From: Harlan Wilkerson
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Date: 1/28/02 7:02pm
Subject: Proposed Settlement (with corrections)

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I feel that adoption of the proposed settlement is not in the public interest.

The Appeals Court ordered the District Court to craft a remedy that would "'unfetter [the] market from anticompetitive conduct,' to 'terminate the illegal monopoly, deny to the defendant the fruits of its statutory violation, and ensure that there remain no practices likely to result in monopolization in the future.'"

Windows has gained it's market position not by consumer demand, but by Microsoft's almost total control of production. In the past, Microsoft has used exclusive OEM licensing and marketing incentives to pass along the so-called "Microsoft tax" to every PC consumer. Most of the top 20 OEMs simply don't offer PC systems without the Windows operating system pre-installed. Microsoft has urged (and rewarded) the OEMs to "just say no" to buyers who request a so called "naked PC" (a PC with no pre-installed software). This is ironic since the OEM's associated support costs should actually be reduced. The OEMs that do offer alternatives to Microsoft's Windows charge essentially the same price for non-Windows models.This is true even for those with pre-installied versions of absolutely free operating systems e.g. Linux, or the BSDs. These operating systems can be freely downloaded and installed on all of a consumers PCs without any licensing fee whatsoever. Consumers who have opted to install these free operating systems (on their own) are usually frustrated in any attempt to obtain refunds from the OEMs for their unused Windows licenses. This despite provisions for a refund from the OEM that are contained in the Microsoft Windows EULA. It's no accident that consumers can't determine the fair price of a PC under these circumstances. This was highlighted during the trial by a grass roots movement that culminated in a "Windows Refund Day". Consumers who purchase Microsoft Windows through an OEM usually have no standing in class action suits brought against Microsoft.
Nothing in the proposed settlement prohibits Microsoft from continuing to offer OEMs existing forms of advertising or marketing incentives (on an equitable basis) to include Windows on every machine, or to decline to sell "naked PCs". We currently are in the worst economic recession in at least a decade. It's doubtful that some of todays OEMs will even survive. Nonetheless, many of these same "equipment manufacturers" won't sell their equipment at any price without pre-installed software from Microsoft. This is hardly the behavior of an unfettered market. Microsoft should be required to post the costs of it's OEM products on a public web site, and they should be precluded from offerring any incentives to OEMs to curtail the sales of "naked PCs".

To paraphrase the Appeals Court by the time this case is resolved the facts will be ancient history, but the effects of the illegal acts will have caused harm nonetheless. The proposed remedy does nothing to "deny to the defendant the fruits of its statutory violation". Microsoft staunchly denies any wrong doing in it's public statements, retains billions in capital, and isn't even held liable for the people's costs in prosecuting the case.

In crafting a remedy that terminates the illegal monopoly or eliminates practices likely to result in monopolization in the future it is important that hearings be held to investigate how we got here in the first place. The Federal Trade Commission and DOJ took up Microsoft's trade practices involving OEM per-machine-licensing of MSDOS. During this case a private antitrust suit was brought against Microsoft by Caldera. That suit was settled but provided no relief for the millions of consumers who purchased Digital Research's Disk Operating System. Digital publicly complained that they had sufferred from Microsoft's anticompetitive per-machine-licensing scheme and were wrongly excluded from the Windows 3.1 beta testing program - even though they were participants in beta testing earlier versions of Windows. Digital's Operating system didn't compete with Windows, but did compete with MSDOS. At the time these were separate Microsoft retail products. The respected magazine and online publication Dr Dobbs Journal revealed that

the Windows 3.1 beta contained code that was only useful for detecting Digital Research DOS. This code gave the user error messages or simply halted a users machine whenever Digital Research DOS was detected. Windows version 4 and MSDOS version 7 were eventually bundled into Windows 95 which carried exclusive OEM license agreements that didn't permit OEMs to use or dual boot other operating systems like Digital's DOS. For example, some Hitachi PCs had a hidden copy of the BeOS that consumers could only discover and activate using instructions on Hitachi's web site. Digital, Hitachi and BeOS have since exited the PC OEM and PC Operating system business. For it's part the DOJ has complained publicly that Microsoft violated the first consent agreement. The practice of monopolies denying companies that compete in any software category timely access to APIs, and the practice of bundling separate retail products for anticompetitive reasons, and/or using exclusive licensing agreements to harm competitors is a common and recurring theme. The judge was correct in denying Microsoft's request to limit the scope of the remedies without an evidentiary hearing, and the DOJ was premature in dropping their case in-main on product bundling. Microsoft is engaged in world-wide trade and the DOJ and European antitrust regulators seem uncoordinated and out of step. The European regulators have taken up complaints that Microsoft has withheld access to Windows server software API's that are necessary for interoperability with other network operating systems, and the bundling of Windows Media Player in Windows XP. Microsoft is not so quietly announcing it's plans for a single Internet logon authentication service it's calling ".NET". The stated objective of this initiative is to leverage the Windows monoply in order to create a new (Internet) monopoly. While these practices may or may not be lawful, it's doubtful that all of the practices likely to result in monopolization in the future have been eliminated without a single hearing on the issues here in our courts.

Most non-Microsoft operating systems provide a boot manager that allows consumers to use several operating systems. In fact, Microsoft includes a boot manager that allows consumers to use multiple (older) versions of Windows e.g. Windows 2000 and Windows 98. The act of installing a Microsoft operating system doesn't invalidate a consumers licenses for a competitors products. Yet installing (or reinstalling) Microsoft Windows will always result in a consumers other operating systems becoming inaccessible. This is anticompetitive behavior. Microsoft should be required to automatically add other operating systems to it's boot manager in the same manner that it adds it's own products.

The DOJ and Microsoft appear to have forgotten that this case is about Personal Computers if a consumer shops for a PC, and makes a purchase based on the software selection, it makes no sense to provide Microsoft the arbitrary right within fourteen days (or some other later date) to delete icons or programs and substitute their own because they have judged the competitors product lacking in some quality or state they deem essential.

Microsoft has stated that their power to innovate or bundle applications into Windows XP is essential to the economic recovery of the PC industry. The PC OEMs have testified that there is no viable alternative to Windows. In the past year alone private business LANs and Internet companies have suffered billions of dollars in damages caused by trojan or virus programs that specifically targeted Windows PCs. The Executive and Legislative branches of the Federal Government have recognized the Internet as a vital piece of our national and international infrastructure. They have established agencies tasked with it's protection. Indeed one reason for pursuing the proposed settlement after September 11 was "the national interest". It's hard to understand why much of Microsoft's ill gotten monopoly shouldn't be considered an essential public facility. Certainly consumers have a right to migrate their own itellectual property out of proprietary Microsoft file formats. Microsoft should be required to publish the file format information needed for other applications to interoperate with files created by MS Office. This is certainly the case with regard to Apple

Computer users who have already been threatened with the cancellation of the Apple version of MS Office.

In conclusion, the court combined the individual State and DOJ cases. A settlement that doesn't include half the plaintiffs is at best not a settlement.

Sincerely,
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