

Microsoft Gets an Undeserved Break

By Einer Elhauge

At the heart of the recent court decision in the Microsoft antitrust lawsuit is a simple, yet complicated question. Is Windows 95, an operating system, a separate product from the company's Internet browser?

Microsoft contends that it can sell Windows 95 and the browser together as one integrated product and that they are unavailable separately on the market. Thus, Microsoft claims it has not violated the antitrust consent decree it signed with Justice Department in 1995.

The Justice Department contends that although Microsoft is selling the browser and the operating system as one product, they are, in fact, two products. Thus, Microsoft is violating the consent decree by forcing anyone who buys Windows to buy the browser as well.

A Federal appeals court ruled last week that Microsoft was right. But the decision was incorrect. The court relied heavily on a legal standard I proposed in what is called the Areeda treatise, a leading antitrust law book. While I am gratified that the court used my standard to decide what constitutes one product, I must point out that these able judges misinterpreted that test.

In the treatise, I proposed a meth-

od to determine whether a company is trying to evade antitrust rules by selling two products as an integrated unit. The plaintiffs must show that the products could feasibly be separated and that some buyers would want to purchase them in their separated form.

But even then, the defendants can rebut the finding by using any of six rationales to prove that the items nonetheless constitute a single product.

One of these rationales is that the

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two items have been integrated to form a new product. To prove this, the defendant must show that the items operate better when combined by the seller than when bought separately and combined by the buyer.

For example, Microsoft could not prove that the Windows operating system and, say, a Microsoft mouse are one integrated product. Windows may work better with a Microsoft mouse than with any other brand of mouse. But Windows and a Microsoft mouse are not one product because a consumer who buys them separately

gets the same "synergy" as one who buys them as a package. In its decision, the court said it explicitly adopted this legal standard.

So far, so good. But the court went astray in identifying who was combining Windows 95 and Internet Explorer. Did Microsoft combine the programs when it manufactured them — in which case it is one product? Or did the buyers combine the programs when installing them onto computers from different disks — in which case they are two distinct products?

The court decided that Microsoft combined Windows 95 and Internet Explorer, because the programs were designed to work better together than they would separately. But if that were true, then Windows 95 and the mouse would also be one product, because they were designed to work better together than separately.

The court came to its conclusion for a very sensible reason. It could think of no other way to explain how Windows 95, if it were distributed on three separate diskettes for installation by the buyer, would be a single product. Surely, disks 1, 2 and 3 would not then be separate products simply because buyers load each disk individually.

What the court forgot was the threshold rule to judge what constitutes one product: the plaintiff must first show that some buyers would actually want the items in their separated form. There are no buyers who want disk 3 of Windows 95 alone because it is useless without the other disks. But surely, there are buyers who would want to buy Windows 95

independently from Internet Explorer.

Therefore, the court should have ruled that Windows 95 and Internet Explorer are separate products. It is obviously feasible to separate them on different diskettes, each of which have independent value — since that is what Microsoft actually did. How can Microsoft claim that they work better when combined by Microsoft than when combined by buyers. Microsoft's main buyers, computer manufacturers, actually did combine them from separate disks.

What all this means for the pending Windows 98 lawsuit remains to be seen, for it involves different technology and it doesn't involve interpretation of the 1995 consent decree. In that lawsuit, or indeed in further appeals in this case, the courts will have an opportunity to revisit the question of what constitutes one product. Then they will be able to adopt not only the correct test, but the correct interpretation of that test. □

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