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Microsoft I ■ By Ian Ayres and Barry Nalebuff

A remedy worthy of Solomon

ONE NEW HAVEN, Connecticut obscure proceedings in Luxembourg are about to have a big impact on all of our lives. The Court of First Instance there recently spent two days listening to a debate between Microsoft and the European Union Commission. The commission found Microsoft guilty of engaging in an illegal "tying arrangement," because Microsoft sells Windows operating systems only with its Windows Media Player built in. Along with fining Microsoft \$497 million euros, the commission ordered Microsoft to sell a version of Windows without media player.

Microsoft wants the court to suspend the remedy until its appeal is resolved, but the commission argues that by the time the appeal is over, the market will have tipped and Microsoft's monopoly will have metastasized.

This isn't a battle over just what music player you use. It's about what operating system will appear on your next mobile phone or TV. It's about how all books, music and movies — anything you can digitize — will be delivered in the future.

Right now, 97 percent of all personal computer users work with some version of the Windows operating system. As a result, most media streams these days are now downloaded in the Windows Media format. Will Microsoft be able to add the whole future world of digital media to its empire?

First, the injunctive remedy is pretty tame. Microsoft was found to have engaged in illegal tying of Windows Media Player with Windows. Yet, they get to keep on selling the package. All they have to do is sell a version of Windows without media player.

The point of the remedy is that Real and others can then create alternative versions of Windows, ones that includes

their media players. They can then induce the Dells of this world to sell these alternative versions of Windows to customers. But no one has to buy them.

Why, then, is Microsoft so upset? First, it claims its reputation will be harmed by the existence of a Windows system that might not come with all the Windows Media Player functionality. But competing players can do anything the Microsoft Media Player does.

Second, Microsoft claims that given the superiority of their integrated Windows with Media Player, no one will buy the alternative versions. Then they should say "Bring it on" to the commission's remedy. If no one buys the competition, that is evidence for the appeal that Microsoft won the media battle on the merits and not due to the illegal tie.

Third, Microsoft argued that while rival players are able to play Windows Media files, they do so by downloading parts of Windows Media code. Why take Windows Media Player files off the machine just so that users will put it back on themselves later?

The reason is, to allow competition. If Windows Media Player code automatically comes on all machines, then content providers know that they have to encode in only one format. Just so long as enough machines are out there without Windows Media Player, then content providers and Web sites will find it worth their while to dual encode. Even a relatively small number of machines that don't come with Windows Media Player will be enough to preserve competition in the market. That's why Microsoft is so concerned.

Several Web developers who joined Microsoft at the hearings complained that allowing different versions of Windows would lead to enormous costs, as they would have to make their media streams compatible with multiple media players rather than just the de facto

Windows Media Player standard. But Web sites will spend resources only if the alternative versions of Windows succeed in the market. That would be the best evidence that Microsoft abused its power by forcing all Windows customers to take its media player. To put it another way, if the remedy has any effect on the market, this means that the commission got it right. Microsoft's success with Windows Media Player was not based on the merits, but on the unlevel playing field created by its tie.

In short, we don't have to know if Microsoft will win the appeal or not or even if the remedy will work or not. All we need to know is that if the remedy does have any impact, that's a sure sign that Microsoft abused its position and hence we should be happy to have the remedy in place.

Just as King Solomon's proposal to divide the baby caused pain only to the true mother, the commission's remedy will cause pain only to a monopolist who abused its position. With apologies to Johnny Cochran: If the market chooses Real, you lose the appeal.

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