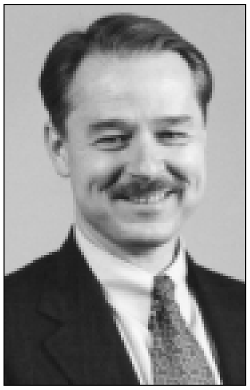
The Theft of Microsoft



They're stealing Bill Gates's company. When you get past all the legal and economic arguments, that's the essence of the legal decision against the Microsoft Corp. Judge Thomas Penfield Jackson ordered that the company be split into two separate companies, as the Justice Department had proposed. Gates will be allowed to run either the operating systems company or the applications company. But half of the company he has built will be taken away from him.

And that's not all. Microsoft has been ordered to share with its competitors its application programming interfaces—the asset it has spent billions of dollars to create. According to the *Washington Post,* "The judge found that Microsoft used access to the code to hurt its competitors and help its allies." It's a strange kind of free enterprise system in which companies that create useful products have to give their competitors access to them.

But even then the judge and the Justice Department weren't finished with their assault. Jackson's order establishes a monitoring system whereby the government is given "access during office hours to inspect and copy . . . all books, ledgers, accounts, correspondence, memoranda, source code, and other records and documents." Jackson even orders Microsoft to "establish and maintain a means by which employees can report potential violations" of the government's regulations "on a confidential basis." From Microsoft to Microserf.

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All the economic debates—has Microsoft helped or hurt technological innovation? What would be the effect on investors of a breakup?—and the legal arguments—has Judge Jackson followed the antitrust laws as written?—are important. But the real issue is that 25 years ago a couple of college dropouts moved to New Mexico and started writing BASIC software for the primitive Altair computer. In 1975 they had 3 employees and revenues of $16,000. Over the next 25 years they grew to 36,000 employees and revenues of $20 billion by obsessively figuring out what computer users needed and delivering it to them. Bill Gates, Paul Allen, and eventually thousands of other people put their minds, their money, and their selves into building the Microsoft Corp. What they achieved is now being taken away by Bill Clinton, Janet Reno, and Joel Klein. What's being taken is not just money, not just a company, but the product of their minds. The term "theft of intellectual property" hardly conveys the enormity of what's happening.

Over the years Gates and his colleagues made a lot of people mad, especially their competitors. Some of those competitors delivered a 222-page white paper in 1996 to Joel Klein, head of the Justice Department's Antitrust Division, and urged him to do to Microsoft in court what they couldn't do in the marketplace. Justice worked closely with the competitors for four years, often showing them sentences or paragraphs in drafts of the department's plans and soliciting their approval. The politics of the case is a far cry from the Platonic ideal of rigorous economists devising the best possible antitrust rules and wise, disinterested judges carefully weighing the evidence.

What lessons will Americans draw from the Microsoft case?

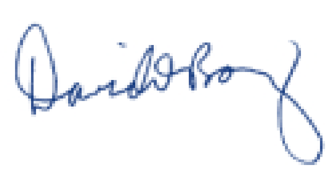
Don't be too successful. Success creates envy and attracts government regulators, who seem driven to attack the most productive people in our society. Bill Gates draws praise from the cultural elite when he gives away his money—and he has given away *more than $20 billion*—but he has done far more good for the world by creating and marketing something useful than by giving away some of the profits he earned.

Hire a lobbyist. For about 20 years Gates and his colleagues just sat out there in "the other Washington," creating and selling. As the company got bigger, Washington, D.C., politicians and journalists began sneering at Microsoft's political innocence. A congressional aide told the press: "They don't want to play the D.C. game, that's clear, and they've gotten away with it so far. The problem is, in the long run they won't be able to." Politicians told Bill Gates, "Nice little company ya got there. Shame if anything happened to it." And Microsoft got the message: If you want to produce something in America, you'd better play the game. Contribute to politicians' campaigns, hire their friends, go hat in hand to a congressional hearing and apologize for your success. In 1995, after repeated assaults by the Federal Trade Commission and the Justice Department, Microsoft broke down and started playing the Washington game. It hired lobbyists and Washington PR firms. Its executives made political contributions. And every other high-tech company is getting the message, too, which is great news for lobbyists and fundraisers.

What lesson should they draw?

The antitrust laws are fatally flawed. When our antitrust laws are used by competitors to harm successful companies, when our most innovative companies are under assault from the federal government, when lawyers and politicians decide to restructure the software, credit-card, and airline industries, it's time to repeal the antitrust laws and let firms compete in a free marketplace.

Janet Reno didn't send a SWAT team to Redmond in the middle of the night. But the bottom line is the same: she's using the power of government to steal what the people at Microsoft created.



—David Boaz