

The Microsoft lawsuit: Appeals court ruling favours company

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The US Court of Appeals for the District of Columbia has overturned the ruling of Judge Thomas Penfield Jackson that Microsoft should be broken-up. The judges severely criticised Judge Jackson's conduct and removed him from future hearings in the case.

In a ruling that presented itself as all things to all men, however, the panel of all seven eligible judges upheld most of Judge Jackson's arguments and referred the case back to the lower court.

The court upheld Judge Jackson's findings that Microsoft acted illegally in bundling the Internet Explorer web browser with the Windows operating system and that this was part of a series of illegal acts to protect its monopoly. Also upheld was the finding that Microsoft took illegal steps to protect its monopoly in dealings with companies such as Netscape Communications (now part of AOL Time Warner), Apple Computer, Intel and Sun Microsystems.

The judges ruled that Microsoft acted illegally in making its version of the Java programming language incompatible with others, thus subverting the attempts of Sun Microsystems to develop a cross platform programming environment.

"Microsoft's conduct related to its Java developer tools served to protect its monopoly of the operating system in a manner not attributable either to the superiority of the operating system or to the acumen of its makers, and therefore was anticompetitive," the court ruled. "Unsurprisingly, Microsoft offers no pro-competitive explanation for its campaign to deceive developers," the judges added.

The court agreed with Judge Jackson's finding that Microsoft's exclusive contracts with Internet Access Providers (ISPs) violated the Sherman Antitrust Act, as did the threat to withhold a version of Microsoft Office from Apple unless the latter cut an exclusive deal to use

the Microsoft browser.

"This exclusive deal between Microsoft and Apple has a substantial effect upon the distribution of rival browsers," the court found.

In removing Judge Jackson from the case the court said that disqualification is never taken lightly but was required in light of his interviews with reporters while the case was pending. The court noted that the case is still pending and did not end with Judge Jackson's break-up ruling. Even more serious from a legal standpoint was Judge Jackson's refusal to allow hearings on evidence about the break up plan before making his ruling, saying there was "no serious doubt that the parties disputed a number of facts during the remedies phase."

Judge Jackson's removal was not the only concession to Microsoft made by the judges. While not accepting Microsoft's argument that it should be allowed to bundle products, the appeals court did set a new standard for product design that went against original findings. In the past, courts have ruled that any separate product tied to a monopoly product was illegal. This was the standard used by Judge Jackson in earlier hearings of the Microsoft case. But the standard set by the appeals court last week says that product-tying is illegal *only if the possible harm to competition outweighs the benefit to consumers*, a much more difficult issue to prove.

Though the option is still there for the lower court to reissue the break-up order, this seems less likely for a number of reasons.

First among these is the change in government. Though there has not been a strict party divide on the issue of the Microsoft lawsuit—Judge Jackson himself is a Reaganite Republican—it was generally assumed that the company would get a more favourable response

from a Bush presidency. So true was this that Bill Gates' company gave \$2.5 million in support of the Republican campaign.

The White House say the president is reserving comment until after the Justice Department have worked through the ruling, but his views on the issue are no secret. Bush spokesman Ari Fleischer said the president "believes there's too much litigation in our society, generally speaking."

It is hoped that in the half-way-house decision of the appeals court—removing Judge Jackson and quashing his break-up order while upholding the finding that the company acted illegally—enough ground can be found for compromise and an out of court settlement reached.

The second factor in Microsoft's favour is the enormous weight of the company within the US economy. The case has had a hugely negative impact upon Microsoft shares, which has in turn been a significant factor in wiping out the value of high-tech stocks. The appeals court decision was greeted enthusiastically on the stock markets, as the company's shares reached a high of \$76.15 before closing at \$72.74, a 2.25 percent increase.

Finally, since the beginning of proceedings against the company 11 years ago, a lot has changed. An unspoken aspect of the case against Microsoft was the belief of the Clinton government that in the interests of protecting its monopoly in the market of desktop computers, Microsoft was stifling innovation and opening the way to US competitors in Japan and Europe.

It is not mere coincidence that the break-up order was issued at precisely the point where technology was shifting away from the desktop, towards a myriad of mobile devices that demand innovation and flexibility. Of great concern was the failure of Microsoft to recognise these changes and the delayed reaction of the company to the emergence of the Internet as a mass medium.

In the period since Judge Jackson's ruling, Microsoft has shifted its strategy more directly towards the Internet. Its so-called .Net strategy takes the company away from its traditional reliance upon the desktop and into the increasingly competitive market of Internet servers. Central to the new strategy are the concept of business applications such as the *Microsoft Word* word processors and other components of the *Microsoft*

Office being hosted on remote servers and accessed over high-speed networks. The main advantage of this is that mobile workers will be able to access one work environment wherever they are. The softening of approach within a section of the political establishment could well be tied to a belief that, through recent strategy changes, Microsoft (and thereby the US) is set to lead the way in the next wave of the technological revolution.

Nevertheless any decision on the part of the Bush administration to either drop the case outright, or reach a settlement short of a break-up is fraught with problems. Any such settlement would require the agreement of the government's fellow plaintiffs, 19 states and the District of Columbia, though two of these were opposed to the break-up proposal issued by Judge Jackson.

The States have expressed concerns that Microsoft is laughing at the government and repeating the same violations of law that prompted the initial antitrust investigations. Microsoft's new operating system, Windows XP, not only includes the Explorer browser but instant messaging and the Windows Media Player.

Even if the States can be convinced of a settlement, the way is still open for future lawsuits by Microsoft's rivals such as AOL and Time Warner and video streaming company RealNetworks, thus promising further instability among high-tech stocks.



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