A Remedy that Falls Short of Restoring Competition

BY TIMOTHY F. BRESNAHAN

THE *MICROSOFT* LITIGATION WAS A contest between two theories. The government plaintiffs successfully proved to the district court and a unanimous appeals court sitting en banc that Microsoft illegally prevented the widespread distribution of new technologies that would have substantially lowered the entry barriers into its Windows monopoly.[1] The courts rejected Microsoft's alternative theory that entry barriers are always low in the operating systems market and that its actions were merely competing hard.

But the government's victory has not been reflected in the proposed settlement reached among the company, the Justice Department, and half the states.[2] An effective remedy for an antitrust violation must flow from, and address, the theory of the case that prevailed. But this settlement fails at its most basic task: It does not lower the entry barriers that protect the Windows monopoly, as it needs to in order to vindicate what the government successfully demonstrated in court. Although the agreement makes some effort to prevent future violations, it is riddled with exceptions that will make it ineffective—in no small part because the logic of the exceptions embodies the losing defendant's theory of the case.

This comment will explain the theory of the case the government won, and show why the settlement falls far short of providing a remedy proportionate to that case.

Protecting a Monopoly by Keeping Entry Barriers High

The threat to Microsoft's operating system monopoly came from the introduction and widespread use of innovative complements to it, such as Netscape's Internet browser and Sun's Java architecture. For those who are not familiar with the personal computer industry or this case, it may be surprising to see complements—not substitutes—identified as a competitive threat. Shouldn't a firm with a successful operating system product, such as Microsoft's Windows, welcome the development of applications programs? After all, the more and better the applications—including word processing, spreadsheets, games, and, yes, the Internet browser—the greater the demand for operating systems.

For the most part, that simple analysis is indeed correct. But every so often in the history of the computer industry, a dramatically new and innovative complementary product comes along to drive the buyer's choice of other components, making the original monopoly much less important and making it easier for substitute products to enter and compete.[3] At one time, for example, the design and construction of the personal computer was dominated by the "IBM PC." But IBM's monopoly power in the computer itself dissipated as users came instead to regard the Microsoft operating system and Intel chip as the key features on which to base purchases, allowing rival computer equipment manufactures like Compaq, Dell, and Gateway to achieve success. As the personal computer design and assembly business has become competitive; the computer itself has gone from an effective monopoly to merely a commodity.

Direct competition through the development of innovative substitutes has often not been successful in the computer industry because network effects are so strong. Network effects, or demand-side scale economies, arise when the value of a product to a user goes up with the number of *other users* of the same product. The network effects benefit Microsoft's operating system product today because software developers prefer to write applications programs for the dominant operating system (Windows), and computer users prefer to buy an operating system that has a wide range of familiar applications programs (again Windows). With strong network effects, it is hard for the seller of a substitute operating system to dislodge the dominant firm, even with a technically superior product.

But the development of a spectacularly innovative complementary product—the kind of development that has taken place perhaps once a decade in the computer industry—can lower entry barriers into the monopolized market and create an opening for substitutes to make inroads and competition to emerge. This possibility worried Microsoft's senior management in 1995. They judged that the creation of Netscape's Internet browser and Sun's Java architecture would lower entry barriers into their Windows monopoly. They feared that the browser and Java would take the computing world by storm, gaining many users and many technical collaborators, and becoming more important to the buyer's choice of a computer than the operating system. Microsoft's Bill Gates, in a memorandum introduced at trial, expressed alarm at the "scary" prospect of competition from "something far less expensive than a PC which is powerful enough for Web browsing" and the fear that an independent browser would set standards and thereby "commoditize the underlying operating system."[4] Indeed, Gates analyzed the "Internet Tidal Wave" as the most important change in the

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industry since the introduction of the IBM PC fourteen years earlier.[5] Dozens of other internal Microsoft documents reached similar conclusions.[6]

In response to this diagnosis, Microsoft engaged in an anticompetitive campaign to halt the erosion of the entry barriers that protect Windows. The innovators, Netscape and Sun, had a window of vulnerability while they attracted users, distribution partners, and collaborators. Microsoft seized that moment to engage in the pattern of exclusionary conduct, in violation of the antitrust laws, detailed by the court of appeals.[7] In short, the government prevailed in the *Microsoft* litigation by showing that entry barriers in the operating system market are high, that entry barriers would have fallen had the Internet entrepreneurs succeeded, and that entry barriers did not fall because of Microsoft's anticompetitive campaign. We do not know whether lower entry barriers would have led to the competitive outcome that Microsoft feared, because Microsoft's success in keeping entry barriers high prevented a market test of Windows against alternatives. But we can be confident that absent Microsoft's antitrust violations, entry barriers into the operating systems market would now be far lower.

The Proposed Settlement Fails to Lower Entry Barriers

Microsoft's antitrust violations prevented a rare opportunity for creating operating systems competition. Absent those violations, Netscape's Internet browser would today be the standard software for browsing the Web.[8] As a result, entry barriers protecting Microsoft's operating system monopoly would be far lower than they are today. Conditions for distributing new competitively threatening technologies, such as Sun's Java, would be far better. Instead of waiting for the kind of dramatic complementary innovation that arrives once in a decade to create the possibility of operating systems competition, Microsoft could be facing genuine competitive threats to its operating system monopoly today. Unfortunately, the proposed settlement does not attempt to lower entry barriers into operating systems, allowing innovative substitutes to gain traction against Windows, and thus restoring these lost competitive opportunities.

But all is not lost. Linux and the World Wide Web still can provide the kind of alternative to Windows that Microsoft feared, if barriers to entry are lowered today. Consumers could have the choice of something more secure and cheaper than Windows like Linux, or something offering innovative kinds of networked or mobile applications on the Web.[9] Ideally, lower barriers would be accomplished through the wide distribution on personal computers of a technologically active networking product sold by a firm other than Microsoft, thus restoring the market structure that would have evolved absent the violations. But it is too late to merely require Microsoft to spin off its browser,[10] and with the change in administrations, the Justice Department has chosen no longer to seek what it once properly advocated: to have Microsoft spin off its Office Suite, the closest analogue to the browser reasonably available. With this possibility taken off the table, any remedy must look to less effective and less immediate forms of relief.

Some of the provisions of the proposed settlement can be understood as aimed at lowering the entry barriers protecting Microsoft's operating system monopoly. One such feature is the right granted to original equipment manufacturers (OEMs) to ship operating systems other than Windows.[11] If effective, it would be valuable to the tiny minority of consumers who already want Linux. But it fails to respond to the high entry barriers in this market associated with applications development committed to Windows, and so will be ineffective at facilitating the growth of a serious alternative to Windows.

Another feature of the settlement that seeks to restore competitive conditions requires the disclosure by Microsoft of some "protocols" by which the monopoly operating system communicates with other computers.[12] The competitive logic here is similar to that of the case won at trial: applications running on other computers and divided applications will be easier to develop and use if protocols are documented and open. This might someday lower entry barriers. However, the requirement that Microsoft document its Windows-centric protocols is far less procompetitive than if another firm, such as Netscape or Sun (or the newly created applications company in the divestiture ordered by Judge Jackson), advances software which communicates using its own protocols, the same ones whether it is running on Windows or on something else.

Unfortunately, the version of protocol documentation in the proposed settlement then adds exceptions that render it toothless and unenforceable. Only protocols communicating with "server operating system products"—a term not defined in the settlement—are covered. Microsoft can plausibly argue now, and easily argue in a year's time, that this exempts the main mechanisms by which the browser communicates with Web servers.[13] The settlement overbroadly exempts the most competitively important protocols such as security, authentication, and identity protocols.[14] It exempts computers that are not servers, and other devices such as handhelds, though Microsoft's future anticompetitive plans include barring entry by software running on those.[15]

Even worse, two of the protocol documentation and middleware distribution exemptions in the proposed decree leave Microsoft with the untrammeled ability to further raise entry barriers according to plans it has already announced publicly. While new independent middleware generally gets the opportunity to interact with Windows on the same informational basis as Microsoft middleware, one provision exempts middleware "invoked solely for use in interoperating with a server maintained by Microsoft (outside the context of general Web browsing)."[16] The other weakens enforcement for key security, identity, and authentication technologies. Together, these exemptions will permit

Microsoft, via its Windows Update and Passport technologies and their descendants, to make it even more difficult than it is today for individual consumers to switch away from Windows to a competitive operating system. Consumers will enter data into their computer over a period of time and then find that if they wish to switch to an operating system other than Windows, they cannot read or recover their own data. As the beneficiary of substantial network effects, Microsoft's Windows operating system is already protected against all but the most significant competitive threats. If Microsoft adds a new entry barrier built around individual-user switching costs, even a competitive event as powerful as the Internet Tidal Wave will be insufficient to lower entry barriers and permit new competition.

Finally, one potentially attractive feature of documenting communications protocols is that they might offer the district court a well-defined point of enforcement, the point at which the client personal computer connects to the network. If the current documentation requirement were beefed up to cover all communications between the monoploy operating system (plus software bundled with it) and any Microsoft software running on other devices, it would be far easier to enforce. All communications through the single point would be covered (with a narrow exception so that customers' security would not be compromised). Violations would be crystal clear and compliance and enforcement would be far easier than under the exception-laden version in the current settlement, which covers only server operating systems protocols. This provision confines the settlement to the competitive equivalent of a rear view mirror, since we do not know from what direction new competitive threats will come.

The Settlement Leaves Future Innovations Vulnerable

The proposed settlement also seeks to prevent exclusionary practices that would inhibit new entrepreneurial innovations that might lower Windows entry barriers—as the Internet innovations would have, absent Microsoft's past exclusionary conduct. For these settlement provisions to succeed, they must permit a new innovator who fundamentally surprises Microsoft (as the Internet entrepreneurs did) to quickly gain free-market levels of consumer choice and unencumbered technical and marketing collaboration. An entrepreneur's eye view of the settlement shows it falls far short of that standard.[17]

Consider an entrepreneur with important network oriented middleware technology. "Important," so Microsoft has a powerful incentive to violate the law to prevent its widespread distribution. "Network oriented," so the entrepreneur needs most of the rights provided by the settlement in order to escape anticompetitive interference and offer her innovations to consumers. Precisely these procompetitive features of the entrepreneur's technology will bring her into close contact with the settlement's exceptions.

To take advantage of their rights under the settlement, such an entrepreneur and her technical and marketing collaborators will be forced to follow Microsoft's preferences in technology and organization. Ironically, the settlement's details embody the losing defendant's theory of the case and compel innovators to conform to defendant's uncompetitive theory of the industry.

For example, under the settlement, the entrepreneur may need to demonstrate that her business is genuine according to standards *set by Microsoft* in procedures that could lead to revelation of her business plan to Microsoft.[18] Under the settlement, she may be required to license some of her intellectual property *to Microsoft*.[19] Stealth strategies are denied, for the entrepreneur can gain some rights only by exposing applications programming interfaces, thus revealing her competitive intentions to Microsoft.[20] She may have to pay money *to Microsoft* for the privilege of interoperating with Windows.[21]

The entrepreneur must move quickly if she is to matter competitively, but the settlement imposes delays. The entrepreneur will begin to gain some of the settlement rights only after a year of widespread distribution of her product.[22] She will be entitled to information about how this new product can interact with Windows only after Microsoft has imitated the innovation.[23] Indeed, Microsoft controls much of the timing of that information release through its own (typically slow) product release schedule.[24] If there is a programming interface, widely used by applications developers, that is also used by the innovative technology, Microsoft may change it and deny the entrepreneur information until Microsoft's own version of the product uses it (if ever).[25]

Moreover, the settlement enables Microsoft, the imitator, to force the innovative entrepreneur to imitate the Microsoft imitation itself. If Microsoft uses its own proprietary technologies (like "host a particular ActiveX control") in its version of the middleware, the entrepreneur is compelled to follow them, for otherwise she loses rights under the decree.[26] This is far from trivial competitively, as many Microsoft software products are bloated with features and not very secure. Thus the entrepreneur may not, if she wishes to preserve these rights under the decree, compete by offering simpler or more secure versions of her own invention. She must conform to Microsoft's technical desires.

If the entrepreneur's product has a user interface it must be "of similar size and shape" to the one in the Microsoft imitation.[27] Thus, if Microsoft imitates but changes size or shape, the innovator is compelled, if she wishes to use her rights, to conform to Microsoft's view rather than to persist in the innovation. If Microsoft moves the boundary between its middleware and the operating system, for example by putting some longstanding OS functionality in the middleware, the entrepreneur must match it (and, by the way, Microsoft gets a multiyear head start just to move the functionality the entrepreneur must invent).[28] This forces the entrepreneur into matching any feature of the existing Microsoft operating system, including ones protected by patent, at Microsoft's whim,[29] by mechanisms found illegal in this case.[30]

The Internet world offers the possibility of specialized organization of innovation in contrast to monolithic Microsoft. If, however, the entrepreneur collaborates with or participates in the open source world—recently escalated by Microsoft to being *the* competitive threat—the entrepreneur loses many of her rights under the settlement.[31] She cannot work with the best available specialized collaborators if she wishes to take advantage of the settlement's entry-facilitating features.

These anticompetitive features of the settlement will prove to be a scandalous tax on innovation. They will restrict substantially the potential competition that innovative middleware entrepreneurs might bring, by slowing innovators and compelling them to be Microsoft-like. They will, in short, make it easier to defend the monopoly that the government's case sought to subject to a market test.

Enforcement of the Proposed Settlement Is Weak

The proposed settlement further weakens its otherwise worthy procompetitive goals with complex technical and business strategy exceptions. This architecture, and the choice of enforcement mechanisms, will lead to a series of practical enforcement problems by offering Microsoft opportunities for significant delay. After all, the key to lowering entry barriers with an innovative software product is to get momentum going *fast*. New products need rapid, widespread distribution and to quickly secure technical and marketing collaborators. Any delay in enforcement undermines the settlement's procompetitive effect.

If the entrepreneur or her collaborators believe there has been a violation of the settlement, will they get a quick resolution? Complaints are initially funneled to a technical committee, which is likely to generate considerable delay. The technical committee has some useful investigative powers. It is compelled, however, to meet with Microsoft to give it an opportunity to respond to the substance of the complaints.[32] After informal, consensual dispute resolution fails—and the situation's anticompetitive incentives ensure it will—then the entrepreneur or its collaborators may at long last turn to the government and request enforcement. The government then decides, with input from the technical committee, whether to bring an enforcement action. In the unlikely event that the technical committee, staffed by non-attorneys, has gathered all the right information in the right form for court, an enforcement action follows; otherwise there is more delay.

Along with slowness comes complexity. If a complaint ultimately is lodged with a court, that court must decide whether a violation of the decree with its complex exceptions has occurred. The technical committee's "work product, findings, or recommendations" are not directly admissible, and technical committee members may not testify.[33] Thus, plaintiffs must attempt to try complex technical matters, well understood by Microsoft, in a proceeding in which they must now recruit new technical experts.

This is the second point at which the exceptions architecture is problematic. Microsoft's executives and attorneys will have the advantage of superior knowledge of the technical details, and the firm will have every incentive to delay resolution and to confuse complex technical issues.

Moreover, Microsoft's past record, in the prior consent decree action and in the antitrust trial, does not inspire confidence that the firm will avoid opportunities to delay and confuse here. Microsoft argues that it won its earlier consent decree case on appeal and thus should not be labeled a recidivist.[34] This is wrong in two ways. First, Microsoft "complied" with a court order in the consent decree case by commingling software code from its browser and the operating system so that a PC without the Microsoft browser would not start. This commingling itself has now been found to be a violation of the antitrust laws on appeal.[35] Second, we now know that Microsoft adopted an extreme view of the order, one that it knew would be viewed as willful noncompliance by the court and the world.[36] That is far from what it represented at the time, that its outrageous "complying" was the way an engineer would read the order.[37]

In response, Microsoft argues that there was a "show trial" on liability, and that unhappy experiences for its witnesses on cross examination were exaggerated into an antitrust case.[38] Now it has lost the antitrust case, and how the witnesses testified is relevant to enforcement of the settlement. Here are a few examples (from among the less technical). One executive disavowed an e-mail he wrote, calling it a draft that was never sent. Yet it came from the files of a recipient.[39] Another disavowed an unambiguous e-mail from Bill Gates, claiming it wasn't clear what "support" meant when he was directed not to support a Java technology.[40] Mr. Gates, in his deposition, said he had "no sense of what Netscape was doing" at the time he wrote the Internet Tidal Wave memo and a series of e-mails directing negotiations with Netscape.[41] These and other examples drawn from the trial argue strongly against the exception-based architecture of the settlement. To be effective where Microsoft is concerned, the settlement must be clear, unambiguous, and substantial.

Conclusion

The economic consequences of the proposed settlement will be with us for decades. As it stands, it does not restore opportunities for competitive choice already lost to the American consumer. Its efforts to lower entry barriers and permit consumer choice in the operating system market going forward are paltry, especially when compared to what would be the case today if there had been no violations. It specifically exempts Microsoft's announced plans that would harm competition by *raising* entry barriers. Use of the settlement's provisions compels entrants to wait for Microsoft, turning hares into tortoises, and to conform to Microsoft's technological and organizational preferences, turning entrepreneurial innovators into constrained, monolithic imitators. Market forces and innovation would have brought substantially more competition than will arise under this settlement. ■

[1] See United States v. Microsoft Corp., 87 F. Supp.2d 30 (D.D.C. 2000), *aff'd in part, denied in part*, 253 F.3d 34 (D.C. Cir. 2001) (affirming in part—Windows monopoly maintenance under section 2 of the Sherman act; denying in part—attempted monopolization of the browser market; and remanding in part—tying under section 1 of the Sherman Act).

[2] See Stipulation and Revised Final Judgment (Settlement), *available at* http://www.usdoj.gov/atr/cases/f9400/9495.htm; and the associated Competitive Impact Statement, *available at* http://www.usdoj.gov/atr/cases/f9500/9549.htm.

[3] I have elsewhere discussed at length the process by which "specialization"—the supply of widely used complementary technologies by different firms (such as Microsoft and Intel today)—supports competition through innovation in complementary products. See especially *The Right Remedy* and *The Economics of the* Microsoft *Case* at http://www.stanford.edu/~tbres/.

[4] The quotes are both from government exhibit (GX) 20, "The Internet Tidal Wave," 5/26/95, Gates's memo to "Executive Staff and direct reports."

[5] *Id.* Since the founding of the personal computer industry in the mid 1970s, the three events important enough to induce many competitive changes are the introduction of the IBM PC, the transition from DOS to Windows, and the widespread use of the Internet.

[6] For example, Ben Slivka's "nightmare scenario" in his memo, "The Web Is the Next Platform," was that Windows would be "surpassed." What is a nightmare to a monopolist? Competition and loss of monopoly. Slivka writes that "the Web is a platform that no one controls and everyone can enhance" and how Windows would be commoditized by the Web becoming "operating system neutral." GX 1016. *See generally* Plaintiff's Revised Proposed Findings of Fact § III, and the district court's Findings of Fact § IV.

[7] See 253 F.3d at § II.B. While the appeals court found that the pattern is not separately illegal above and beyond the individual acts, this does not remove the fact of the pattern of illegal acts. *See id.* at 59 ("we reverse its conclusion that Microsoft's course of conduct *separately* violates section 2") (emphasis added).

[8] *See, e.g.*, Competitive Impact Statement at B.3.a.

[9] If the industry evolves on its current path, however, we shall have to wait for Microsoft to finally introduce its own version of "The Web Is the Next Platform," about a decade after competitors would have, and without benefit of competition or customer choice.

[10] While a viable business in the late 1990s, an independent browser firm would now face real challenges to survive.

[11] Settlement III.A.

[12] Settlement III.E.

[13] See Settlement III.E and definition B. At the moment, Internet Information Server is part of what Microsoft calls operating systems, but Microsoft controls the definitions going forward (definition U.)

[14] Settlement III.J.1. This paragraph was somewhat improved when some of the states joined the settlement but remains overbroad by not limiting its exception to the security of "installations" making use of the security protocols and potentially letting Microsoft evade legitimate, secure, disclosure requirements.

[15] See Settlement III.E and definition B. For threats from handhelds and anticompetitive plans against them, see Remedy Exhibits 1, 2.

[16] Settlement III.H.1.

[17] I take this perspective not because such firms deserve protection from Microsoft, but because Microsoft's past acts blocked such firms in order to protect its monopoly. Only if such firms have the opportunity to be chosen by consumers based on the merits of their products will competition be protected from recurrence of the anticompetitive acts.

[18] Settlement III.J.2 (c).

[19] Settlement III.I.5.

[20] Settlement, definition N.

[21] Settlement III.E. The prices Microsoft may compel from firms it finds competitively threatening must be nondiscriminatory—among outsiders, not between Microsoft and outsiders—and "reasonable," whatever that turns out to mean in practice.

[22] Settlement, definition N.

[23] Settlement III.D.

[24] Settlement III.D.

[25] Settlement III.D conditions disclosure on Microsoft Middleware and limits disclosure to interfaces to the operating system used by that Middleware. Other interfaces need never be disclosed.

[26] Settlement III.H.2 removes the parity treatment of Microsoft and non-Microsoft middleware established under III.H in this contingency.

[27] Settlement III.C.2

[28] Disclosure dates will be determined by Microsoft's shipping the middleware version under Settlement III.D.

[29] See *supra* note 25, and also definition U, which leaves definition of an operating system to Microsoft's "sole discretion."

[30] In my example, the mechanism is commingling of code.

[31] Settlement III.J.

[32] In addition to delay, this step reveals to Microsoft information that the entrepreneurs and collaborators may well wish to keep secret. Under more ordinary circumstances, it would be revealed in open court only if an enforcement action was initiated.

[33] Settlement IV.D.4.d.

[34] See Defendant Microsoft Corporation's Summary Response to Plaintiffs' Proposed Final Judgment.

[35] See Microsoft, 253 F.3d 34, 40 (D.C. Cir. 2001). In the consent decree case, *United States v. Microsoft Corp.*, 147 F.3d 935 (D.C. Cir. 1998), the appeals court noted the lack of an evidentiary hearing, which we have now had, and cautioned that enforcement should be consistent with antitrust law more broadly (see, *e.g.*, *id.* at 36, where it notes the absence of a government theory, much less a showing, that the tie harmed competition), which the same court now finds it was.

[36] See, *e.g.*, DAVID BANK, BREAKING WINDOWS 118–122 (2001).

[37] See Transcript of 01/14/1998 hearing in the consent decree case. The court: "It seemed absolutely clear to you that I entered an order that required that you distribute a product that would not work . . . That's what you're telling me?" Microsoft executive: "In plain English, yes. I followed an order. It wasn't my place to consider the consequences of it."

[38] See Ken Auletta, *Hard Core*, NEW YORKER, Aug. 16, 1999 (quoting an e-mail sent to him by Mr. Gates: "a show trial with the primary goal of embarrassing us every day, rather than focusing on the facts of their damaged case. In same ways, when we started this trial, we were a little old fashioned—we believed the real trial was in the courtroom.").

[39] See trial transcript of 2/22/1999 a.m., "Q. And is this what it appears to be, sir—an e-mail that was actually sent on May 15, 1995 at 12:48 a.m.? A. Oh, no. Oh, no, not at all . . ." Later: "Q. So what you're saying is that where it says "sent Monday, May 15, 1995 at 12:48 a.m.," that really doesn't mean that it was ever sent? That's your testimony? A. It doesn't necessarily mean that it was ever sent. When you save something, the sent date gets filled in." After examining a letter from Microsoft's attorneys showing that the email came from the files of recipient Ben Slivka: "Yes, at the very least I sent it to Mr. Slivka." Transcript 2/22/1999 p.m.

[40] Compare GX 253 Gates: "I am hard core about NOT supporting JDK 1.2" (a Java technology from Sun), *with* Transcript 02/26/1999: "exactly what Bill meant by the word 'support' isn't really clear."

[41] See transcript of videotaped deposition as played in court on 11/02/1998. Compare GX 20 (Gates "Internet Tidal Wave" discussed above, Netscape a "new competitor") GX 22 (Gates to Maritz and others "I think there is a very powerful deal of some kind we can do with Netscape . . . . I would really like to see something like this happen!!" GX 25, 27 (Reports of Netscape meeting to Gates.) GX 537 (attendees at meeting dispute whether Netscape accepted Microsoft offer and Gates, who did not attend, correctly resolves dispute.) Compare also GX 22 (Gates: "We could even pay them money as part of the deal buying some piece of them or something") with Gates deposition "somebody said to me that—asked if it made sense for us to consider investing in Netscape, and I said that that didn't make sense to me" (also played 11/02/1998).

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