

Microsoft feels the pressure

The heat is on the technology giant as it attempts to overturn the U.S. antitrust case which threatens to force it to unbundle products from its Windows operating system

On May 18, the U.S. Department of Justice (DOJ) expanded its case against Microsoft, filing a complaint against the company's plans to bundle its Internet browser with Windows 98. At the same time, 20 states filed a similar complaint but with additional allegations relating to Microsoft Office and other Windows applications. Microsoft can feel the heat being turned up.

The DOJ's approach against Microsoft has been reasoned and limited but vigorous all the same. It is not seeking to restructure Microsoft rather to attack its bundling of separate products with its Windows operating system. Under U.S. antitrust laws, bundling two separate products is illegal where it allows the holder of a monopoly to maintain its monopoly and to extend its monopoly power from one product market to another. The Internet browser product is the most obvious and compelling case for court scrutiny because of the shift in relative market shares following Microsoft's bundling and the potential of browsers as a threat to the dominance of Windows operating systems. The DOJ views Internet browsers as the linchpin to greater competition and innovation in the software industry and has focused its efforts on Microsoft's browser strategy. In addition to bundling, the DOJ alleges Microsoft has used its monopoly position to reach agreements with Internet Service Providers and Internet content suppliers to restrict access from competitive browsers. If the DOJ succeeds in the current case, Microsoft may be similarly prevented from bundling other products or software with its operating system and unfairly driving competitors out of the market.

The recent complaints follow failed negotiations between Microsoft and the states and the DOJ on the unbundling of Internet Explorer from Windows 98. While Microsoft is still subject to the December 1997 preliminary injunction that requires the removal of Internet Explorer from Windows 95, an appeals court recently found that the December 1997 injunction did not apply to Windows 98.

Prior to the filing by the states and the DOJ, Microsoft launched a lobbying campaign claiming that a delay in the release of Windows 98 will hurt the U.S. economy. Microsoft recruited several software vendors and computer retailers in its lobbying attempts to forestall an enforcement action. Companies claim they have invested millions of dollars in marketing and development in conjunction with the launch of Windows 98. Bill Gates, chairman of Microsoft, adopted a pointedly patriotic tone in his Manhattan news conference. "Any government actions that would delay or derail Windows 98 would hurt the American economy and cost American jobs," Gates said. "It would also create an opening for foreign companies to move into a position of leadership in an industry that has been a strong exporter for America." The claims were curious given that most of the competitors to benefit directly from the DOJ's actions are American firms.

The conduct of the case has muted Microsoft's exaggerated economic impact arguments because the DOJ had not sought an injunction to prevent shipment of Windows 98 in June. Rather the states and the DOJ seek a preliminary injunction ordering Microsoft either to unbundle its browser from Windows 98 or to include Netscape in the same position from the time the injunction is issued. The urgency to act prior to the release of Windows 98 is not in evidence in the DOJ motions. But it is interested in a speedy resolution to prevent a merry-go-round of filings that try to keep pace with new software releases or upgrades. The court has set a September 8 trial date. This will allow OEMs to pre-install Windows 98 for shipment of computers in time for the back-to-school and Christmas seasons, with the potential for a Windows 98 without Internet Explorer, if the DOJ action succeeds.

It is interesting to note that all of the three major DOJ antitrust cases in the past 30 years have dealt with complex technology issues (AT&T, IBM and Microsoft). The current litigation is not as yet on the same scale and scope of the DOJ's past attempts against large technology-driven firms such as IBM and AT&T but marks a return to active antitrust enforcement. In 1980, the IBM case was closed, after years of discovery and litigation, when the Reagan administration scaled back antitrust enforcement actions considerably. The DOJ prosecution of AT&T led to the break-up of the Ma Bell telephone system, and the burgeoning of the telecommunications equipment and supply market in the US. With one win and one draw under its belt, the Antitrust Division hopes to improve on that record by taking on Microsoft one product at a time.

Maura Bollinger