SETTLING FOR MORE

BY ALAN REYNOLDS

Antitrust works like any other regulatory bureaucracy. Business interests lobby to thwart their rivals. Key members of congressional committees shake down predators and prey for campaign contributions. And ambitious bureaucratic mandarins have an incentive to fabricate high-profile cases, because publicity opens the revolving door to high-paying positions in the affected industries.

From this perspective, it was only natural that the Department of Justice press release about October's Microsoft settlement began by touting the benefits bestowed on *other* politically influential high-tech companies. The deal is described as creating "opportunity for independent software vendors" and "giving computer manufacturers the flexibility to contract with [such] software developers." Regardless of whether the new mandates and regulations are good or bad, they are clearly profitable for some key players. Computer makers, for example, are invited to solicit fees for turning the Windows start-up screen into a billboard for software and Web site icons.

The key provisions of the deal, however, have to do with allowing computer makers to promote "non-Microsoft middleware," even a whole new "non-Microsoft operating system," while preventing Microsoft from, say, retaliating against those companies by charging them a punitive price. In addition, a three-man Technical Committee in Redmond will ensure that outside producers of such software have access to as much Windows code as they need to make their products fully competitive—and compatible—with Microsoft's.

The issue is not entirely settled, of course, because there is still the possibility of antitrust action by state attorneys general, private companies and the European Union. European authorities managed to scuttle the GE-Honeywell merger, and claim to worry that Microsoft's modest share of the server software market is somehow unfair to the dominant UNIX producers. They have also expressed "level playing field" concerns about Internet audio and video "streaming" software, though here the Technical Committee offers an obvious way out. But the EU has also leaked threats of fat fines, perhaps because fines mean you don't have to actually identify any specifically illicit behavior in need of being fixed.

Predictably, there have been gripes from half of the 18 state attorneys general who had been party to the original suit—particularly Democrats with higher political ambitions and generally those from states that are home to major Microsoft competitors. Some want all required changes to occur almost instantly, which would be a good way to paralyze what is left of the computer industry. Others claim to see loopholes in a provision preserving secrecy for code the Technical Committee believes could compromise security and anti-privacy measures. *USA Today* reported that some fear one provision "could make it tough for Justice or the states to sue Microsoft for tying separate products to Windows." But Justice has already dropped the "tying" charge as a sure loser. What little remains of the issue is legally complex, technologically challenged, and not expandable from Netscape's browser—the original focus of the suit—to all "middleware."

BROAD BOUND

Although critics claim the agreement is "too narrow," it is actually much broader than the trial itself. The DOJ has gone overboard, claiming the deal would "restore competition in the software market." But this case was never about the software market. As the Appeals Court observed, the government's case relied "almost exclusively on Microsoft's varied efforts to unseat Netscape Navigator as the preeminent Internet browser."

The DOJ is now trying to say the case was really about much more than just browser software, and boasts in its press release of using "a broad definition of middleware products which is wide ranging and will cover all the technologies that have the potential to be middleware threats to Microsoft's system monopoly. It includes browsers, e-mail clients, media players, instant messaging software, and future middleware development."

How could instant messaging from AOL or Yahoo ever become a threat to the Windows operating system? What "potential" does RealPlayer or QuickTime have to replace Windows, or to render us indifferent between Windows, Mac, Palm or Solaris systems? Such "threats" are not "nascent"—they're fanciful. The only conceivable purpose of expanding the "remedies" to cover software in which Microsoft is not even the leading provider—instant messaging and media players—is simply to appease Microsoft's most rabid critics (in those cases, AOL and RealPlayer respectively).

In late September, for example, the Consumer Federation of America released a report accusing Microsoft of "leveraging its illegally preserved monopolies in operating systems, the browser and office applications." Yet Microsoft was explicitly absolved by the Appeals Court of even attempting to monopolize browsers. And Microsoft was never accused of monopolizing office applications—high market share only proves popularity, not monopoly. Besides, there is no crime called "leveraging."

The word "bundle" appears as often as "leveraging," as though it were inherently anti-competitive to sell word processors with spread sheets, radios with cars, or knife blades with handles. But the government's post-appeal complaints are *not* about tying, and *cannot* be applied to every Windows feature that some competitor prefers to see excluded. In fact, the software business naturally gravitates toward marketing larger and better bundles, for two reasons: the fixed costs of research are high, while the marginal cost of adding more features is negligible; and persuading software users to upgrade gets harder and harder as older versions get better and better.

The CFA went on to claim that Microsoft's new Windows XP and .NET services constitute "a bundle of products and services designed to extend its monopoly to . . . communications, such as e-mail and instant messaging...calendars and contact lists...media players and digital photography, and even Internet services themselves (e.g., MSN)." Now, for Microsoft to monopolize e-mail, instant messaging and Internet services would at least require doing away with AOL-Time Warner—scarcely an imminent threat. To monopolize media players would require that the eighth version of Media Player somehow accomplish what the previous seven did not–namely, vanquishing the dominant RealPlayer, and once again extinguishing it's biggest customer, AOL. The notion that any single database could monopolize "transac-

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tions records," much less online calendars and address books, is pure paranoia.

None of that is getting in the way of three other self-styled consumer groups. The Media Access Project—of "fairness doctrine" infamy—and Ralph Nader's Public Interest Research Group have signed on to the crusade, as did the respectable Consumers Union. Their strategy seems to be to try to spread the shrunken post-Appeal antitrust blanket over issues that have nothing to do with any topic mentioned at trial—.NET, Passport, "the entire 'Windows' family," including markets where Windows has a relatively puny share, such as servers, workstations, network computers and handhelds. Fortunately, even antitrust law, vague as it is, has to abide by a few rules.

MIDDLEWARE SCI FI

How an accusation of unlawful monopoly in "Intel-based" operating systems came to be defined in terms of any and all sorts of "middleware" is a fascinating tale of technological fantasy.

In 1995, when this case was born, Microsoft had two entirely proper worries: that Netscape's dominant browser would continue to steer most surfing to and through Netscape's portal, at the expense of Microsoft online content and services; and that Netscape's opening screen would blanket the Windows desktop, and thus "commoditize" elegant features designed to promote upgrades. What they were concerned about was that Netscape might remain the dominant platform of the *Internet*, not a platform for desktop applications.

There is nothing in the trial record to suggest any Microsoft executive ever imagined that Netscape's browser could possibly be a direct threat to Windows. The Internet itself was the threat, because many functions that once required PC software—calendars, tax preparation—are now available online. Web sites are largely indifferent to their users' operating systems. The Internet was the threat to Microsoft, and in 1995 Netscape held the best key to it.

Antitrust officials concocted a far more exotic theory. Had Microsoft simply left Netscape's near-monopoly unchallenged, the DOJ argued, then software developers might have written the same sorts of applications for Netscape's browser that are available for Windows, Mac and UNIX. Leaving aside the irony of trustbusters encouraging a monopolist, this theory was never much more than science fiction. The Appeals Court could not avoid noticing that "neither Netscape [nor] Java . . . [could] serve as a platform for popular applications, much less take over all operating system functions." Yet speculation about invisible applications on impossible platforms is nonetheless how Netscape's *failure* to maintain monopoly in browsers has come to be defined instead as Microsoft's *success* in maintaining monopoly in operating systems.

This is the flimsy rationale for the new DOJ agreement's "broad definition of middleware products." In order to write an application for Windows, non-Microsoft software developers need access to the required application programming interfaces, APIs in the jargon. Once such a program is written for two or three operating systems, then it could theoretically become a "platform" on which still other applications might be written. In other words, if somebody other than AOL wrote applications to run on AOL's instant messaging software, then those apps would likewise run on all operating systems that AOL supports.

The original DOJ fantasy about middleware competition with Windows was always implausible, even when confined to Netscape's browser. But the idea becomes truly absurd when stretched to include things like media players and instant messaging. No software developers are about to design any significant application that depends on Apple or AOL's proprietary middleware, and they would be promptly hauled into court if they even tried it.

When it came to explaining how applications might be written to run on the Netscape browser, the only examples Judge Jackson could come up with were Web sites themselves and "applications that run in association with Web pages" (apparently meaning Java applets). Even defining websites as applications did not solve the mystery, however. Because Microsoft's browser can view websites and applets just as well as Netscape's. So we are still left wondering how Netscape's middleware—rather than the Internet itself—could possibly have been a unique threat to Windows.

Why can't the DOJ name even one example of real-world software that poses a "nascent threat to the Windows operating system"? The standard answer is that today's middleware does not yet expose enough APIs, which is supposed to make us believe that reality is merely a temporary setback for this high-tech, low-logic theory. But the entire source code of Netscape's browser is now open source, and you just can't "expose" more APIs than that. The problem is not that middleware such as browsers and media players fail to expose "enough" APIs, but that they fail to expose the *right* APIs to make any complex application interact properly with complex computer hardware. Browsers compete with browsers, and media players with media players, but only operating systems compete with operating systems.

Many Windows issues involve the endless contest over who gets to put which icons on the Windows start-up screen or the browser's bookmarks. This should be something settled by contracts, but it has become something settled by antitrust politics. Everyone involved with the Internet has always tried to steer traffic their way. AOL's Keywords take you to CNN, but certainly not to Microsoft's MSNBC. Clicking "travel" or "auto" on any AOL or Netscape page takes you to AOL's partners, not Expedia or CarPoint. Internet commerce is a hectic bazaar; nobody—not AOL, and certainly not Microsoft—has any chance of dominating it.

Consumer groups and competitors such as Oracle Corp. and Sun Microsystems claim that Windows XP hides a clever plot to take over all instant messaging or media players. The fact is that Microsoft has never faced a trial on these issues, much less been proven guilty. In fact, the Appeals Court, in their own words, "drastically altered [reduced] the scope of Microsoft's liability." To extend what remains of the dubious complaint about Internet Explorer to newer Windows features would require arguing that, say, RealPlayer or AOL's instant messenger could somehow "serve as a platform for popular applications" and thus compete with Windows itself. Not even the godfather of the DOJ's original 1998 complaint, Joel Klein, could stretch creative technological futurism quite that far.

Interested parties at home and abroad have lobbied hard to expand the Microsoft case far beyond anything considered during the trial. And they succeeded. Microsoft's critics should be celebrating the astonishingly broad scope of the new deal, which puts an unneeded leash on one of the engines of our prosperity. Declare victory and go home. Unfortunately, professional complainers seem to have a hard time enjoying themselves.

'WE DON'T NEED AN

Richard Perle's liberal and other enemies like to call him "the Prince of Darkness." Osama bin Laden & friends should take the hint. Perle is the hardliner's hardliner.

Assistant secretary of defense for international security policy in the Reagan Administration, he took the liberal critics' derisive nickname for high-tech national missile defense—"Star Wars"—and made it a battle cry. Now chairman of the Pentagon's Defense Policy Board, he is a powerful force for aggressive use of Americans' superpower advantage. Jim Glassman and Nick Schulz—host and editor, respectively of Washington-based Tech Central Station, one of our favorite online policy forums–spoke with Perle in late October.

TAS: Washington is buzzing about a "competition for the President's soul," over the scope of the war on terrorism. Hardliners led by you and Deputy Defense Secretary Paul Wolfowitz want to pursue a wider struggle, against Iraq and possibly others. The State Department led by Secretary Colin Powell wants to keep the narrow focus on bin Laden. Who will win?

PERLE: I would redefine it a little bit. The President has said that we are at war with terrorism and with the states that sponsor and harbor terrorists. So that already suggests a so-called "wider" war. It is not limited to al Qaeda and Afghanistan. And therefore the question is: should we accept the counsel of those who want to narrow the President's objective, in ways that would leave terrorist networks standing and leave states sponsoring terrorism in the business of doing so? When you put it that way, the question pretty much answers itself.

What about Iraq? What evidence do we need to go after Baghdad?

I very much favor going after Saddam Hussein's regime and Saddam Hussein. And I think all the evidence that's necessary is in. It has nothing to do with whether he's involved with September 11 or with al Qaeda. What's relevant here is that he hates the United States. He has weapons of mass destruction. He has used them against his own people and would not hesitate to use them against us.

So you think the Bush Administration has purposely diverted attention from Iraq because they don't want a conflict?

I don't think it's necessary to establish an Iraqi anthrax connection in order to recognize an Iraqi threat. Suppose we take the position that we cannot or should not or will not act against Iraq unless there is overwhelming evidence of Iraq's culpability in some hostile action. What does that tell us about Iraq's potential for *future* hostile action? Nothing. And everything we know about Saddam suggests that he's perfectly capable of using weapons of mass destruction, and against us. So, the simple issue in my view is: do we wait and hope for the best? Or do we take preemptive action?

In 1981, when the Israelis saw that a nuclear reactor that could have placed weapons-grade material in Saddam's hand was about to be completed, they didn't wait. They considered it an intolerable threat, and they destroyed the reactor. It is fundamental to self-defense that we act preemptively when necessary to forestall attacks on our country.

You say there's "as much myth as reality" in the coalition now being led by the U.S. What do you mean?

There are frequent references to "the coalition," but I don't know who's in it. I don't know what the basis of membership is. If you join, can you be expelled later if you don't do whatever it is that's expected of you? Is there a procedure for blackballing would-be applicants? Do we accept anyone, even countries that are themselves engaged in acts of terrorism? It's a vague concept. And it seems to me, principally, to reflect the tendency to fight the last war.

In 1991, when we fought Iraq over its invasion and occupation of Kuwait, it was considered essential to have a coalition. And I believe it was in those days—not least of all, because there was so little support for that military action in the United States. The coalition became a means of legitimizing American action at home. That's not the case now.

I believe we can do it without the coalition's support. We're not globalizing half a million men. We're not mobilizing an armada with 1,600 aircraft. We don't need bases and local support. We're doing this very differently.

What do you think of the reactions of the moderate Arabs?

Well, talk is cheap. And we've had a lot of cheap talk. I don't mean to disparage it—I'd rather they say the things they're saying than the things they might be saying. But at the end of the day, it's just words. And there are those who believe that it's important, that it somehow legitimizes what we are doing. We've been attacked, directly on our own territory, and thousands of our citizens have been killed. I don't think we need anybody's approval to defend ourselves.

What we are not seeing among moderate Arabs is the battle that I hope will take place one day: between moderate Arabs and the extremists in their own ranks. Bin Laden seems to be betting on that, at least in Saudi Arabia?

Saudi Arabia is very shaky by any modern political standard. It's a corrupt regime in which the wealth of the country is expropriated by a small number of people at the top, and in which fundamental rights are routinely denied. There is no consent of the governed, so it's always difficult to know what the people of Saudi Arabia would do if they were free to do it. They're not—it's a police state. But like the others in the region, it is pretty fragile, and we need to recognize that.

Is the Bush Administration being contradictory in pursuing a war on terrorism but then telling the Israelis to pull back from Palestinian-controlled territory?

I wouldn't attribute that view—which is certainly contradictory—to the Administration. It seems to be the province of the Department of State, which is well-schooled in the propagation of contradictions. Yes, it strikes me as extraordinary that while we are doing everything we know how to do to protect the American people, some State Department officials would have the nerve to sug-