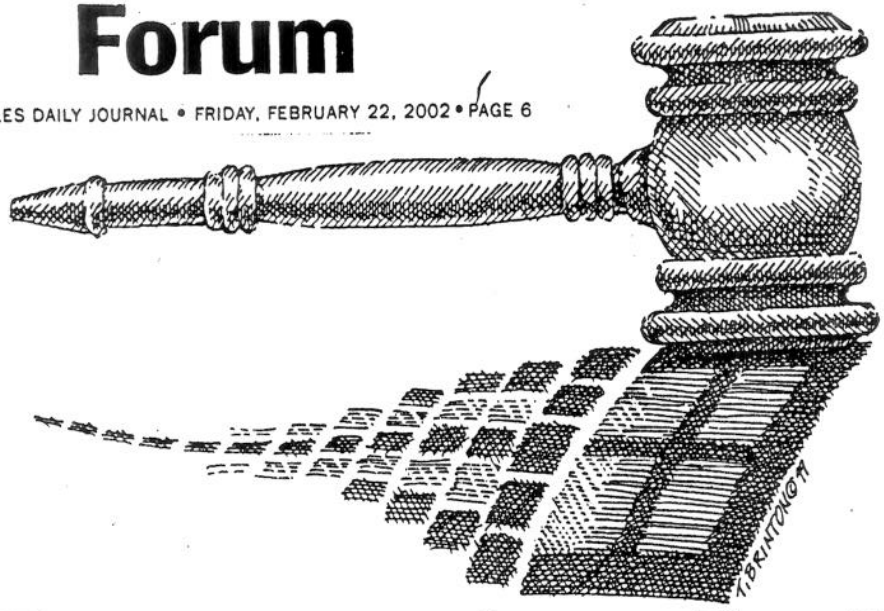

Hammering It Out

Microsoft's Monopoly Requires a Bold Structural or Licensing Remedy

By Jeffrey I. Shinder

An effective remedy in a monopolization case should accomplish three objectives: terminate the illegal monopoly, deny the defendant the fruits of its illegal conduct and prevent the defendant from engaging in future acts of monopolization. *United States v. United Shoe Machinery Corp.*, 391 U.S. 244 (1968).

Yet after the U.S. Circuit Court of Appeals for the District of Columbia condemned Microsoft's monopoly (*United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001)), the Justice Department put its name on a settlement that achieves none of these goals. And the more stringent remedies proposed by the nine states who refused to settle, while an improvement, will not jump-start competition.

It is easier to criticize the numerous loopholes and flaws in the proposed settlement than it is to offer a better alternative. Any remedy that would terminate Microsoft's monopoly raises a host of difficult issues. Can viable long-term competition in operating systems be created? Would the benefits of such competition be outweighed by the costs of "fragmenting" the operating-system standard? Would the benefits be short-lived because the market inevitably will "tip" and create a new monopoly platform? And, if "tipping" is inevitable, is the operating system a natural monopoly that the government should regulate?

While these questions raise difficult issues, several alternative remedies promise to introduce real competition into the market. One option would be to force Microsoft to comply with industry standards that it does not control. This "must carry" provision could require Microsoft to distribute the Sun-compliant Java Virtual Machine and other competing middleware products, including browsers, media players and e-mail software.

The states endorsed a limited version of this approach when they proposed that Microsoft should be required to distribute a "competitively performing" version of Sun's Java technology for 10 years.

While an improvement over the Justice Department's meager remedies, the states' must-carry remedy is incomplete. Microsoft's new Windows XP comes with Microsoft's instant messaging and media player products tied to the operating system. Competitive products, such as Apple's QuickTime media player (since Microsoft presumably would use proprietary standards, as well), and whether it would cause delays in the introduction of new technology.

The final issue pertains to the remedy's ultimate effectiveness; since Microsoft would retain its monopoly and control over standards, it still could disadvantage competitors while purporting to give them "competitive performance." Given these concerns, licensing or structural remedies that would jump-start competition in the operating-system market appear to be a better way to go.

For example, the court could order a one-time auction for fully paid-up licenses to Microsoft's operating systems and key applications like Microsoft Office to create immediate competition in the operating-system market. Licensees would have the right to modify, resell and sublicense the intellectual property. This approach would create a competitive market without dismembering Microsoft.

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This virtue, however, could prove to be a major flaw. The source code is long and complex, and Microsoft easily could undermine the remedy by providing incomplete documentation to interpret the data. Licensees probably would need access to Microsoft's programmers, who would be unwilling to help them. While licensees could be given the opportunity to hire Microsoft employees, the question remains whether the licensees could attract them quickly enough to become viable competitors.

If these issues prove too difficult, various forms of structural relief could provide effective alternatives. The District Court should not resurrect the remedy ordered by Judge Thomas Penfield Jackson — splitting Microsoft into separate operating-system and applications companies. That approach left the operating-system monopoly intact and created the possibility that separate monopolists at the applications and operating-system levels actually would raise prices to consumers.

A better alternative would be to split every incentive to remain interoperable in order to satisfy consumers and applications developers. Since they would be starting from the same base code, maintaining compatibility will not be difficult.

Moreover, one should not accept at face value the argument that divergence in operating systems is necessarily harmful to consumers. What some criticize as "fragmentation" should more accurately be described as the type of "product differentiation" that we expect from our market economy. The antitrust laws have long disfavored arguments that competition is too messy or costly. *National Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679 (1978). There is no reason to abandon this bedrock principle in this context.

Even if the District Court is convinced that a more stringent remedy is necessary, the question remains whether it can order such relief at this stage in the proceedings. The court will be reviewing the proposed settlement under the Tunney Act, 15 U.S.C. Section 16(B)(h), which provides procedures for consent decrees with antitrust defendants. Under this statute, the District Court must conduct a hearing to determine whether the proposed settlement is in the "public interest."

Under the "public interest" standard, the District Court must enter the Justice Department's proposed decree "even if it falls short of the remedy the court would impose on its own, as long as it falls within the range of acceptability." *United States v. AT&T*, 552 F. Supp. 131 (D. D.C. 1982), aff'd sub nom., *Maryland v. United States*, 460 U.S. 1001 (1983). The court cannot reject this decree simply because other remedies may be preferable. *United States v. Microsoft Corp.*, 56 F.3d 1448 (D.C. Cir. 1995).

One could argue that this case is factually distinguishable from the leading Tunney Act cases because there has been a full trial and appellate court review. While this distinction arguably justifies a more rigorous Tunney Act review, the District Court likely will refrain from elevating its judgment over the Justice Department's.

However, the District Court will be under no such restriction when it considers the states' proposed remedies. There, the court should follow long-standing Supreme Court precedent, which holds that in monopolization cases, courts have wide latitude to devise relief and an "inescapable responsibility" to achieve the three goals of an effective remedy for monopo-