

CEI ON POINT

The Competitive Enterprise Institute

1001 Connecticut Avenue NW • Suite 1250 • Washington, D.C. 20036 • (202) 331-1010 • <http://www.cei.org>

Committed to Advancing the Principles of Free Enterprise and Limited Government

August 13, 1999

No. 47

Microsoft Trial: The Heat is On

By Jonathan Zuck¹

This summer, the heat is on Judge Thomas Penfield Jackson even more than the rest of us, as action on the Microsoft case resumes. The Department of Justice (DOJ) and Microsoft file proposed “findings of fact” with Judge Jackson, the first step in what promises to be a long decision-making process.

These filings run to hundreds of pages, but one thing is clear: The evidence before Judge Jackson portrays an intensely competitive industry, but he’s seen no evidence of harm to consumers.

This should come as no surprise. This case started when a few Microsoft rivals cried for relief, and the concerns of consumers have never been a consideration. Lawyers at DOJ are deeply entrenched in an epic power struggle, with the ultimate goal of bringing Microsoft to its knees. Out here in the real world, however, the questions of consumer welfare can’t be ignored so easily:

- An independent industry survey shows that executives overwhelmingly oppose (63%) the breakup of Microsoft.²
- A CNN/Gallup/USA Today survey shows that 45% of consumers side with Microsoft versus 28% for the Justice Department.³

Despite lack of any showing of consumer harm, the debate on potential “remedies” is already in full swing – with the DOJ reportedly contemplating a break-up of Microsoft. There are, however, several considerations that have thus far been conspicuously absent from the remedies debate:

Is there any legal basis or precedent for breaking up Microsoft? An extreme measure such as breaking up Microsoft would be a highly unusual antitrust remedy. More important, splitting Microsoft would likely lead to the kind of long-term judicial oversight that plagued our

¹ Jonathan Zuck is president of the Association for Competitive Technology (ACT), an association representing businesses and professionals in the information technology industry (<http://www.ACTonline.org>).

² Poll of Information Technology Industry Executives, conducted 1/11-1/27/99 by Mason-Dixon Political/Media Research Inc.; surveyed 408 computer and software industry executives and managers, (<http://www.actonline.org/pubs/polls/itpoll.asp>)

³ CNN/Gallup/USA Today poll, conducted 2/8-2/9/99; surveyed 1,054 adults; margin of error +/- 3% (released 2/22), National Journal (members-only site) (<http://www.cloakroom.com/members/polltrack/todays/1999/hp99023.htm#CNN/GALLUP/USATODAY>).

telecommunications industry for 12 years after the break-up of AT&T.⁴ For instance, a split between operating systems and applications would lead to ongoing judicial regulation about the kinds of software allowed in each company.

How would a breakup change the rules for business competition? A breakup sends a new message to business: If you compete too successfully, you may be victim of radical antitrust surgery performed at the behest of your rivals. This will increase the risks that businesses take when investing to build better products that might increase your market share at the expense of your competitors. More risk means less investing, less R&D, and less growth in the industry that our secretary of commerce calls “the engine for economic growth in the next century.”⁵

How will the breakup of Microsoft Windows harm the industry and consumers? Breaking up Windows would “balkanize” an operating system standard that has been the overwhelming choice of businesses and consumers for their desktop computers. One recent economic analysis estimated a \$30 billion increase in software costs if Microsoft Windows is split among multiple companies.⁶

What’s the balance of costs versus benefits in breaking up Microsoft? For any remedies being considered, the DOJ should remember the costs that will be incurred by businesses, consumers, and the industry. Furthermore, these costs have to be balanced by the presumed benefit of “restoring competition” to one of our most competitive industries. Moreover, no weight should be given to the benefits that would be enjoyed only by the four Microsoft competitors who brought this case upon us.

Are competition, innovation, and change making Windows obsolete? Some industry experts already predict a decline for Microsoft Windows because the Internet has so changed the industry landscape. Market trends are pointing away from the PC desktop and toward Internet appliances, television set-top boxes, hand-held devices, and alternative PC platforms.

We’re still waiting to hear about these kinds of economic and legal considerations in the Microsoft case. Let’s hope that Judge Jackson will soon bring relief, and that cooler weather will help cooler heads to prevail.

⁴ Association for Competitive Technology (ACT) and Sidley & Austin, Breakup and Compulsory Licensing: Remedies or Bad Medicine, Feb. 18, 1999.

⁵ William M. Daley, “The Emerging Digital Economy II” U.S. Department of Commerce, June 1999, (<http://www.commerce.gov/ede/ede2.pdf>).

⁶ Stan Liebowitz, “Breaking Windows: Estimating the Cost of Breaking up Microsoft Windows, April 30, 1999. (http://www.actonline.org/pubs/econ_study.asp).