

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STATE OF NEW YORK, *et al.*,

Plaintiffs

v.

MICROSOFT CORPORATION,

Defendant.

Civil Action No. 98-1233 (CKK)

Executive Summary
(November 1, 2002)

Introduction

The Court has prepared this brief summary to assist the public in understanding the Court's ruling in the case *State of New York, et al. v. Microsoft Corp.*, No. 98-1233. This document is not the opinion of the Court and should not be considered as a substitute for the full Memorandum Opinion. Nevertheless, given the demonstrated public interest in this case and the fact that the Court's Memorandum Opinion spans over three-hundred pages, the Court has prepared the following brief description of some, but not all, of the key legal and discretionary conclusions in an effort to make its opinion accessible to as many interested persons as possible. The Court emphasizes, however, that this is a very complex and unprecedented case and that this summary, by necessity, simplifies the issues. Following a very abbreviated discussion of the procedural history, the appellate court's opinion, and the applicable law of antitrust remedies, the Summary describes the remedy that the Court has determined to impose. The Summary does not

include the Court's full discussion of the law, nor does it include a description of remedy provisions wholly rejected by the Court. Also omitted from the Summary is a discussion of the specific factual findings entered by the Court in Appendix A of the Memorandum Opinion.

Procedural History

On May 18, 1998, simultaneous with the filing of a complaint by the United States in a related case, a group of state plaintiffs filed a civil complaint alleging antitrust violations by Microsoft and seeking preliminary and permanent injunctions barring the company's allegedly unlawful conduct. In *United States v. Microsoft Corp.*, No. 98-1232 (D.D.C.), the federal government brought claims pursuant to federal law, while in *State of New York, et al. v. Microsoft Corp.*, No. 98-1233 (D.D.C.), the Plaintiff States¹ brought claims pursuant to both federal and state law. These two cases were consolidated, and following a bench trial in the consolidated cases, Judge Thomas Penfield Jackson concluded that Microsoft had violated §§ 1 and 2 of the Sherman Act, imposing liability for illegal monopoly maintenance, attempted monopolization, and unlawful tying. Correspondingly, Judge Jackson held that Microsoft had violated the state antitrust laws analogous to §§ 1 and 2 of the Sherman Act in each of the nineteen Plaintiff States and the District of Columbia. To remedy these findings of liability, Judge Jackson ordered the division of Microsoft into two separate corporations. Microsoft filed

¹This suit was originally brought by twenty states and the District of Columbia. One state withdrew from the action prior to the issuance of liability findings by the District Court. Another state settled its claims in July of 2001. The claims of the States of New York, Ohio, Illinois, Kentucky, Louisiana, Maryland, Michigan, North Carolina, and Wisconsin were litigated through liability and have been conditionally settled as to the issue of remedy. Hence, the "Plaintiff States" refers to the States of California, Connecticut, Florida, Iowa, Kansas, Minnesota, Utah, and West Virginia, the Commonwealth of Massachusetts, and the District of Columbia.

an appeal in both cases. On appeal, the United States Court of Appeals for the District of Columbia Circuit deferred to Judge Jackson's factual findings, altered his findings of liability—affirming in part and reversing in part, and vacated the remedy decree. The appellate court affirmed only limited violations based on § 2 of the Sherman Act for illegal monopoly maintenance; all other grounds were reversed. Soon thereafter, the case was randomly reassigned to this Court for the imposition of a remedy.

Following remand, pursuant to Court Order, the parties in the two consolidated cases entered into intensive settlement negotiations. The settlement negotiations did not resolve both cases in their entirety. However, the United States and Microsoft were able to reach a resolution in *United States v. Microsoft Corp.* in the form of a proposed consent decree. The settlement negotiations were partially successful with regard to the states' case, *State of New York, et al. v. Microsoft Corp.*; a portion of the plaintiffs in that case joined the settlement between the United States and Microsoft. Consequently, those states have elected not to proceed to a remedies-specific hearing in *State of New York, et al. v. Microsoft Corp.* The states which opted not to join the settlement between the United States and Microsoft have proposed a remedy distinct from that presented in the proposed consent decree. Following expedited discovery, the Court held an evidentiary hearing, lasting thirty-two trial days, on the issue of the remedy. The law has long recognized that it is the job of the district court to frame the remedy decree in an antitrust case, and the district court has broad discretion in doing so.

I. APPELLATE OPINION & ANTITRUST LAW OF REMEDIES

- ▶ The appellate court stated unambiguously that “we have *drastically* altered the scope of Microsoft's liability, and it is for the District Court in the first instance to determine the propriety of a specific remedy for the *limited* ground of liability we have upheld.”

- ▶ The monopoly in this case was not found to have been illegally acquired, but only to have been illegally maintained. Therefore, rather than termination of the monopoly, the proper objective of the remedy in this case is termination of the exclusionary acts and practices related thereto which served to illegally maintain the monopoly.
- ▶ Ultimately, the goal of a remedy in an equitable suit is not the “punishment of past transgression, nor is it merely to end specific illegal practices.” Rather, the remedy should “effectively pry open to competition a market that has been closed by [a] defendant[’s] illegal restraints.” Equitable relief in an antitrust case should not “embody harsh measures when less severe ones will do,” nor should it adopt overly regulatory requirements which involve the judiciary in the intricacies of business management. In crafting a remedy specific to the violations, the Court “is not limited to prohibition of the proven means by which the evil was accomplished, but may range broadly through practices connected with acts actually found to be illegal.”
- ▶ The “causal connection between Microsoft’s exclusionary conduct and its continuing position in the operating systems market” was established “only through inference.” In fact, the district court expressly determined as a factual matter that there was “insufficient evidence to find that, absent Microsoft’s actions, Navigator and Java already would have ignited genuine competition in the market for Intel-compatible PC operating systems.” The appellate court advised that the strength of the causal connection is to be considered “in connection with the appropriate remedy issue, *i.e.*, whether the court should impose a structural remedy or merely enjoin the offensive conduct at issue.” As a result, the Court’s determination of the appropriate remedy in this case reflects, among other considerations, the strength of the evidence linking Defendant’s anticompetitive behavior to its present position in the market. It is noteworthy, however, that Plaintiffs have not persisted in their request for a structural remedy of dissolution (“a break-up of Microsoft”) and instead have proposed a remedy which focuses on regulating Microsoft’s behavior.

II. THEORY OF LIABILITY

- ▶ The appellate court concluded that the district court properly identified the relevant market as the market for Intel-compatible PC operating systems and properly excluded middleware products from that market.
 - Operating systems perform many functions, including allocating computer memory and controlling peripherals such as printers and keyboards. Operating systems also function as platforms for software applications. They do this by “exposing”—*i.e.*, making available to software

developers—routines or protocols that perform certain widely-used functions. These are known as Application Programming Interfaces, or “APIs.”

- Because “[e]very operating system has different APIs,” applications written for one operating system will not function on another operating system unless the developer undertakes the “time consuming and expensive” process of transferring and adapting, known in the industry as “porting,” the application to the alternative operating system.
 - Both the district and appellate courts noted that Microsoft’s lawfully-acquired monopoly is naturally protected by a “structural barrier,” known as the “applications barrier to entry.”
- ▶ Plaintiffs proceeded under the theory that certain kinds of software products, termed “middleware,”² could reduce the “applications barrier to entry” by serving as a platform for applications, taking over some of the platform functions provided by Windows and thereby “weaken[ing] the applications barrier to entry.” Eventually, reasoned Plaintiffs, if applications were written to rely on the middleware API set, rather than the Windows API set, the applications could be made to run on alternative operating systems simply by porting the middleware. Ultimately, by writing to the middleware API set, applications developers could write applications which would run on any operating system on which the middleware was preset.
 - ▶ Plaintiffs focused their attention primarily upon two such middleware threats to Microsoft’s operating system dominance—Netscape Navigator and the Java technologies. The district and appellate courts accepted Plaintiffs’ theory of competition despite the fact that “neither Navigator, Java, nor any other middleware product could [at that time], or would soon, expose enough APIs to serve as a platform for popular applications.”

III. SCOPE OF THE REMEDY

A. Middleware

- ▶ Integral to understanding the two remedies proposed in this case is a preliminary understanding of the manner in which the two remedies treat middleware. In simple terms, the treatment of middleware in the two remedies plays a significant

²Such software takes the name “middleware” because “it relies on the interfaces provided by the underlying operating system while simultaneously exposing its own APIs to developers” and, therefore, is said to reside in the middle.

role in defining the scope of products which will receive various protections under the terms of the respective remedies.

- ▶ The Court ultimately concludes that Plaintiffs' proposed definition of "middleware" is inconsonant with the treatment of the term during the liability phase of this case. Plaintiffs include in their definition of "middleware" almost any software product, without regard to the potential of the product to evolve into a true platform for other applications.
 - Plaintiffs' definition of "middleware" is irreparably flawed in its attempt to capture within their parameters all software that exposes even a single API. Plaintiffs fail to adduce evidence sufficient to establish that these various pieces of software, which often lack robust platform capabilities but expose at least one API, have the capacity to lower the applications barrier to entry, and thereby promote competition in the monopolized market. As a result, to label such software as "middleware" is not consistent with the manner in which middleware was discussed during the liability phase of this case.
 - A further flaw in Plaintiffs' treatment of middleware is the inclusion of technologies which fall outside of the relevant market and which do not pose a threat to Microsoft's monopoly similar to the threat posed by nascent middleware. While the Court does not fault Plaintiffs' general approach in looking beyond the relevant market to search for the new nascent threats, the Court is unable to conclude that Plaintiffs have established that all of these technologies have the capacity to increase competition within the relevant market.
 - The Court observes in addition that Plaintiffs' middleware definition, because of its use throughout their proposed remedy, frequently renders various provisions of Plaintiffs' remedy to be ambiguous and, therefore, unenforceable.
- ▶ Conversely, the Court finds that the treatment of middleware and the related definitions in Microsoft's proposed remedy more closely reflect the meaning given to the term from the inception of this proceeding. Microsoft's treatment of middleware appropriately expands beyond the specific middleware addressed during the liability phase to address new potential platform threats which possess many of the defining characteristics of the middleware identified by Judge Jackson. The Court's remedial decree reflects this determination, adopting the treatment of middleware advanced by Microsoft in its remedy proposal.
 - **"Non-Microsoft Middleware,"** as that term is defined in Microsoft's remedy proposal, captures the essence of the middleware threats which

were discussed during the liability phase. The definition of “Non-Microsoft Middleware” expands beyond the middleware discussed at the liability phase in that it does not require that the software products already run on multiple PC operating systems, only that they have the potential, *if ported* to such operating systems, to serve as platforms for applications. In this regard, the term “Non-Microsoft Middleware” is noteworthy for the breadth of its coverage of software products without limitation as to specific types of functionality.

- Microsoft’s proposed remedy also uses the term “**Non-Microsoft Middleware Product**,” which is defined similarly to “Non-Microsoft Middleware,” but adds a requirement that “at least one million copies” of the product “were distributed in the United States within the previous year.” The one-million-copies distribution requirement in the definition of “Non-Microsoft Middleware Products” is reflective of the treatment of middleware threats in this case because the district and appellate courts did not merely focus on *any* software with the potential to serve as a multi-purpose platform, but specifically focused upon middleware which could “gain widespread use based on its value as a complement to Windows.” Because a certain portion of Microsoft’s proposed remedy requires Microsoft to undertake the redesign of its own product, the one-million-copies threshold relieves Microsoft of the obligation to redesign its product to accommodate a particular piece of software with extremely limited use.
- In contrast to the broad definitions of “Non-Microsoft Middleware” and “Non-Microsoft Middleware Products,” the term “**Microsoft Middleware Product**” is defined according to a specific set of existing Microsoft functionalities, as well as future Microsoft functionality. The existing set of functionalities which are included in “Microsoft Middleware Product” are those provided by Internet Explorer, Microsoft’s Java Virtual Machine, Windows Media Player, Windows Messenger, Outlook Express, and their successors in Windows. The future technologies captured by the definition of “Microsoft Middleware Product” encompass software included in Windows that provides the functionality of Internet browsers, email client software, networked audio/video client software, and instant messaging software. Other future technologies captured in the definition of “Microsoft Middleware Product” are those functionalities which are both distributed as part of Windows and distributed separately from Windows by Microsoft, trademarked by Microsoft, and which compete with third-party middleware products.
- In portions of Microsoft’s proposed remedy, there is a need to identify the specific code in Windows. Hence, Microsoft’s remedy proposal uses the

term “**Microsoft Middleware**,” which is largely reflective of the definition of “Microsoft Middleware Product,” but which is further limited to the *code* separately distributed and trademarked or marketed as a major version of the Microsoft Middleware Product. SRPFJ § VI.J. The term “Microsoft Middleware” is used sparingly in Microsoft’s remedy proposal, with its most significant and prominent use arising in conjunction with a provision that requires Microsoft to disclose very specific APIs and related technical information

B. New Technologies

- ▶ Plaintiffs have identified certain technologies which, prior to this remedy proceeding, had not been addressed by the district and appellate courts in detail in conjunction with this case. Plaintiffs identify these technologies as the new frontier in “middleware platform threats” and, therefore, seek to include these technologies in the definition of “middleware” and related definitions. The Court examined four categories of technologies in order to determine if Plaintiffs’ proposal to encompass these technologies within the remedy is appropriate: (1) network and server-based applications; (2) interactive television middleware and set-top boxes; (3) handheld devices; and (4) Web services.
- ▶ The Court concludes that **server/network computing** has the capacity to function in a role akin to middleware, and therefore, over Microsoft’s objection, the Court addresses this technology in a portion of the remedy.
- ▶ The potential “threat” posed by **interactive television software** is almost entirely hypothetical. However, the Court notes that, if interactive television software is proven, in the future, to have been ported from TV set-top boxes to run on a Microsoft PC operating system and expose a range of functionality to ISVs through published APIs, such technology would be included automatically in a number of the Court’s remedy provisions.
- ▶ Plaintiffs advance four theories pursuant to which **handheld devices** pose a “platform threat to the Windows operating system.” The Court rejects each of these theories as either logically flawed or unsupported by the evidence. In short, the technology associated with handheld devices has not been shown to have the potential to function in a manner similar to “middleware” consistent with the liability phase.
- ▶ Plaintiffs argue that **Web services**, which are entirely distinct from Web browsing, carry the potential to decrease reliance upon personal computers while increasing reliance upon other computing devices, emphasizing that a number of non-PC devices will have the capacity to access Web services. The Court rejects this argument on the grounds that Plaintiffs have not explained how the increase

in the use of non-PC devices in conjunction with Web services will reduce Microsoft's monopoly in the market for PC operating systems.

- The Court's rejection of Plaintiffs' inclusion in the remedy of handheld devices and Web services is based, in part, upon the conclusion that mere reduction in the popularity of the PC and the ensuing reduction in the absolute demand for Microsoft's Windows operating system does not necessarily "pry open to competition" the market for PC operating systems.

IV. ALLEGED "BAD" ACTS BY MICROSOFT

- ▶ Throughout this phase of the proceeding, Plaintiffs have recited for the Court's benefit countless findings of fact entered by Judge Jackson during the liability phase regarding actions taken by Microsoft. These findings recount various actions taken by Microsoft which can be characterized as improper or unsavory in one respect or another and, at the very least, harmful to its competitors. Significantly however, many of these findings were ultimately not relied upon by the district and appellate courts in conjunction with the imposition of liability for violation of § 2 of the Sherman Act
- ▶ As the appellate court observed, "[e]ven an act of pure malice by one business competitor against another does not, without more, state a claim under the federal antitrust laws" The federal antitrust laws "do not create a federal law of unfair competition or 'purport to afford remedies for all torts committed by or against persons engaged in interstate commerce.'" Harm to "one or more competitors," *however severe*, is not condemned by the Sherman Act in the absence of harm to the competitive process and thereby harm to consumers. Because no court has yet found that the acts identified in Judge Jackson's *Findings of Fact*, but not relied upon for the imposition of liability, visited *any* harm upon competition, let alone a harm which was not outweighed by the simultaneous procompetitive effect, this Court cannot presume that each of the acts identified in the *Findings of Fact* merits consideration equal with those acts which were found to be anticompetitive, nor that these acts merit any special weight.
- ▶ The parties have agreed throughout this proceeding that it would be inappropriate now, during the remedy phase of this proceeding, for the Court to consider and evaluate for anticompetitive effect new allegations against Microsoft.
- ▶ Nevertheless, Plaintiffs identify a number of new and, for lack of a better term, allegedly "bad" acts, relating predominantly to interoperability, taken by Microsoft both prior and subsequent to the imposition of liability. Upon review of Plaintiffs' allegations of "bad" conduct by Microsoft relating to interoperability

and the liability findings in this case, the Court concludes that Plaintiffs' allegations in this area bear only a remote relationship to the liability findings. In this regard, the Court has rejected Plaintiffs' suggestion that the imposition of liability, in any way, condemns decisions to depart from industry standards or to utilize a proprietary standard in the absence of deception regarding the departure. In fact, Microsoft's alteration or proprietary extension of industry standards more closely resembles conduct for which Microsoft was absolved of liability; the appellate court absolved Microsoft of liability for its development of a Java implementation incompatible with Sun's Java Implementation

- ▶ Moreover, despite Plaintiffs' protestations to the contrary, the Court finds that Plaintiffs' allegations with regard to Microsoft's conduct in the area of interoperability are, at their core, new allegations of anticompetitive conduct. As a result, Plaintiffs' reliance upon this series of allegedly new "bad" acts by Microsoft carries little weight, if any, in the Court's determination of the appropriate remedy in this case.

V. REMEDY-SPECIFIC CONCLUSIONS

A. Original Equipment Manufacturer ("OEM") Configuration Flexibility

1. Windows Licenses

- ▶ The remedy imposed by the Court will provide substantial freedom to OEMs in their configuration of Microsoft's Windows operating system by lifting Microsoft's illegal license restrictions.
- ▶ The Court rejects the third-party licensing portion of Plaintiffs' proposal that would permit such third parties to "customize" the appearance of Windows to reflect the third party's input. Plaintiffs have failed to establish that such licensing will actually benefit or promote competition. Additionally, Plaintiffs' proposal for third-party licensing does not reflect the appellate court's recognition that, to the extent that Microsoft's license restrictions prevented drastic alteration of the user interface, they did not violate the Sherman Act.

2. Installation and Display of Icons, Shortcuts, and Menu Entries

- ▶ Microsoft will be enjoined from restricting by agreement any OEM licensee from installing an icon, menu entry, shortcut, product, or service related to "Non-Microsoft Middleware."
- ▶ The remedy imposed by the Court will secure for OEMs the general ability to install and display icons, shortcuts, and menu entries for middleware—the type of software disfavored by Microsoft's anticompetitive restrictions—on the Windows

desktop or in the Start menu.

- ▶ However, the Court will not prevent Microsoft from imposing non-discriminatory limitations on the specific areas in which icons may be displayed, provided that such limitations cannot be used to favor Microsoft and, instead, exist as part of the Windows product design. The Court's remedy will also permit Microsoft to protect the design of its product from drastic alteration in a manner which is the substantial equivalent of a launching of a new user interface, such as OEM designation of an icon in such an extreme size or shape that it obscures the crucial elements of the Windows user interface.

3. *Insertion of Internet Access Provider ("IAP") Registration Offers*

- ▶ The remedial decree imposed by the Court will enjoin Microsoft from imposing license restrictions on the ability of OEMs to insert offers of service from IAPs during the initial boot sequence. The insertion of these offers was found to provide an opportunity for the promotion of alternative middleware. Microsoft's limitation on the ability of OEMs to insert such offers was found to have an anticompetitive effect in violation of antitrust law.
- ▶ The Court rejects Microsoft's argument that the insertion of IAP registration sequences should be subject to the imposition of Microsoft's "reasonable technical requirements" on the rationale that such requirements preserve a consistent user experience.

4. *Automatic Launching of Applications*

- ▶ It is appropriate for the remedy in this case to permit the automatic launch of non-Microsoft programs upon the completion of the initial boot sequence where the automatically launched program does not substitute the Windows user interface for a different interface or otherwise drastically alter Microsoft's copyrighted work.
- ▶ The Court has tailored its remedy to permit the automatic launch of such programs because the ability to launch programs automatically will assist in the promotion of non-Microsoft software and middleware, resulting in an increased likelihood that a particular piece of middleware will reach its potential to serve as a multi-purpose platform for applications.
- ▶ The Court, therefore, specifically rejects the contention by Microsoft that automatic launching of software products should be limited to circumstances in which Microsoft has chosen to launch automatically a competing middleware program.

B. End-User Access

- ▶ The Court's remedial order will require Microsoft to alter its Windows technology to ensure that OEMs and end users may disable end-user access to various types of Windows functionality. In addition, the Court will prohibit Microsoft from designing its operating system product so as to induce reconfiguration of an OEM's or consumer's formatting of icons, shortcuts, and menu entries in an attempt to favor Microsoft's own software.
- ▶ Plaintiffs have advanced a remedy that requires the removal of Windows software code. Yet, Plaintiffs' remedy proposal does not offer a reasonable way for Microsoft to separate the code in order to comply with the code removal requirements therein. More importantly, the evidence does not indicate that the removal of software code is beneficial from an economic perspective. The Court also finds that the forced removal of software code from the Windows operating system will disrupt the industry, harming both ISVs and consumers.
- ▶ Nothing in the rationale underlying the commingling liability finding requires removal of software code to remedy the violation. To the contrary, the evidence presented to the Court indicates that the ability to remove end-user access to any commingled functionality would sufficiently address the anticompetitive aspect of the conduct and would prove far less disruptive to consumers and industry participants. In the case of commingling, therefore, the most appropriate remedy must place paramount significance upon addressing the exclusionary effect of the commingling, rather than the mere conduct which gives rise to the effect.

C. Additional Protection for OEM Flexibility

- ▶ Because the OEM channel is such a significant channel of distribution for middleware, the remedy in this case can further unfetter the market from the effects of Microsoft's unlawful anticompetitive behavior by protecting OEMs from retaliation by Microsoft based upon an OEM's support for alternative middleware or operating systems. Nevertheless, restrictions on Microsoft's freedom to retaliate or threaten retaliation must be carefully drawn so as not to unduly restrict legitimate business practices.
- ▶ Over Microsoft's objection, the Court finds that protection of OEMs against threats of retaliation as well as acts of retaliation will have an effect similar to a ban on actual retaliation and, thus, will further the ultimate goal of promoting competition.
- ▶ Further protection for OEMs as a middleware channel of distribution is available through the implementation of uniformity in the licenses Microsoft provides in the monopoly market. To tailor the uniform licensing provision so as to provide

OEMs with the greatest security, while minimizing the less desirable collateral effects of uniformity, the Court’s order of remedy will not prohibit Microsoft’s practice of awarding “market development allowances, programs, or other discounts” (“MDPs”), provided that the award of such benefits is based upon reasonable, objective criteria, which are enforced uniformly and without discrimination.

- ▶ Additional protection for OEMs and their ability to exercise their rights under the remedy imposed in this case can be derived from limited regulation of Microsoft’s ability to terminate an OEM’s Windows license. Microsoft shall not be permitted to terminate an OEM’s license without having first provided the OEM with notice and opportunity to cure. When Microsoft has provided two such notices, Microsoft may terminate the license without any further notice or opportunity to cure.

D. Other Participants in the Ecosystem

1. Ban on Retaliation

- ▶ Microsoft is not permitted to retaliate against ISVs and Independent Hardware Vendors (“IHVs”) for their support of platform software that *competes* with Microsoft’s PC operating system software. In addition, the Court will prohibit threats of retaliation, which have the capacity to chill ISV and IHV support for competing products even where the retaliation itself is prohibited.

2. Agreements Limiting Support for Competing Products

- ▶ The Court’s remedy will preclude Microsoft from entering into agreements predicated upon an ISV’s promise to refrain from developing, promoting, or distributing any software which competes with the platform capabilities of Microsoft software. Such a provision will ensure that Microsoft is unable to chill the development of competing software products which may provide a platform for PC applications.
- ▶ Because a remedy which “dampen[s] . . . technological innovation would be at cross-purposes with antitrust law,” and because Plaintiffs have not offered any valid justification for prohibiting such agreements, the remedy in this case is carefully tailored so as not to hinder Microsoft’s ability to enter into legitimate joint ventures and work-for-hire agreements.

3. Exclusive Agreements

- ▶ The Court’s remedial decree will limit Microsoft’s ability to enter into agreements in which the other party agrees to support Microsoft’s operating

system products exclusively or in a fixed percentage. This provision will address those industry participants with whom Microsoft entered into unlawful and anticompetitive exclusive agreements, namely ISVs, IAPs, and OEMs, as well as those industry participants, such as Internet Content Providers (“ICPs”) and IHVs, who are ready targets for the imposition of similarly unlawful exclusive agreements.

- ▶ Again, in recognition of the benefit to technology and to competition derived from cooperative agreements between industry participants, the Court’s remedy takes pains not to discourage Microsoft from entering into legitimate joint ventures and joint development agreements. In this regard, Microsoft will have some limited ability to prohibit competition with the object of the joint venture or joint agreement, where both parties have contributed significant resources to the venture.

4. *Agreements Regarding Placement on the Desktop*

- ▶ The Court’s remedy will include a provision which addresses the particular means of leverage Microsoft used to induce IAPs to enter into these agreements; namely, special placement on the desktop or elsewhere in Microsoft’s PC operating system products of a visible means of end-user access to the third-party product. Therefore, the remedy imposed by the Court shall prohibit Microsoft from granting special placement within the Windows operating system on the condition that the IAP refrain from support of software which competes with not merely Microsoft’s Web-browsing technology, but also a number of technologies incorporated into Windows which portray middleware characteristics such that they are properly treated as “Microsoft Middleware.” This provision applies to ICPs as well as IAPs, notwithstanding the fact that the appellate court declined to impose liability for Microsoft’s exclusive agreements with ICPs.

E. Explicitly Forward-Looking Remedies

1. *API Disclosures (Interoperation between Windows and Microsoft Middleware)*

- ▶ The remedy imposed by the Court with regard to the disclosure of APIs shall require Microsoft to disclose those APIs, along with related technical information, which “Microsoft Middleware” utilizes to interoperate with the Windows platform.

2. *Communications Protocols (Interoperation Between PC Operating Systems and Server Operating Systems)*

- ▶ The remedy imposed by the Court will mandate disclosure and licensing of

protocols used by clients running on Microsoft's Windows operating system to interoperate with Microsoft servers.

- ▶ In all likelihood, the requirement that Microsoft disclose and license the communications protocols utilized by its PC operating systems to communicate with Microsoft's servers is the *most* forward-looking provision in the Court's remedy.

3. *Plaintiffs' Flawed Arguments for Overly Broad Disclosures*

- ▶ Plaintiffs are unable to establish a satisfactory link between the interoperability disclosures they seek and the liability in this case.
- ▶ Over-broad disclosure, such as that proposed by Plaintiffs, must also be avoided because it will likely enable wholesale copying or cloning³ of Windows without violating Microsoft's intellectual property rights. The cloning of Microsoft's technology carries the potential to hinder some aspects of competition and discourage innovation. As antitrust law does not exist for the protection of competitors, but for the protection of competition, the Court does not regard this end as a legitimate one.
- ▶ The Court finds that there is sufficient harm which flows from the mandated disclosure of a vast quantity of internal interfaces which is not countermanded by competitive benefit such that it is best not to require Microsoft to disclose a multitude of internal interfaces. There exist a number of technical justifications for operating system vendors to decline to make such internal interfaces public. For example, internal interfaces are often unstable, meaning that they will not perform effectively when relied upon by third-party applications.

4. *Reasonable, Non-Discriminatory Licenses*

- ▶ Although the Court has rejected Plaintiffs' request for the broad disclosure of technical information relating to Microsoft's products, the Court's remedial decree will require Microsoft to make more limited disclosures of APIs, communications protocols, and related technical information in order to facilitate interoperability.
- ▶ The Court will prohibit Microsoft from imposing unreasonable or discriminatory license terms, but will permit Microsoft to require a reasonable royalty for the

³By cloning, the Court means the creation of a piece of software which replicates the functions of another piece of software, even if the replication is accomplished by some means other than the literal repetition of the same source code.

licenses necessary to exercise the rights guaranteed by the final judgment.

5. *Protection Against Hackers, Viruses and Piracy*

- ▶ The Court's remedy will exempt certain material from disclosure in order to preserve the security of Microsoft products against hackers and viruses. Similarly, Microsoft will not be forced to disclose valuable information to firms with a history of piracy, so long as Microsoft does not use claims of piracy as a means by which to discriminate.

F. Compliance and Enforcement Provisions

- ▶ The scheme envisioned by Plaintiffs for enforcing the injunctive decree entered as the remedy in this case is marked by its reliance upon a special master. In light of the applicable law, the Court harbors serious concerns as to the propriety of Plaintiffs' proposed use of a special master. Even if the Court were confident that Plaintiffs' proposed use of a special master was legally sound, such a conclusion would not allay the Court's remaining concerns with regard to the logistical difficulties in Plaintiffs' special master proposal. Accordingly, the Court declines to appoint a special master at this time.
- ▶ The remedy in this case will charge Plaintiffs with the obligation of monitoring Microsoft's compliance. While Plaintiffs may rely upon the views of third parties to guide them in this task, the duty of enforcement belongs to Plaintiffs. To ease the burden on the Court and on Microsoft in addressing Plaintiffs' concerns, the Court will require Plaintiffs to form a committee to coordinate enforcement of the remedial decree. Such a committee will serve to minimize duplication of enforcement activities and requests of the Court and Microsoft.
- ▶ Plaintiffs have been unwaveringly critical of Microsoft's proposal for a technical committee. As the technical committee provision exists largely to assist Plaintiffs in enforcing the provisions of the final judgment in this case, if Plaintiffs do not want to rely upon a technical committee, the Court will not require them to do so.
- ▶ The Court adopts Plaintiffs' proposal for selecting a compliance officer who serves as a high-level Microsoft employee, but retains a significant amount of autonomy and independence from the corporation.
- ▶ The Court adopts Microsoft's proposal that the compliance officer distribute the decree and obtain a certification of understanding and compliance only from Microsoft's officers and directors.
- ▶ The remedy adopted by the Court will provide Plaintiffs, acting only after consultation with their enforcement committee, reasonable access to Microsoft's

source code, books, ledgers, accounts, correspondence, memoranda, and other correspondence, access to Microsoft employees for interview, and the right to request and receive written reports from Microsoft on any matter contained in the Court's remedial decree. Plaintiffs will, of course, be bound to limit any use of information obtained through these means for the purpose of ensuring Microsoft's compliance with the remedial decree, or as otherwise required by law. Similarly, should information and documents provided to Plaintiffs be subject to disclosure to a third party, Microsoft will not be deprived of the opportunity to claim protection pursuant to Federal Rule of Civil Procedure 26(c)(7).

G. Term of the Decree

- ▶ The Court's remedial decree shall persist for five years from its effective date.
- ▶ As an incentive for Microsoft to comply with the terms of the decree, however, the Court specifically reserves the right to extend the term of the decree for up to two years upon a finding that Microsoft has engaged in a pattern of willful and systemic violation of the Court's decree.

Conclusion

Recognizing, as they must, the confluence of the rapid pace of change in the software industry and the delays inherent in antitrust litigation, Plaintiffs sought to gather all existing complaints regarding Microsoft's business practices and bring them before the Court at this late stage in the case. In doing so, Plaintiffs attempted to circumvent the arduous process which necessarily precedes the imposition of antitrust liability and, instead, proceeded directly to seek a remedy for the readily identifiable aspects of Microsoft's business conduct that other industry participants find objectionable. Though an appropriate remedy may be forward-looking and address conduct beyond the specific acts found to be anticompetitive, Plaintiffs are mistaken in thinking that the imposition of § 2 liability under the Sherman Act for unlawful monopoly maintenance in the market for Intel-compatible PC operating systems permits the Court to impose a remedy in areas unrelated to the monopoly market. This suit, however remarkable, is not the vehicle through which Plaintiffs can resolve all existing allegations of anticompetitive

conduct which have not been proven or for which liability has not been ascribed.

The appellate court could not have been clearer in its admonition that this Court's decree should be "tailored to fit the wrong creating the occasion for the remedy." Yet despite this admonition, in their request for relief, Plaintiffs have shown little respect for the parameters of liability that were so precisely delineated by the appellate court. In many instances, therefore, this Court has had little choice but to reject Plaintiffs' remedial suggestions on the grounds that they are unjustifiably in conflict with the imposition as well as the rejection of liability in this case.

Additionally, the Court observes that a number of the remedial provisions proposed by Plaintiffs would require drastic alterations to Microsoft's products, as well as to aspects of its business model which do not involve illegal conduct. Plaintiffs present little, if any, legitimate justification for these remedies, and in most instances, these proposals are not supported by any economic analysis. Instead, it appears that these types of remedial provisions seek to convert certain legitimate aspects of Microsoft's business model and/or product design into a model which resembles that of other industry participants simply for the sake of changing the status quo. Certain of Microsoft's competitors appear to be those who most desire these provisions and, concomitantly, are the likely beneficiaries of these provisions, while other competitors in the relevant market would not necessarily benefit. In bringing these types of proposals before the Court, Plaintiffs again misunderstand the task presently before the Court—to *remedy* Microsoft's antitrust violations. General changes to the lawful aspects of Microsoft's business model or product design of the type proposed by Plaintiffs do not themselves provide a remedy, nor have Plaintiffs established that such changes are required, or even appropriate, in

conjunction with a remedy. Accordingly, the Court has rejected those aspects of Plaintiffs' remedy proposal which would impose such changes.

Instead, the appropriate remedy, which the Court has devised and explained at length in the full Memorandum Opinion, is carefully tailored to fit the wrong creating the occasion for the remedy. The Court's remedy exceeds a mere proscription of the precise conduct found to be anticompetitive and is forward-looking in the parameters of the relief provided. Moreover, the remedy imposed by the Court is crafted to foster competition in the monopolized market in a manner consistent with the theory of liability in this case.

In particular, the Court's remedy addresses, to the extent appropriate, Plaintiffs' desire that Microsoft disclose technical information to foster interoperation between Microsoft's PC operating system software and third-party products, as well as between Microsoft's PC operating system products and server operating systems. The mandatory disclosures between Microsoft's monopoly product and server operating systems acknowledge the competitive significance of server/network computing as the most significant "platform threat" to Microsoft's dominance in the relevant market. The disclosures mandated by the Court will likely prove beneficial to the development of middleware platforms and the functional equivalent of the middleware platform provided by server operating systems.

Likewise, the Court's remedy satisfies Plaintiffs' demand for remedial provisions which address OEM flexibility in the configuration of Microsoft's operating system products, but is tempered by the necessary respect for Microsoft's intellectual property rights. In this regard, the Court has largely rejected Microsoft's paternalistic view that it can determine what is best for consumers with regard to the configuration of the Windows operating system. In rejecting this

view, the Court's remedy affords OEMs the freedom to configure Microsoft's operating system products in a manner which promotes third-party middleware through the prominent display of icons, shortcuts, and menu entries, and such configuration will be protected against automatic alteration resulting from Microsoft's product design. In addition, OEMs will have the freedom to remove all prominent means of end-user access to portions of middleware functionality integrated into Microsoft's operating system so as to encourage the installation of third-party middleware. The Court's remedial decree also ensures that OEMs may introduce subscription services during the boot sequence without restriction by unjustified Microsoft technical requirements. Further secured by the terms of the Court's decree is the automatic launching of innovative software programs limited only by the requirement that the programs not drastically alter the Windows user interface.

In its order of remedy, the Court has heeded Plaintiffs' call for broad protection for OEMs, ISVs, and IHVs against retaliation and threats of retaliation by Microsoft for the support of products that compete with Microsoft's monopoly product. The Court's remedy further curtails Microsoft's ability to enter into agreements that have the effect of excluding competitors from the marketplace. The Court's prohibition on exclusionary contracts is carefully drawn, however, so as to foster, rather than prohibit, procompetitive joint ventures, work-for-hire agreements, and intellectual property licenses. Notwithstanding these affirmative measures, the Court's remedy, of necessity, stops short of any measure which will substantially discourage procompetitive joint ventures, require the substantial redesign of Microsoft's products, or otherwise interfere in Microsoft's lawful use of proprietary technology.

Throughout all of its provisions, the Court's remedial order is generous in its treatment of

middleware platform threats. The defined terms in the Court’s order are appropriately grounded in the theory of liability and the treatment of middleware platform threats during the liability phase, while simultaneously prescient in that they are not confined to technology which exists today. Most notable is the scope of the term “Non-Microsoft Middleware,” which captures a wide array of existing platform technology, as well as technology not yet developed. In this regard, even the technologies which Plaintiffs have identified as future potential platform threats, such as interactive television middleware—whose success is but a prediction, will be addressed by the Court’s remedial order, provided the aspirations of these technologies become reality.

Plaintiffs are correct that Microsoft has a tendency to minimize the effects of its illegal conduct. Yet this minimization, however frustrating, does not require a remedy which prodigiously exceeds even an expansive view of the illegal conduct. The remedy in this case addresses the conduct found by the district and appellate courts to violate the antitrust laws and is imposed without regard to Microsoft’s minimalist view of its own illegal conduct. More importantly, the behavioral remedy imposed by this Court neither bends nor softens simply because Microsoft refuses to acknowledge the extent of its own wrongdoing.

During this litigation, promises have been made on behalf of Microsoft that the company will change its predatory practices which have been part of its competitive strategy in order to comply with the remedial decree. The Court will hold Microsoft’s directors, particularly those who testified before this Court, responsible for implementing each provision of this remedial decree. Let it not be said of Microsoft that “a prince never lacks legitimate reasons to break his promise,”⁴ for this Court will exercise its full panoply of powers to ensure that the letter and

⁴NICCOLÒ MACHIAVELLI, *THE PRINCE*, ch. 18 (1514).

spirit of this remedial decree are carried out.