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POINT OF VIEW

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A case of insecure browsing

Exploring missed opportunities in the Microsoft antitrust suit

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CHAPEL HILL -- United States v. Microsoft, the most celebrated antitrust case in a generation, quietly ended its six-year run Wednesday, as the Supreme Court's deadline to file a final appeal passed without a whimper from any of the parties. Little comfort can be taken from the legal system's silence.

Now, there will be no final ruling on whether Microsoft illegally tied Internet Explorer to Windows. Internet Explorer will continue its chokehold on the World Wide Web. Even worse, the law of competition in the software industry will remain unclear and unstable.

The government wasted its best opportunity to avoid this result three years ago, when the incoming Bush Justice Department, in a stunning reversal, decided to drop its "tying" claim. Still, the road not taken -- pressing Microsoft to offer a neutral choice of Web browsers for use with Windows -- started to look a lot more appealing this summer, when Internet Explorer's security flaws made national headlines.

Many commentators, including the Department of Homeland Security's computer emergency readiness team and even Microsoft's own online magazine, Slate, recommended that Windows users switch to a more secure Web browser.

But switching can be difficult. Windows users who want to access a document on the Web are sometimes required to use Internet Explorer, flaws and all, even if they have chosen a different product for that purpose. Given the inconvenience of using two different products for the same purpose, many Windows users do not bother to try other browsers. By tilting Windows users toward Internet Explorer in this and other ways over the past nine years, Microsoft has ensured that many consumers are using a less secure browser than they would if offered a neutral choice, and prevented other software companies from competing for these customers on the merits.

The Clinton Justice Department proved all of these facts at trial. Yet the lower courts did not move to restore freedom of competition in the market for Web browsers, because they found Microsoft's appeal for freedom more compelling.

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According to Microsoft, antitrust law should never require changes to the design of software products, because this will chill the freedom of programmers to innovate. One such innovation was in writing the shared blocks of code that support both operating system and Web browsing functions in Windows. The D.C. Circuit Court of Appeals agreed, describing Windows and Internet Explorer as "physically and technologically integrated" through this sharing of code.

Microsoft's argument might make sense if its freedom to design software products ended when the last line of code was written. But a software product does not consist of code. If it did, you would own the Windows code on your computer and could sell copies of that code with impunity.

Actually, what you own is a license consisting of certain legal rights derived from Microsoft's copyright in the Windows code, together with the technological ability to use the code with your computer in the exercise of those rights. (Similarly, when you buy a movie on a Region 1 DVD, you acquire a license to view it at your home in the United States or Canada, and the technological ability to play the DVD in those countries but not others.)

As the sole author of the license contract, Microsoft enjoys considerable freedom in defining the extent to which consumers are able to use the Windows code.

But freedom of contract is expressly limited by the antitrust laws. The courts therefore had authority to order Microsoft to license and distribute its software so as to offer a neutral choice of Web browser. Microsoft could easily have done so without undoing its programming innovations.

Instead, the D.C. Circuit Court of Appeals created a special antitrust immunity to license Windows and other "platform software" under contractual terms that destroy freedom of competition.

The security hazards that have resulted from Microsoft's unredressed actions are serious, and already being felt. Equally serious, but perhaps less tangible, is the D.C. Circuit's waste of judicial resources in issuing precedential opinions that fallaciously treat Microsoft's flagship software product as consisting of lines of code rather than intellectual property rights. The courts have missed a golden opportunity to affirm the freedom to compete in the information age.

(Andrew Chin is an associate professor at the UNC School of Law and a former legal extern to Judge Thomas Penfield Jackson, the trial judge in U.S. v. Microsoft. An article by Professor Chin on that case is in the current issue of the Harvard Journal of Law and Technology.)