Free Software Matters: Shaking Up The Microsoft Settlement

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The deal between Microsoft and the United States government has now met the force of electronic democracy. Back on November 6, the Bush Administration made a settlement with Microsoft, apparently designed to compromise the long-running antitrust action brought by the Clinton Administration. The settlement contained numerous provisions seemingly designed to control Microsoft's market conduct, including requirements that Microsoft make available information about its application program interfaces (APIs), in order to permit competitors to interoperate with Microsoft products.

In fact, the settlement agreement was carefully tilted in favor of Microsoft, the wrongdoer supposedly facing judgment for illegally maintaining a monopoly. In all its details, the agreement was tailored to give the appearance of more protection against monopolization than was actually achieved.

But American antitrust law is primarily about protecting democracy againt private economic power, a nineteenth-century truth that twentieth-century politicians only occasionally remembered. Under our antitrust laws, when the government settles such a case it is required to publish the settlement agreement, accept public comment, and then convince the relevant trial judge, in light of the comments, that the settlement reached protects the public interest. Under twenty-first century communications conditions, as the outstandingly pro-corporate Bush Justice Department just learned, that's a weapon with new power to protect freedom. More than twenty thousand people and organizations filed comments during the

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comment period that just ended, and although Microsoft-allied lobbying organizations went so far as to offer handheld computers to a few lucky winners in a lottery whose entry ticket was a pro-Microsoft letter to the Justice Department, the bulk of the comments highlighted all the ways in which the deal was fixed.

On behalf of the Free Software Foundation, I filed a comment with the Department of Justice concentrating on the API disclosure provisions, which are the single most important aspect for the free software community. Free software—through the combination of the GNU operating system, the Linux kernel, the X Windows system, the Windows emulator WINE and other free programs—can, if Microsoft fully and completely documents all the Windows APIs, be readily adapted to run all existing applications written for Windows, without modification. This would allow you to purchase Windows applications from developers of your choice and run them directly on a competing free operating system. Sounds like a pretty good remedy against an illegal monopoly in PC operating systems, which is what the US government succeeded in proving at trial that Microsoft was. But the relevant provision in the Bush Administration's settlement contains a Microsoft booby trap:

> Microsoft shall disclose to [relevant developers and other industry participants] *for the sole purpose of interoperating with a Windows Operating System Product*, ... the APIs and related Documentation that are used by Microsoft Middleware to interoperate with a Windows Operating System Product.

In other words, Microsoft only has to disclose the APIs used by the Internet Explorer to applications developers, not to developers of any competing operating system. The settlement was carefully twisted by Microsoft's lawyers to exclude from its benefits Microsoft's actual competitor, the developers of GNU, Linux, X and WINE.

Other provisions of the settlement follow the same course. Microsoft is required to disclose communications protocols, but only, again, for the purpose of writing Windows applications, not a competing OS. Microsoft can prohibit sub-licensing, so someone who gains API information to write Windows applications can't release that code under GPL, for modification and use in WINE or X Windows. Microsoft can charge royalties for this information, so that even though free software discloses all *its* APIs for free, Microsoft is not required to engage in reciprocity. In these and several other areas Microsoft lawyers were able to turn an agreement intended to remedy illegal monopolization into a charter for continued exclusion of free software competition. The Bush Justice Department either didn't understand or just didn't care.

The United States Government is now required to spend an estimated $2 million publishing all the comments received in the US Federal Register, and to summarize the arguments made in a filing with the District Court, which has the power to accept or reject the settlement. The Free Software Foundation, acting as the author and distributor of GNU and other parts of the competing free operating system, and on behalf of all other free software developers, will ask the District Court for the opportunity to present evidence in line with its comments, showing that the settlement negotiated by the Bush Administration is not in the public interest and will not restore competition to the market Microsoft illegally controlled. This process will proceed alongside the continuing European Commission investigation of Microsoft; EU regulators will no doubt carefully consider the major flaws in the US settlement disclosed in the comment period.

The battle to end monopolization by the leading architect of software unfreedom still goes on. But it is already clear that electronic democracy has won a very important round, bringing to world attention again why Free Software Matters.