Microsoft appeal against break-up, claiming judge was biased

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US software giant Microsoft filed a 150-page brief with a court of appeals this week, in an attempt to halt a planned break-up of the company.

The written arguments were presented before the US Court of Appeals for the District of Columbia Circuit on November 27, in the latest stage of the long-running legal battle between the company and government anti-trust bodies.

Microsoft is appealing the decision by Judge Thomas Penfield Jackson, who ruled on June 7 that the company should be broken into two entities. Jackson had ruled that a new company should be formed containing the *Office* suit of business software together with the web-browser *Internet Explorer*. The operating system itself would remain separate.

Much of the Microsoft brief is a reiteration of their stance during the initial trial. The company maintains that it does not have a monopoly, that it did nothing to subvert competing technologies and that the existence of Microsoft has been of benefit to the consumer. It says, "to sanction Microsoft for improving its products and promoting and distributing them vigorously—as the district did—would stifle innovation and chill competition, contrary to the purposes of the anti-trust laws," the brief argues.

What is new, compared with their previous briefs, is a vitriolic attack on Judge Jackson and the way in which the hearings were conducted.

Microsoft argues that the judge over-stepped his remit and allowed the case to grow in the telling. "The proceedings below went badly awry from the outset. When this case was filed in May 1998, then Assistant Attorney General Joel Klein said that the DOJ [Department of Justice] had embarked on a ‘surgical strike', challenging Microsoft's inclusion of Web browsing software in Windows... Over the next two years, however, the district court permitted plaintiffs to transform their case beyond recognition. As a result, what began as an attack on Microsoft's addition of Internet technologies to Windows ended with an unprecedented order breaking up the company—a completely unjustified outcome that no one could have imagined at the outset.”

Microsoft condemns the judge's "extensive public comments about the merits of the case", which they say, "epitomize his disregard for proper procedure." Microsoft cites a report by "Two *New York Times* reporters, who liberally quoted the district judge in a recently-published book, disclosed that he granted them interviews 'during the trial on the condition that his comments not be used until the case left his courtroom.'" The brief complains "These 'friendly, informal and unstructured' discussions were described as 'a rare audience with a sitting judge during the course of a trial.'"

Microsoft conclude that, "The district judge's public comments would lead a reasonable observer to question his impartiality and—together with other procedural irregularities—the fairness of the entire proceedings."

The company refers to Judge Jackson's insistence on a speedy resolution of the case and his rulings against allowing extra time or witnesses for Microsoft. They portray Jackson as a man inherently biased against Microsoft. Such arguments are difficult to explain when one considers Judge Jackson's political biography. He was appointed by the Reagan administration and is a staunch Republican. He has insisted that the break-up ruling arose from Microsoft's own intransigence and could have been avoided if only the company were willing to meet the Justice Department part way.

Far from pursuing a course of compromise, however,

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Microsoft is intent on a confrontation. The company will have been heartened by the Supreme Court's rejection of a direct appeal in October, believing that the district appeals court offered more favourable territory.

Arguments will be heard in the appeals case in late February. The Justice Department, 18 States and the District of Columbia, are expected to file a joint reply on January 12, just eight days before the inauguration of the new president.

Throughout the case against Microsoft, the final outcome has been bound up with political considerations. Microsoft recognised this prior to the Presidential elections, throwing large sums of money at both campaigns. While Vice President Gore indicated he would continue with the anti-trust case upon becoming President, George W. Bush indicated that he would not have supported a break-up proposal.

Some legal experts believe Bush would not go so far as to drop the case altogether, instead favouring a compromise. It may well be that Microsoft is ruling out any compromise in the belief that they can get Judge Jackson's verdict overturned in full. Whatever the stand of Bush, there are those within the Republican right who would support such a stance.

In identifying the right wing forces lining up behind Microsoft, it would be wrong to consider the actions of the Justice Department under Clinton to be motivated by progressive considerations. The case against Microsoft was never about an opposition to monopoly as such and certainly not about protecting the rights of the consumer.

The conflict between the Justice Department and Microsoft is a reflection of deep-going differences within the ruling elite as to how best to maintain America's leading position in the world market of information technology and global communications.

Behind the actions of the Clinton administration is a growing concern that the unrivalled dominance of Microsoft acts as a barrier to the technological innovation required to meet up to the emergence of the Internet and the new business sectors which it is giving rise to—particular e-commerce.

While rejecting any compromise in the anti-trust case, Microsoft has today made the Internet central to its operations—developing a new operating system that will open up the possibility of applications being stored on servers connected to the Internet rather than on the user's desktop computer. In doing so, Microsoft has concentrated on developing a proprietary system that serves to undermine one of the great benefits of the Internet—its open platform for developers.

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