

REMEDY ISSUES IN SECTION 2 CASES

Franklin M. Fisher

Jane Berkowitz Carlton and Dennis William Carlton
Professor of Microeconomics, Emeritus,
Massachusetts Institute of Technology

Major Topics

1. Principles and Objectives

2. Remedies in the Microsoft Case

Principles and Objectives

- A. Restore competition
- B. Fit the remedy to the violation
- C. Disgorge monopoly profits
- D. Make the remedy self-enforcing
- E. Avoid prolonged and complicated judicial oversight

Remedies in the Microsoft Case

- A. The underlying economics and the “applications barrier to entry”
- B. The Violation
- C. Conduct Remedies (All with problems)
- D. Structural Remedies (All with at least some problems)

A. The underlying economics and the “applications barrier to entry”

- a. Applications written for one operating system will generally not run on others.
- b. Software application writing has large economies of scale.
- c. Application writers prefer to write for operating systems with many users.
- d. Computer users prefer operating systems with large numbers of applications.

A. The underlying economics and the “applications barrier to entry”

As a result, an operating system that becomes relatively popular attracts more applications. These attract additional users which, in turn, attracts even more users, and so on.

Eventually, that operating system attains monopoly power as other operating systems find it difficult or expensive to attract application writers – the “applications barrier to entry”.

B. The Violation

Microsoft was not content with this natural phenomenon, however. It sought to destroy or contain two innovations (Netscape's browser and Sun Microsystems's Java) that threatened to weaken or remove the applications barrier to entry.

C. Conduct Remedies

Remedy 1. The ultimate settlement

Matched violation and may deter similar conduct. Did not restore competition and may have left Microsoft secure in having destroyed two important threats.

Possibly would have been appropriate for a pre-trial consent decree. Not appropriate after liability finally decided. Gave up fruits of victory.

C. Conduct Remedies

Remedy 2. Letting other operating systems use Windows' APIs.

Might have gone too far. Would have required prolonged and complicated judicial oversight.

D. Structural Remedies

Remedy 3. The “Baby Bills”

Three successor companies each with Windows

a. Would successor companies have kept their versions of Windows compatible with installed base?

b. Who would get Bill Gates?

c. Ultimate return to monopoly with original Microsoft shareholders the principal beneficiaries.

D. Structural Remedies

Remedy 4 (proposed by Antitrust Division)

Break up Microsoft into operating systems company and applications company.

Rely on applications company to encourage competition in operating systems.

Self-enforcing and, if successful, competition restoring. But round about and complicated.

D. Structural Remedies

Remedy 5. (Proposed by Herbert Hovenkamp but apparently not seriously discussed.)

Have Microsoft auction off n licenses to Windows and requisite knowhow. Do nothing further.

Self-enforcing. Competition improving. No break-up required. If ultimate monopoly, gains do not necessarily principally accrue to original Microsoft shareholders.

A model of remedy design despite its possible flaws.