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by David R. Henderson

It's hard to believe that the Microsoft case is Judge Colleen Kollar-Kotelly's first excursion into antitrust. Her decision reads as if written by someone with a nuanced understanding of the complex series of precedents that constitute modern antitrust law. In antitrust cases, knowledge of the law must also be supplemented with an understanding of economics. Here, too, the Judge shows a grasp of key principles, especially the crucial importance of incentives in encouraging innovation.

Consider first the law. In the last 30 years, legal scholars have adopted the economist's view that, whatever the original motives of those who pushed for the Sherman Act of 1890, there is only one justification for antitrust law today: to protect consumers by making sure markets are competitive. The law should not be used to favor some competitors over others, or to assure that competition is "fair" in the sense that no one is driven out of business.

Judge Kollar-Kotelly's reasoning track this consensus perfectly. At page 46 of her decision, for example, she chides the plaintiffs:

The Court takes careful note of those remedial proposals that advance the interests of particular competitors and takes pains to ensure that the remedy in this case is not a vehicle by which such competitors can advance their own interests.

One major supporter of the nine dissenting states actions against Microsoft was Sun Microsystems, which wanted to require Microsoft to distribute Sun's version of Java - software that serves as a platform for small software applications. In other words, Sun wanted to coerce Microsoft to use its vast reach to promote Sun's product. But the Judge saw through it. "What Plaintiffs, and quite clearly Sun Microsystems, are proposing is nothing more than 'market engineering'," she wrote. (p. 316) To Sun executive Richard Green's concern that without such coercion, computer makers would have little incentive to distribute Sun's own "Java Virtual Machine," Judge Kollar-Kotelly responded:

The Court finds this complaint to be meritless, as a lack of incentive to distribute a particular product reflects a problem of a competitor, not a problem with competition. (p. 315)

The Judge also noted that requiring such special treatment for Sun contradicted the legal/economic understanding of even the plaintiffs' own expert economic witness. She cited University of California (Berkeley) economics professor Carl Shapiro, who, in his testimony for the plaintiffs stated, "to the extent possible, the remedy should be 'technology neutral,' leaving it to market forces to identify the most promising threats to Microsoft's monopoly." Summing up, she wrote:

The Court can conceive of no provision less "technologically neutral" than [the above part] of the Plaintiffs' remedy. Rather, [this part] appears to be a bold manipulation of the market which provides a particular technology, indeed a particular format of this technology-the Sun-compliant format-with an artificial advantage over other non-Microsoft technologies which may now or in the future compete with Java. (p. 317)

Throughout her decision, Judge Kollar-Kotelly showed a keen awareness that incentives are the life-blood of a productive, innovative economy. Amazingly, the plaintiffs had proposed that Microsoft be forced to disclose proprietary information that would allow Microsoft's competitors to clone Windows. The judge flatly rejected the initiative, pointing out that such a remedy "runs contrary to the theory of protection of intellectual property rights." (p. 164) Further,

Such a scheme inherently decreases both Microsoft's incentive to innovate as well as the incentive for other software developers to innovate, since they can simply create clones of Microsoft's technology. (p. 164)

The plaintiffs would also have required Microsoft to maintain full support for predecessors to its most recent version of its Windows - a regulation that, as far as I know, has no precedent in the United States. Not only would such a requirement run afoul of the Appeals Court's opinion, the judge opined, but would retard development and confuse consumers. "The slowing of innovation," she wrote, "cannot be squared with the objectives of antitrust law." (p. 182)

Nor did the judge miss the fact that the plaintiffs' only expert economic witness, the above-mentioned Carl Shapiro, presented no independent case for the plaintiffs' drastic remedies:

Dr. Shapiro was unable to identify any source other than the district and appellate court opinions in this case upon which he relied to examine the effects of Microsoft's anticompetitive conduct upon the applications barrier to entry. . . . In this regard, Dr. Shapiro admitted that his citation to Judge Jackson's Findings of Fact in order to illustrate the impact of Microsoft' anticompetitive conduct upon Navigator and Java included conduct which was found not to violate the antitrust laws. . . . Dr. Shapiro also conceded that he did not make any attempt to separate the effect of the illegal conduct from the effect of the conduct fund not to be illegal. (italics in original) p. 115

It's true that the Judge also rejected the testimony of University of Chicago economist Kevin Murphy, one of Microsoft's experts. But here, her reasoning was far different. She agreed that Murphy did present new evidence on the effects of Microsoft's anticompetitive conduct. But, she noted that Murphy's evidence conflicted with the Appeals Court finding that Microsoft's behavior had harmed competition. Because Judge Kollar-Kotelly was obliged to take the Appeals Court's findings as given, she could not accept Murphy's evidence even had she found it as compelling as I did.

Equally striking, Judge Kollar-Kotelly seems to have a feel for the role of technological innovation in the software industry - a feel that led her to limit the term of the Court's decree to five years. The usual length of such decrees is ten years. But because technology is moving so fast in software, imposing a remedy "is not unlike trying to shoe a galloping horse." (P. 178)

Were the Court to impose a ten-year term, it is likely that, by the latter half of the term, the market will have long since sent the horse to pasture in favor of more advanced technology. Thus, although the remedy crafted by the Court is undoubtedly forward-looking, it is beyond the capacity of this Court, counsel, or any witness, to craft a remedy in 2002, for antitrust violations which commenced in the mid-1990s, which will be appropriately tailored to the needs of a rapidly changing industry in 2012. (P. 178)

I would, of course, have preferred the Microsoft case not come to this. After all, for the next five years, Microsoft will operate under onerous regulations

that none of its competitors will face. Still, had the dissenting states had their way, Microsoft's principle assets would have been expropriated

A judge who has just finished handling the first, and, most likely, the biggest antitrust case of her life, has done a great service, not just for Microsoft, but also for consumers. More important, she has ably defended the property rights and rule of law that protect the freedom and wealth of us all.

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