

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 States<sup>1</sup> 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

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<sup>1</sup>This 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,”<sup>2</sup> 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

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<sup>2</sup>Such 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

