A remedy worthy of Solomon

NEW HAVEN, Connecticut—Burke 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 fines of $497 million, 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 players 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—which you can digitize—will be delivered in the future.

Eighteen years ago, 97 percent of all personal computer users worked 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 exculpatory 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 include their media players. They can then induce the Delphi 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, its reputation will be harmed by the existence of a Windows player that couldn’t come with all the Windows Media Player functionalities. Competing players that aren’t Microsoft but are not the Microsoft Media Player does, second, Microsoft claims that given the superiority of its Integrated Windows Media Player, no one will buy the alternative version. Then they should say “Bring it on” to the commission’s remedy. If no one buys the competition, that’s 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 real 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 while to do that encode. Even a relatively small number of machines that don’t come with Windows Media Player will be enough to preserve competition to the market. That’s why Microsoft is so concerned.

Several Web developers who joined Microsoft in the lawsuit 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 alternative versions of Windows succeed in the market. That will be the best way to allow Microsoft to abuse 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 can’t have its cake and eat it too. Microsoft’s success with Windows Media Player means that it can’t just let the unlicensed on the market.

In short, we don’t have to know if Microsoft will win the appeal or not. 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 Cash, if the market chooses Real, you lose the appeal.

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