December 2006

# Re-Framing Windows: The Durable Meaning of the Microsoft Antitrust Litigation

Harry First
*NYU School of Law*, FIRSTH@juris.law.nyu.edu

Andrew I. Gavil
*Howard University - School of Law*, agavil@law.howard.edu

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*Harry First and Andrew I. Gavil*[*]



## I. INTRODUCTION

On May 18, 1998, the Attorney General of the United States, Janet Reno, accompanied by the Assistant Attorney General in charge of the Antitrust Division of the Department of Justice and the representatives of twenty states and the District of Columbia, appeared at a press conference in Washington, D.C. Their purpose was to announce publicly the filing of two complementary antitrust actions against one of the most successful American companies of the information age—Microsoft Corporation. The actions were prompted by the imminent release date of Windows 98, the latest version of Microsoft's

*The authors are, respectively, Charles L. Denison Professor of Law, New York University School of Law, and Professor of Law, Howard University School of Law. The authors express their appreciation to Jonathan B. Baker and William E. Kovacic for their helpful comments and insights on previous drafts of this Article, and to Ralph Eissler for his excellent research assistance. This Article is adapted from portions of ANDREW I. GAVIL & HARRY FIRST, MICROSOFT AND THE GLOBALIZATION OF COMPETITION POLICY: A STUDY IN ANTITRUST INSTITUTIONS (forthcoming). Professor First was Chief of the Antitrust Bureau of the New York State Attorney General's Office from May 1999 to May 2001, during which time he was responsible for supervising New York's efforts in the *Microsoft* litigation. The views he expresses in this Article are solely his own and do not in any way reflect the views of the Office of the Attorney General. Financial assistance for this Article was provided in part by research grants from the Filomen D'Agostino and Max E. Greenberg Research Fund at New York University School of Law and Howard University School of Law.

operating system for desktop personal computers, which included Microsoft's latest version of Internet Explorer ("IE"), an Internet web browser. The government plaintiffs (sometimes collectively referred to as the "government") were asking the federal district court in Washington to enjoin Microsoft from configuring Windows, and engaging in other conduct, that collectively had the effect of perpetuating its monopoly of operating systems and destroying competition in the emerging market for Internet web browsers.[1] In his prepared statement, Joel I. Klein, the Assistant Attorney General in charge of the Antitrust Division, explained their collective purpose: "to put an end to Microsoft's unlawful campaign to eliminate competition, deter innovation, and restrict consumer choice."[2]

In stepping out before the cameras that day, and in prosecuting their claims against Microsoft over the months and years that followed, federal and state prosecutors were not assuming any novel role. Since the first federal antitrust law—the Sherman Act[3]—was signed into law by President Benjamin Harrison on July 2, 1890, the federal government has been repeatedly cast as the policeman of national markets, dispensed to rein in overbearing private corporate power. Public power, wielded in the public interest, was conceived as the antidote to such private power.

Many of antitrust law's most storied prosecutions have involved challenges to the largest, most publicly visible, and most successful firms. Antitrust law as a

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[1]The government did not seek to enjoin the shipment of Windows 98. It explained:

> What the United States seeks is an Order during the pendency of this litigation enjoining Microsoft:
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> 1. from enforcing restrictive agreements which prevent OEMs [Original Equipment Manufacturers], ISPs [Internet Service Providers], and ICPs [Internet Content Providers] from choosing which browser or browsers they will distribute or promote, including any restrictions on the right of OEMs to remove Microsoft's browser or to implement the OEM's own screens or boot-up sequence;
>
> 2. from distributing bundled versions of its operating system and its browser at a single price unless Microsoft provides a practical way of removing Internet browser functions and provides OEMs who do not wish to license the Microsoft browser an appropriate deduction from the royalty fee; and
>
> 3. from distributing a bundled version of its operating system and its Internet browser unless Microsoft treats Netscape's browser the same as it [sic] own with respect to inclusion in and removal from the operating system.

Memorandum of the United States in Support of Motion for a Preliminary Injunction at 11, United States v. Microsoft Corp., 87 F. Supp. 2d 30 (D.D.C. 2000) (Nos. 98-1232 & 98-1233), *available at* http://www.usdoj.gov/atr/cases/f1700/1762.htm.

[2]Press Release, Joel I. Klein, Assistant Att'y Gen., Dep't of Justice, Filing of Antitrust Suit against Microsoft 1 (May 18, 1998), *available at* http://www.usdoj.gov/atr/public/press_releases/1998/1770.pdf [hereinafter Klein Statement].

[3]Sherman Antitrust Act, ch. 647, 26 Stat. 209 (1890) (current version at 15 U.S.C. §§ 1–7).

regulatory device is often remembered and judged by these cases, which influence public perception of the capacity of government to serve as a counterweight to private power. Cases like *Standard Oil Co. of New Jersey v. United States* (*Standard Oil*),[4] *American Tobacco Co. v. United States* (*American Tobacco*),[5] *United States v. United States Steel Corp.* (*United States Steel*),[6] *United States v. Aluminum Co. of America* (*Alcoa*),[7] and *United States v. E. I. Du Pont de Nemours & Co.* (*DuPont*),[8] and later the controversial prosecutions of *In re International Business Machines* (*IBM*)[9] and *AT&T Co. v. United States* (*AT&T*),[10] have all commanded popular attention and sparked substantial legal and economic commentary. Although the image of the empowered public policeman of markets thwarting private power has been romanticized—in fact, few monopolization cases are brought[11]—it is a powerful and enduring image that promotes popular support for antitrust enforcement and remains relevant to other areas of antitrust law.[12]

In this Article, we locate *United States v. Microsoft Corp.* (*Microsoft*)[13] within this broader tradition of government prosecutions of monopolists. As an expression of public power wielded in the public interest, *Microsoft* is but the latest in this long and important tradition in antitrust law. We also examine a second, and related question: If "history is written by the victors," who will write the history of the *Microsoft* cases? The success of a monopolization prosecution—and the judgment of history—turn largely on how the case is "framed." In the original view of the government plaintiffs, Microsoft had sought to maintain its monopoly of desktop computer operating systems not through its skill or the superiority of its product, but through its raw clout. It exercised its power to strangle nascent competitive threats in the hope of perpetuating its monopoly—and its plan succeeded. In decided contrast, Microsoft argued that the government was interfering with a dynamic and

[4] 221 U.S. 1 (1911).

[5] 328 U.S. 781 (1946).

[6] 251 U.S. 417 (1920).

[7] 148 F.2d 416 (2d Cir. 1945).

[8] 351 U.S. 377 (1956).

[9] 687 F.2d 591, 593 (2d Cir. 1982) (granting petition for writ of mandamus ordering dismissal of case pursuant to stipulation of dismissal reached by Department of Justice and IBM in government's Section 2 case under the Sherman Act).

[10] 552 F. Supp. 131 (D.D.C. 1982), *aff'd mem.*, Maryland v. United States, 460 U.S. 1001 (1983) (approving dismissal pursuant to settlement between Department of Justice and AT&T).

[11] *See* William E. Kovacic, *The Modern Evolution of U.S. Competition Policy Enforcement Norms*, 71 ANTITRUST L.J. 377, 448–60 (2003) (discussing modest level of Sherman Act's Section 2 enforcement over time, with a focus on trends across various presidential administrations); *see also infra* notes 25, 43 and accompanying text.

[12] *See generally* Richard Hofstadter, *What Happened to the Antitrust Movement*, *in* THE PARANOID STYLE IN AMERICAN POLITICS AND OTHER ESSAYS 188 (1965).

[13] 253 F.3d 34 (D.C. Cir. 2001), *cert.denied*, 534 U.S. 952 (2001).

continually evolving industry, one in which it was merely engaged in hard competition, facing new, daily, and potent competitive threats.[14] These very characteristics of the case made it particularly important to apply antitrust to Microsoft—and particularly difficult.

For a time, the government plaintiffs' narrative was ascendant. That narrative began to lose ground, however, when, following a change of administration in the United States in January 2001 and a mixed court of appeals decision in June 2001, the case was settled. A "re-framing" was under way. The result is that the government that once clearly chastised Microsoft has come full circle to defend many of its core business strategies in the U.S. and elsewhere in the world. More broadly, that re-framing effort has sought to use the *Microsoft* case as a vehicle for redirecting antitrust doctrine and enforcement away from the problems of monopoly, especially in the new economy.

We will argue that the significant victories of antitrust enforcers in the United States, Europe, and elsewhere strongly favor the "exclusionary" narrative—i.e., that the case was accurately framed by the government plaintiffs at the outset, and that revisionist efforts to re-frame the case are inconsistent with the factual record. We will also argue that a large price is already being paid for the re-framing effort, which secured its first concrete fruit in the plainly ineffectual settlement of the case reached in the United States. That settlement left competition hobbled and significant violations of antitrust law largely uncorrected. In so doing, the settlement risked eroding public confidence in the efficacy of antitrust enforcement, especially in new economy industries. Finally, as the cornerstone of the re-framing effort, the settlement is being invoked by the leadership of the Department of Justice to attack antitrust enforcers around the globe who fail to embrace fully the philosophy of restraint it reflects.

Our argument concludes with our view of the durable meaning of the *Microsoft* prosecution. The history of the public prosecution of Microsoft reminds us that major monopolization cases are important to bring, but politically difficult to manage to successful conclusion. In significant ways, the government's initial victory vindicated its effort to restrain Microsoft from pursuing strategies that undermined competition. It also re-affirmed that the government was up to the task of litigating to conclusion a complex, modern antitrust case in a cutting-edge industry—and that it could be done in a reasonable span of time.[15] The ultimate settlement of the case on weak terms,

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[14]As one commentator has observed, the battle in the courtroom became a battle to establish the dominant narrative. Joshua A. Newberg, *The Narrative Construction of Antitrust*, 12 S. CAL. INTERDISC. L.J. 181, 183 (2003) (discussing role of narrative in *Microsoft* government litigation); *see also* Andrew I. Gavil, *Exclusionary Distribution Strategies by Dominant Firms: Striking a Better Balance*, 72 ANTITRUST L.J. 3, 30–51 (2004) (discussing role of narrative in U.S. monopolization cases more generally).

[15]A frequently-cited paradigm of the opposite is the thirteen-year antitrust prosecution of IBM. *See* John E. Lopatka, United States v. IBM*: A Monument to Arrogance*, 68 ANTITRUST L.J. 145, 145–46 (2000). The *IBM* experience was no doubt on the mind of Judge Thomas Penfield

however, eroded the value of that victory. Powerful companies that commit serious violations of the law must face meaningful remedies if the discipline of the marketplace is to be imposed on them, future violations are to be deterred, and the long tradition of public confidence in public enforcement is to be maintained. The ability of Microsoft and the leadership of the Department of Justice to re-frame the *Microsoft* case underscores a political truth: antitrust is about more than abstract economic theory.

Our examination of the litigation through an explicit political lens is consistent with a long tradition of viewing antitrust as an act of political economy, intended to promote the public interest by opposing—and attempting to disperse—concentrated private economic power.[16] This view asserts antitrust's public-regarding political purpose, while at the same time recognizing that the targets of antitrust may very well be able to use their political power to thwart antitrust's exercise. If the current effort to re-frame the *Microsoft* case succeeds, the already limited public power that remains to pursue private power in the public interest will be even more circumscribed, and the capacity of the government to challenge competition-related abuses of private power may be crippled for decades to come.

## II. THE SHERMAN ACT AND PUBLIC POWER

### *A. Origins*

The history and evolution of American antitrust law is a tale of power and institutions. With the adoption of the Sherman Act in 1890, public power was created at the federal level and pitted against private power, which had itself been facilitated at the state level through the invention and expansion of general

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Jackson, who drew some important lessons from the *IBM* prosecution as he approached the *Microsoft* cases. *See* Andrew I. Gavil, *The End of Antitrust Trench Warfare?: An Analysis of Some Procedural Aspects of the* Microsoft *Trial*, ANTITRUST, Summer 1999, at 7, 11–13.

[16] John Flynn's writing reflects this political tradition, as does the work of Louis B. Schwartz, John Flynn's co-author and colleague. *See, e.g.*, John J. Flynn, Introduction, *Antitrust Jurisprudence: A Symposium on the Economic, Political and Social Goals of Antitrust Policy*, 125 U. PA. L. REV. 1182 (1977); John J. Flynn, *Antitrust Policy and the Concept of a Competitive Process*, 35 N.Y.L. SCH. L. REV. 893 (1990) [hereinafter Flynn, *Antitrust Policy*]; John J. Flynn & James F. Ponsoldt, *Legal Reasoning and the Jurisprudence of Vertical Restraints: The Limitations of Neoclassical Economic Analysis in the Resolution of Antitrust Disputes*, 62 N.Y.U. L. REV. 1125 (1987); John J. Flynn, Standard Oil *and* Microsoft—*Intriguing Parallels or Limping Analogies*, 46 ANTITRUST BULL. 645 (2001) [hereinafter Flynn, *Intriguing Parallels*]; Louis B. Schwartz, *Institutional Size and Individual Liberty: Authoritarian Aspects of Bigness*, 55 NW. U. L. REV. 4 (1960); Louis B. Schwartz, *"Justice" and Other Non-Economic Goals of Antitrust*, 127 U. PA. L. REV. 1076 (1979). For an argument that U.S. antitrust laws result from—and depend for popular support upon—a "political bargain" between consumers and producers, see Jonathan B. Baker, *Competition Policy as a Political Bargain*, 73 ANTITRUST L.J. 483 (2006).

corporation laws.[17] Public and private institutions at both the state and national levels had to adapt to the new economic realities of a national economy. Indeed, the Sherman Act triggered a substantial history of commentary and dialogue about the balance of power between the public and private sectors.[18] No category of cases better illustrates these tensions than government prosecutions of privately-grown "monopolies."

It would be a revisionist mistake, however, to conclude that the reasons for congressional and popular concern with private power in 1890 were limited to its immediate economic consequences for consumers, as is often presumed today. As Professor Hans B. Thorelli observed in his still impressive study of the adoption of the Sherman Act:

> There can be no doubt that the Congress felt that the ultimate beneficiary in this whole process was the consumer, enjoying a continuous increase in production and commodity quality at progressively lowered prices. The immediate beneficiary legislators had in mind, however, was in all probability the small business proprietor or tradesman whose opportunities were to be safeguarded from the dangers emanating from those recently-evolving elements of business that seemed so strange, gigantic, ruthless and awe-inspiring. . . . Perhaps we are even justified in saying that the Sherman Act is not to be viewed exclusively as an expression of economic policy. In safeguarding rights of the "common man" in business "equal" to those of the evolving more "ruthless" and impersonal forms of enterprise the Sherman Act embodies what is to be characterized as an eminently "social" purpose.[19]

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[17] *See, e.g.*, HANS B. THORELLI, THE FEDERAL ANTITRUST POLICY: ORIGINATION OF AN AMERICAN TRADITION 84 (1955) (noting that "New Jersey had been the leader in what had gradually become a race among some of the states to stimulate the registration of new corporations by lax incorporation laws"); *see also* David Millon, *Theories of the Corporation*, 1990 DUKE L.J. 201, 208.

[18] *See, e.g.*, David S. Millon, *The Sherman Act and the Balance of Power*, 61 S. CAL. L. REV. 1219, 1255 (1988).

[19] THORELLI, *supra* note 17, at 227. The origins and purposes of the Sherman Act have been the subject of a long-running and intense debate. *See, e.g.*, Robert H. Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J.L. & ECON. 7, 7–14 (1966) (identifying efficiency as the Sherman Act framers' overriding purpose); Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L.J. 65, 93–96 (1982) (responding to Bork's position, arguing that preventing wealth transfers was the Sherman Act framers' primary purpose). Other commentators have emphasized additional historical, legal, social, and economic factors that may have influenced the Sherman Act's drafters. For example, Professor Rudolph Peritz has described the Sherman Act as the product of a factional conflict between those adhering to two differing, recurring "rhetorics" of competition, reflecting comparatively greater emphasis on equality and liberty, respectively. *See generally* RUDOLPH J. R. PERITZ, COMPETITION POLICY IN AMERICA 1888–1992: HISTORY,

At least two consequences flow from the recognition that social and political concerns are imbedded in the federal antitrust laws. First, they influence how we interpret debate and commentary directed at the content and purposes of antitrust laws. It would be naive to think that such debates can fairly be described as wholly "objective" merely because they invoke economics. Some "economic" judgments can be value-laden, and the assumptions and arguments made concerning economics can mask underlying social and political values. The second consequence is perhaps more of a challenge: How can we find measured ways to give effect to these goals in the enforcement of the Act? The *Microsoft* cases illustrate both of these perennial companions to debates about national competition policy.

### *B. The Evolution of Modern Monopolization Standards*

#### *1. Distinguishing Aggressive Competition from "Predation" and "Exclusionary Conduct":* Alcoa *to* Trinko

It is clear from the language and early history of Section 2 of the Sherman Act that "mere size" has never been viewed as an offense in and of itself.[20] Reflecting this fact, the Supreme Court has long adhered to a two-part test for monopolization, most recently restated in *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko* (*Trinko*): "It is settled law that this offense requires, in addition to the possession of monopoly power in the relevant market, 'the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.'"[21] The Court continued, expanding on the rationale for the conduct requirement:

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RHETORIC, LAW (1996). Professor James May has emphasized the influence of the economic and political vision at the heart of contemporary "laissez-faire constitutionalism," which strongly encouraged a belief that antitrust law simultaneously could protect economic opportunity, efficiency, competition, fair distribution, and political liberty through a process of largely nondiscretionary adjudication. *See generally* James May, *Antitrust in the Formative Era: Political and Economic Theory in Constitutional and Antitrust Analysis, 1880–1918*, 50 OHIO ST. L.J. 257 (1989). For additional perspectives on the Sherman Act and its origins, see Thomas C. Arthur, *Farewell to the Sea of Doubt: Jettisoning the Constitutional Sherman Act*, 74 CAL. L. REV. 263 (1986); John J. Flynn, *The Reagan Administration's Antitrust Policy, "Original Intent" and the Legislative History of the Sherman Act*, 33 ANTITRUST BULL. 259 (1988); and Eleanor M. Fox, *The Politics of Law and Economics in Judicial Decision Making: Antitrust as a Window*, 61 N.Y.U. L. REV. 554 (1986).

[20] *See, e.g.*, United States v. U.S. Steel Corp., 251 U.S. 417, 451 (1920) ("[T]he law does not make mere size an offense, or the existence of unexerted power an offense.").

[21] 540 U.S. 398, 407 (2004) (quoting United States v. Grinnell Corp., 384 U.S. 563, 570–71 (1966)).

> The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system. The opportunity to charge monopoly prices—at least for a short period—is what attracts "business acumen" in the first place; it induces risk taking that produces innovation and economic growth. To safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive *conduct*.[22]

"Conduct" thus is a critical prerequisite to the active "monopolization" or "attempt to monopolize."

From the moment of its inception, however, Section 2 presented a challenging question: What kind of conduct warrants condemnation? How can fact-finders distinguish between aggressive but wholly legitimate competition by monopolists, what Judge Hand described in *Alcoa* as "superior skill, foresight, and industry,"[23] and "predatory" or "exclusionary" conduct, which warrants condemnation?[24] The standard refrain restated by the Court in *Trinko* distinguishes between "superior product, business acumen, or historic accident" and "willful acquisition or maintenance," but this articulation of the distinction largely begs the question of how courts are to draw the line.

Courts and commentators have grappled with this Section 2 puzzle, taking many different approaches in trying to solve it.[25] The common goal is to develop

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[22]*Id.* For a critique of the Court's reasoning in this passage, see Gavil, *supra* note 14, at 42–43.

[23]United States v. Aluminum Co. of Am., 148 F.2d 416, 430 (2d Cir. 1945) ("A single producer may be the survivor out of a group of active competitors, merely by virtue of his superior skill, foresight and industry. In such cases a strong argument can be made that, although the result may expose the public to the evils of monopoly, the Act does not mean to condemn the resultant of those very forces which it is its prime object to foster: *finis opus coronat*. The successful competitor, having been urged to compete, must not be turned upon when he wins.").

[24]This notion that monopoly obtained by "skill" should be protected can be traced to Section 2's very limited legislative history. *See* 21 CONG. REC. 3151–52 (1890) (statements of Sens. Kenna and Hoar). Senator Hoar actually used the phrase "superior skill and intelligence," and distinguished such acts from what he viewed as the common law definition of unlawful monopoly: "the sole engrossing to a man's self by means which prevent other men from engaging in fair competition with him." *Id.*; *see also* United States v. E.I. Du Pont de Nemours & Co., 351 U.S. 377, 390–91 & n.15 (1956) (discussing limited legislative history of Section 2). The distinction was also acknowledged by William Howard Taft, who authored one of the earliest monographs on the Sherman Act. *See* WILLIAM HOWARD TAFT, THE ANTI-TRUST ACT AND THE SUPREME COURT 127 (Rothman Rep. 1993) (1914).

[25]A lively discussion of these issues is now unfolding both in the United States and Europe. The Antitrust Division of the U.S. Department of Justice and the Federal Trade Commission announced their intention to conduct joint hearings on single-firm conduct in November 2005. *See* Press Release, Dep't of Justice, DOJ and FTC to Hold Joint Pub. Hearings

a standard that strikes the optimal balance between over- and under-deterrence, while providing some degree of predictability to firms about the permissible scope of single-firm conduct.

To achieve these goals, some courts and commentators have sought to translate "skill, foresight, and industry" into more economically grounded concepts, such as competition on the merits or competition based on superior efficiency. A good example is *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.* (*Aspen Skiing*), a private Section 2 challenge by Aspen Skiing's smaller rival, Aspen Highlands.[26] After a careful review of its own previous Section 2 decisions, the Court concluded:

> The question whether Ski Co.'s conduct may properly be characterized as exclusionary cannot be answered by simply considering its effect on Highlands. In addition, it is relevant to consider its impact on consumers and whether it has impaired competition in an unnecessarily restrictive way. If a firm has been "attempting to exclude rivals on some basis other than efficiency," it is fair to characterize its behavior as predatory. It is, accordingly, appropriate to examine the effect of the challenged pattern of conduct on consumers, on Ski Co.'s smaller rival, and on Ski Co. itself.[27]

Two points are important. First, the Court sought to integrate not only its prior decisions, but also the efforts of several prominent commentators, who had themselves sought to define the line between permissible and condemnable single-firm conduct. The Court drew "impairing competition in an unnecessarily restrictive way" from the work of Professors Areeda and Turner: "Thus 'exclusionary' comprehends, at the most, behavior that not only (1) tends to impair the opportunities of rivals, but also (2) either does not further competition on the merits or does so in an unnecessarily restrictive way."[28] Additionally, it drew from Robert H. Bork the idea of "attempting to exclude rivals on some basis other than efficiency."[29]

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on Competition Policy Related to Single-Firm Conduct, *available at* http://www.usdoj.gov/atr/public/press_releases/2005/213369.htm. Those hearings commenced in June 2006. *See* Single-Firm Conduct and Antitrust Law Hearings Information, http://www.usdoj.gov/atr/public/hearings/single_firm/sfchearing.htm. In December 2005, the European Commission invited further commentary and study when it released the DG Competition Paper. *See* EUROPEAN COMM'N, DG COMPETITION DISCUSSION PAPER ON THE APPLICATION OF ARTICLE 82 OF THE TREATY TO EXCLUSIONARY ABUSES 1 (2005), *available at* http://ec.europa.eu/comm/competition/antitrust/others/discpaper2005.pdf.

[26] 472 U.S. 585 (1985). For further discussion, see Gavil, *supra* note 14, at 17–20.

[27] *Aspen Skiing*, 472 U.S. at 605 (footnotes omitted).

[28] *Id.* at 605 n.32 (quoting 3 PHILIP AREEDA & DONALD F. TURNER, ANTITRUST LAW 78 (1978)).

[29] *Id.* at 605 n.33 (quoting ROBERT H. BORK, THE ANTITRUST PARADOX 138 (1978)).

Second, the Court suggested a framework in which these various ideas about "bad" vs. "good" conduct could be evaluated—a more process-oriented approach to addressing the conduct question under Section 2. The final sentence of the Court's synthesis in *Aspen Skiing* directs lower courts to examine the impact of the conduct on rivals, consumers, and, importantly, the alleged predator itself, to reach a conclusion as to whether the conduct is fairly characterized as "exclusionary." The Court did not undertake, however, to assign any weight to any particular factor. Its suggested approach, therefore arguably has features in common with the rule of reason approach long followed under Section 1 of the Sherman Act (sometimes referred to herein as "Section 1"), but is more structured:

> Inherent in this approach is a framework that involves shifting burdens of production: the plaintiff demonstrates exclusion or impairment of rivals and consequent actual or likely impact on consumers. The defendant must then come forward with "business justifications." The approach is suggestive of a kind of "balancing," at least when the defendant can meet its burden of production and presents evidence of legitimate purposes.[30]

The D.C. Circuit's opinion in *Microsoft* commences, as did *Aspen Skiing*, by restating the two-part *Grinnell-Alcoa* test.[31] Instead of then trying to define "exclusionary" as a theoretical matter, the court took a far more practical, process-oriented route. It drew upon "a century of case law" to synthesize a framework for identifying exclusionary conduct in a fashion that is specifically geared towards the litigation context.[32] Assuming that monopoly power has been established, the *Microsoft* framework looks for evidence of actual anticompetitive effects, which must involve harm not merely to rivals, but injury to competition, i.e. to consumers.[33] If a plaintiff introduces evidence of both power and competitive harm, the burden of production necessarily shifts to the defendant, who can offer evidence of a procompetitive justification: "If the monopolist asserts a procompetitive justification—a nonpretextual claim that its conduct is indeed a form of competition on the merits because it involves, for example, greater efficiency or enhanced consumer appeal—then the burden shifts back to the plaintiff to rebut that claim."[34] Only at that point, if the justification stands "unrebutted," must the plaintiff "demonstrate that the

[30]*See* Gavil, *supra* note 14, at 18.

[31]United States v. Microsoft Corp., 253 F.3d 34, 50 (D.C. Cir. 2001), *cert. denied*, 534 U.S. 952 (2001).

[32]*Id.* at 58.

[33]*Id.* at 58–59.

[34]*Id.* at 59.

anticompetitive harm outweighs the procompetitive benefit."[35] The court observed at this juncture that "[i]n cases arising under Section 1 of the Sherman Act, the courts routinely apply a similar balancing approach under the rubric of the 'rule of reason.'"[36] In doing so, however, the D.C. Circuit reasoned that courts should confine the inquiry to evidence of actual effects, both salient and harmful. "Intent" is only relevant to the extent it aids in the establishment of effect.[37] The court thus recognized that to resolve the hardest antitrust cases, those that involve evidence of both harm to consumers and some legitimate justification, some kind of "weighing" or "balancing" of the evidence will be necessary.[38] This insight reveals the common core to antitrust analysis across Sections 1 and 2 of the Sherman Act, and even Section 7 of the Clayton Act.[39]

*Trinko* did not attempt either to define "exclusionary" conduct or to offer a process-oriented approach that would aid courts in identifying it.[40] It instead focused on identifying some specific kinds of conduct where courts should hesitate to encroach on the autonomy of single firms by applying Section 2. In its view, both *Aspen Skiing* and *Trinko* involved refusals to assist rivals. In that context—while reaffirming its previous decision in *Aspen Skiing*—the Court also sought to confine its reach, stating that the decision lies "at or near the outer boundary" of Section 2 liability, and should be viewed as a "limited exception."[41] The Court's effort to confine *Aspen Skiing* was not directed to its articulation of a synthesized Areeda-Turner-Bork test for identifying exclusionary conduct.[42] It was directed at the result.

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[35] *Id.*

[36] *Id.*

[37] *Id.* ("Finally, in considering whether the monopolist's conduct on balance harms competition and is therefore condemned as exclusionary for purposes of § 2, our focus is upon the effect of that conduct, not upon the intent behind it. Evidence of the intent behind the conduct of a monopolist is relevant only to the extent it helps us understand the likely effect of the monopolist's conduct." (citations omitted)).

[38] *See also* Steven C. Salop & R. Craig Romaine, *Preserving Monopoly: Economic Analysis, Legal Standards, and* Microsoft, 7 GEO. MASON L. REV. 617, 648–49 (1999) (discussing operation of balancing test for Section 2 monopolization claims).

[39] *See* Clayton Act, 15 U.S.C. § 18 (2000). Whether the court actually applied that standard in *Microsoft*, and if it did, whether it applied it correctly is open to question. *See* Gavil, *supra* note 14, at 21–23; *infra* Part II.B.2.

[40] The closest it came to suggesting a standard was in noting the presence of sacrifice of profit in *Aspen Skiing*. Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, L.L.P., 540 U.S. 398, 409 (2004). But the Court in no way suggested that profit sacrifice should be viewed as a necessary, as opposed to a sufficient, condition for a finding of exclusionary conduct. In fact, it also noted that Aspen Skiing's other conduct "revealed a distinctly anticompetitive bent." *Id.*

[41] *Id.*

[42] *See supra* notes 28–29 and accompanying text. One essential distinction in *Trinko* was the fact that the defendant's refusal to assist its rival arose in the context of an elaborate government regulatory scheme that was specifically directed toward regulating competition. In

### 2. *Microsoft, the Origins of Section 2 and the "Rule of Reason"*

There was no significant public reaction from the Department of Justice in response to the D.C. Circuit's *Microsoft* framework, including its suggestion that the approach under Section 2 in cases involving both effects and justifications would be analogous to the rule of reason under Section 1. After the change of administrations, however, the Department specifically distanced itself from the D.C. Circuit's suggestion that a rule-of-reason-type balancing approach would be appropriate under Section 2 in its brief urging the Supreme Court to grant the petition for a writ of certiorari in *Trinko*.[43]

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that context, the Court expressed the view that antitrust liability under Section 2 was unnecessary at best, and at worst incompatible:

> Finally, we do not believe that traditional antitrust principles justify adding the present case to the few existing exceptions from the proposition that there is no duty to aid competitors. Antitrust analysis must always be attuned to the particular structure and circumstances of the industry at issue. Part of that attention to economic context is an awareness of the significance of regulation.

*Id.* at 411.

[43]Brief for the United States and the Federal Trade Commission as Amici Curiae in Support of the Petition for a Writ of Certiorari at 11 n.2, *Trinko*, 540 U.S. 398 (No. 02-682), 2002 WL 32354606 (citing to the Section 2 framework analysis in *Microsoft* and stating: "[t]he United States did not suggest or endorse such a 'balancing approach' in the *Microsoft* case"); *see also* Brief for the United States and the Federal Trade Commission as Amici Curiae Supporting Petitioner at 15, *Trinko*, 540 U.S. 398 (No. 02-682), 2003 WL 21269559 [hereinafter United States and FTC Brief Supporting Petitioner] (quoting Copperweld Corp. v. Independence Tube Corp., 476 U.S. 752, 767, 775 (1984), for the proposition that the conduct of single firms cannot be judged by a "reasonableness" standard). There was, however, no such unfavorable reference to the *Microsoft* balancing approach in the government's merits brief in *Trinko*. *See id.* at 15–16 (discussing proposed standard for proving exclusionary conduct). Moreover, the Court in *Trinko* did not refer to the D.C. Circuit's balancing test, either to endorse or reject it, *see Trinko*, 540 U.S. at 407–09 (defining requirements for claim of monopolization), although it did cite to the *Microsoft* opinion with approval on another proposition, *see id.* at 414. Nevertheless, one commentator has argued that beginning with the *Microsoft* brief—which was drafted by the Clinton Antitrust Division leadership—the government has consistently urged the courts to adopt a single test for defining exclusionary conduct. *See* Gregory J. Werden, *Identifying Exclusionary Conduct under Section 2: The "No Economic Sense" Test*, 73 ANTITRUST L.J. 413, 413–14 (2006). That test, which has been labeled the "no economic sense" test, would only permit conduct to be deemed exclusionary if "it would make no economic sense for the defendant but for the tendency to eliminate or lessen competition." *Id.* at 413; *see also* A. Douglas Melamed, *Exclusive Dealing Agreements and Other Exclusionary Conduct—Are There Unifying Principles?*, 73 ANTITRUST L.J. 375. 389–412 (2006) (advocating "profit sacrifice" variant of no economic sense test). A careful reading of the *Microsoft* appellate brief demonstrates, however, that while the phrase "no economic sense" is used, the broader approach

Surely issues remain as to how a rule-of-reason-type approach could best be implemented for Section 2 and whether the D.C. Circuit properly did so in *Microsoft*. But the D.C. Circuit's proposed framework was a faithful effort to synthesize the Supreme Court's most recent Section 2 decisions and was well-rooted in the history and purposes of Section 2, as was noted by the court itself.[44]

Section 2's triplet of prohibitions on monopolization, attempts to monopolize, and conspiracy to monopolize emerged late in the legislative evolution of the Sherman Act. Only after the Sherman Act emerged for the final time from the Senate Judiciary Committee did the provision appear, and the legislative history is sparse.[45] At first glance, this would seem odd given the congressional preoccupation with monopolistic trusts. However, as the Supreme Court explained in detail in *Standard Oil*, at common law there was a distinction between true "monopoly," which could only be created by the Crown, and private acts that might emulate the economic consequences of monopoly. These private acts—engrossing, forestalling, and regrating—were the objects of early prohibitions. It was presumed that these acts of individuals "were the consequence of a contract or course of dealing of such a character as to give rise to the presumption of an intent to injure others through the means, for instance, of a monopolistic increase of prices."[46] As the Supreme Court went on to detail

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articulated in the brief emphasized the need to look at multiple factors, including harm to consumers and rivals, in determining whether a violation of Section 2 has occurred. *See* Brief for Appellees United States and the State Plaintiffs at 48–52, United States v. Microsoft Corp., 253 F.3d 34 (D.C. Cir. 2001) (Nos. 00-5212 & 00-5213), 2001 WL 34152428. Moreover, when the "no economic sense" test was advocated by the Bush administration as an amicus in its joint Department of Justice-Federal Trade Commission merits brief in *Trinko*, it was specifically confined to the context of refusals to deal, a limitation that the commentator does not acknowledge. *See* United States and FTC Brief Supporting Petitioner, *supra*, at 15–16. Finally, the actual enforcement record strongly supports the view that there has been a change of philosophy regarding the enforcement of Section 2, without regard to how the Justice Department articulates the legal test in its appellate briefs. Whereas the Clinton Antitrust Division filed nine Section 2 cases between 1994 and 2000, the Bush Antitrust Division has filed just one—and none in the last four years. *See* United States Department of Justice, Antitrust Division Workload Statistics FY 1996–2005, http://www.usdoj.gov/atr/public/workstats.pdf; United States Department of Justice, Antitrust Division, Workload Statistics, FY 1994–2003, http://www.usdoj.gov/atr/public/12848.htm (for years 1994 and 1995). For a more sweeping critique of the no economic sense test, see Steven C. Salop, *Exclusionary Conduct, Effect on Consumers, and the Flawed Profit-Sacrifice Standard*, 73 ANTITRUST L.J. 311 (2006); *see also* Gavil, *supra* note 14, at 52-55 (labeling the approach a "but for" test and analyzing and criticizing its use).

[44] United States v. Microsoft Corp., 253 F.3d 34, 58–59 (D.C. Cir. 2001) (quoting Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 61–62 (1911)). For a broader consideration of possible parallels between the government's prosecution of *Microsoft* and the case against *Standard Oil*, see Flynn, *Intriguing Parallels*, *supra* note 16, at 647–52, 725–33.

[45] *See* THORELLI, *supra* note 17, at 200–03; *see also* ANDREW I. GAVIL, AN ANTITRUST ANTHOLOGY 43–44 (1996) (reproducing excerpts from legislative history of Section 2).

[46] *Standard Oil*, 221 U.S. at 52. The Court went on to explain that:

in *Standard Oil*, "contracts in restraint of trade" and "monopoly" thus were related and integrated concepts, not distinct ones as the Supreme Court would much later maintain in *Copperweld Corp. v. Independence Tube Corp.* (*Copperweld*).[47] In fact, "monopoly" was just one expression of a restraint of trade. The modern bright line between "unilateral" and "concerted" action was unknown and likely would have been viewed as highly artificial, because firms themselves were the product of "contracts" and "combinations" of capital, people, and other resources.[48] Citing the classic common law case of *Mitchell v. Reynolds*,[49] the Court observed that "monopoly" is "generically within the description of restraint of trade."[50]

This relationship between Sections 1 and 2 was at the heart of the Court's penultimate holding in *Standard Oil*—that Section 1 should be interpreted in light of the rule of reason. The Court expressed that view in the context of its observations about the overall scheme of the Sherman Act, especially the complementary relationship of Sections 1 and 2:

> [H]aving by the 1st section forbidden all means of monopolizing trade, that is, unduly restraining it by means of every contract, combination, etc., the 2d section seeks, if possible, to make the prohibitions of the act all the more complete and perfect by embracing all attempts to reach the end prohibited by the 1st section, that is, restraints of trade, by any attempt to monopolize, or monopolization thereof, even although the acts by which such results are attempted to be brought about or are brought about be not embraced within the general

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> [A]s the principal wrong which it was deemed would result from monopoly, that is, an enhancement of the price, was the same wrong to which it was thought the prohibited engrossment would give rise, it came to pass that monopoly and engrossing were regarded as virtually one and the same thing. In other words, the prohibited act of engrossing, because of its inevitable accomplishment of one of the evils deemed to be engendered by monopoly, came to be referred to as being a monopoly or constituting an attempt to monopolize.

*Id.* at 53.

[47] 467 U.S. at 774–75 (asserting that there is an intentional "gap" built into the Sherman Act that separates violations of Section 1 from those of Section 2 based on degrees of anticompetitive effect). For a discussion and critique of *Copperweld*'s "gap" theory, see Andrew I. Gavil, Copperweld *2000: The Vanishing Gap between Sections 1 and 2 of the Sherman Act*, 68 ANTITRUST L.J. 87 (2000).

[48] *Standard Oil*, 221 U.S. at 54 ("And by operation of the mental process which led to considering as a monopoly acts which, although they did not constitute a monopoly, were thought to produce some of its baneful effects, so also because of the impediment or burden to the due course of trade which they produced, such acts came to be referred to as in restraint of trade.").

[49] 1 P. Wms. 181, 24 Eng. Rep. 347 (K.B. 1711).

[50] *Standard Oil*, 221 U.S. at 54.

> enumeration of the 1st section. And, of course, *when the 2d section is thus harmonized with and made, as it was intended to be, the complement of the 1st, it becomes obvious that the criteria to be resorted to in any given case for the purpose of ascertaining whether violations of the section have been committed is the rule of reason guided by the established law and by the plain duty to enforce the prohibitions of the act*, and thus the public policy which its restrictions were obviously enacted to subserve.[51]

This relationship between Sections 1 and 2 had, to a great extent, been lost in the drive to define analytical models for evaluating conduct under each of the two sections until it was resurrected in the *Microsoft* circuit court opinion.[52] One of *Microsoft*'s potentially enduring contributions to the development of Section 2 standards, therefore, is its effort to synthesize the prior case law and articulate a structured approach to analyzing conduct challenged under Section 2. This approach holds open the possibility of a full factual examination of the competitive effects of a monopolist's conduct, although, as the court of appeals' decision in *Microsoft* itself reveals, it is not self-executing or free from problems.[53]

## II. THE CASE AGAINST MICROSOFT

### *A. Framing the Case*

The initial framing of the case against Microsoft reflected a narrative that evolved over time through the initial complaints filed by the United States[54] and the states[55] on May 18, 1998, and in subsequent papers filed in the case,

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[51] *Id.* at 61–62 (emphasis added).

[52] Immediately following the D.C. Circuit's reference to the rule of reason, it quoted this very language from *Standard Oil* and reasoned: "The source of the rule of reason is *Standard Oil* . . . in which *the Supreme Court used that term to describe the proper inquiry under both sections of the Act*." United States v. Microsoft Corp., 253 F.3d 34, 59 (D.C. Cir. 2001) (emphasis added). It also noted that the Fifth Circuit has similarly recognized the common nature of the approach to resolving cases under Sections 1 and 2: "It is clear . . . that the analysis under section 2 is similar to that under section 1 regardless whether the rule of reason label is applied . . . ." Mid-Texas Commc'ns Sys., Inc. v. AT&T Co., 615 F.2d 1372, 1389 n.13 (5th Cir. 1980) (citing Byars v. Bluff City News Co., 609 F.2d 843, 860 (6th Cir. 1979)); *see also* Cal. Computer Prods., Inc. v. IBM Corp., 613 F.2d 727, 737 (9th Cir. 1979).

[53] For a recent explication and defense of a "consumer welfare" model of analysis for Section 2, see Salop, *supra* note 43, at 333–35.

[54] Complaint, United States v. Microsoft Corp., 87 F. Supp. 2d 30 (D.D.C. 2000) (No. 98-1232), *available at* http://www.usdoj.gov/atr/cases/f1700/1763.pdf [hereinafter DOJ Complaint].

[55] Complaint, *Microsoft*, 87 F. Supp. 2d 30 (No. 98-1233) [hereinafter States' Complaint] (filed on behalf of twenty states and District of Columbia) (on file with authors). An amended

especially the declarations and later direct testimony of the expert economists,[56] Microsoft's motion for summary judgment[57] and the government's response thereto,[58] the direct testimony of other key witnesses,[59] the opening and closing statements of counsel,[60] and in the end, the proposed findings of fact and conclusions of law.[61] The narrative was also nurtured outside the courtroom in press releases, public comments, and an unprecedented—for antitrust—level of press coverage. That narrative proceeded on multiple levels. The first level concerned the *conduct* itself. Although there was some significant agreement on what the conduct was, the government plaintiffs and Microsoft advocated very different characterizations of the conduct. Differences also emerged in the respective portrayals of the *markets* in which the conduct occurred. Finally, there

complaint was filed in July 1998. Plaintiff States' First Amended Complaint, *Microsoft*, 87 F. Supp. 2d 30 (No. 98-1233) [hereinafter First Amended Complaint] (on file with authors).

[56]For the government plaintiffs, see Direct Testimony of Franklin M. Fisher, *Microsoft*, 87 F. Supp. 2d 30 (Nos. 98-1232 & 98-1233), *available at* http://www.usdoj.gov/atr/cases/f213400/213457.pdf [hereinafter Fisher Testimony]; Direct Testimony of Frederick R. Warren-Boulton, *Microsoft*, 87 F. Supp. 2d 30 (Nos. 98-1232 & 98-1233), *available at* http://www.usdoj.gov/atr/cases/f2000/2079.htm. For Microsoft, see Direct Testimony of Richard L. Schmalensee, *Microsoft*, 87 F. Supp. 2d 30 (Nos. 98-1232 & 98-1233) [hereinafter Schmalensee Testimony].

[57]Microsoft Corporation's Motion for Summary Judgment, *Microsoft*, 87 F. Supp. 2d 30 (Nos. 98-1232 & 98-1233). Microsoft also sought to influence public perceptions of the government's case through strongly-worded press releases that relayed its own counter-narrative. For the press release issued by Microsoft in conjunction with its motion, see Press Release, Microsoft Corp., Microsoft Asks Court to Dismiss Government Lawsuit (Aug. 10, 1998), *available at* http://www.microsoft.com/presspass/press/1998/Aug98/8-10summarypr.mspx [hereinafter Press Release, Microsoft Asks Court to Dismiss Lawsuit].

[58]Plaintiffs' Joint Response to Microsoft's Motion for Summary Judgment and Reply in Support of Motions for Preliminary Injunction, *Microsoft*, 87 F. Supp. 2d 30 (Nos. 98-1232 & 98-1233), *available at* http://www.usdoj.gov/atr/cases/f1900/1914.htm.

[59]An especially critical witness for the government's narrative was the President and Chief Executive Officer of Netscape, Jim Barksdale. *See* Direct Testimony of Jim Barksdale, *Microsoft*, 87 F. Supp. 2d 30 (Nos. 98-1232 & 98-1233), *available at* http://www.usdoj.gov/atr/cases/f1900/1999.pdf.

[60]For an analysis of the role and nature of narrative in the closing arguments, see Newberg, *supra* note 14, at 186–93.

[61]*See* Plaintiffs' Joint Proposed Findings of Fact—Revised, *Microsoft*, 87 F. Supp. 2d 30 (Nos. 98-1232 & 98-1233), *available at* http://www.usdoj.gov/atr/cases/f2600/2613pdf.htm (redacted version only); Plaintiffs' Joint Proposed Conclusions of Law, *Microsoft*, 87 F. Supp. 2d 30 (Nos. 98-1232 & 98-1233), *available at* http://www.usdoj.gov/atr/cases/f217900/217969.pdf; *see also* Press Release, Microsoft Corp., Microsoft Submits Proposed Findings of Fact (Aug. 10, 1999), *available at* http://www.microsoft.com/presspass/features/1999/08-10findings.mspx [hereinafter Proposed Findings] (expressing principal themes of Microsoft's defense).

were quite different views of the adequacy of the *antitrust system* timely and effectively to police new economy industries.[62]

*1. The Narrative: A Thematic Overview*

The government plaintiffs sought to reduce a fairly complex series of events into a simple yet elegant story of classic exclusion: faced with what it perceived as a significant threat to its operating system ("OS") monopoly, Microsoft sought to solicit an agreement to suspend competition from one of its emerging rivals, Netscape, and when that effort was rebuffed, it embarked on a broad-based effort to eliminate the threat.[63] A twist to the story was the nascent state of that competitive threat, which had two components, neither of which was an "operating system": Netscape's Internet browser, called Navigator, and Sun's Java programming language.

Microsoft had been wildly successful in the market for Intel-compatible desktop operating systems, where it possessed a share that was persistently above ninety percent. Until the rise of the Internet, and the development of Navigator and Java, its domination of that market had been insulated from competitive challenge by significant barriers to entry. Yet, despite its successes, Microsoft had been caught unprepared for the Internet revolution; Netscape and Sun had not. It now sought to play catch-up by marketing its own Internet browser, Internet Explorer, and by integrating it into its Windows operating system.

As the government plaintiffs set out in their complaints, and especially in their opening trial witness, Netscape's President and CEO, Jim Barksdale, Microsoft perceived a two-fold threat to its OS monopoly. First, the combination of Netscape's Internet browser and Sun's Java programming language threatened to "commoditize" the operating system. In contrast to Windows, Navigator and Java were platform-neutral programs, i.e., they were designed specifically to interoperate with *any* underlying operating system. Moreover, Netscape elected to expose Navigator's applications programming interfaces ("APIs"), which invited other programmers to write programs to run on top of Navigator.[64] With

[62]Professor Newberg deconstructs the narrative, as reflected in the closing arguments, into discussions of "characters," "time," "narrative structure/plot," and "schemas." *See* Newberg, *supra* note 14, at 193–209.

[63]The importance of developing a focused, non-technical narrative was arguably one of the lessons the government drew from previous high-profile monopolization prosecutions. *See* Gavil, *supra* note 15, at 11–12.

[64]Hence Navigator was referred to as "middleware," because it ran on top of the operating system. Yet by exposing its own APIs, Navigator invited other programs to run on top of it without the proprietary constraints of having to conform to Windows. For a more complete description, see United States v. Microsoft Corp., 253 F.3d 34, 53–54 (D.C. Cir. 2001) (defining and describing competitive significance of middleware).

the growth of the Internet, Navigator thus had become a delivery mechanism for providing computer users with easy Internet access to platform-neutral programs, whether written to Netscape's APIs or in Java's programming language.

This was anathema to Microsoft, which had been so successful in marketing its flagship, and proprietary, Windows product. By combining the features of both Netscape and Sun, Microsoft believed, consumers would someday soon be able to access non-Windows programs over the Internet using any kind of computer running any kind of operating system. This might lead some programmers to envision alternative operating systems, as well.[65] "Commoditization" would provide new incentives to software developers interested in developing new operating systems, alternative middleware platforms, such as Netscape, and new programs that would not necessarily have to be "windows compatible." It would free original equipment manufacturers ("OEMs") and consumers from their dependence on Windows and hence bring Microsoft's domination of personal computer ("PC") operating systems to an end.[66]

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[65]Quoting internal Microsoft documents, the Justice Department's complaint explained the perceived threat:

> One important current source of potential competition for Microsoft's Windows operating system monopoly comes from the Internet, described by Microsoft's CEO, Bill Gates, in May 1995 as "the most important single development to come along since the IBM PC was introduced in 1981." As Mr. Gates recognized, the development of competing Internet browsers—specialized software programs that allow PC users to locate, access, display, and manipulate content and applications located on the Internet's World Wide Web ("the web")—posed a serious potential threat to Microsoft's Windows operating system monopoly. Mr. Gates warned his executives:
>
> ["]A new competitor 'born' on the Internet is Netscape. Their browser is dominant, with a 70% usage share, allowing them to determine which network extensions will catch on. They are pursuing a multi-platform strategy where they move the key API [applications programming interface] into the client to commoditize the underlying operating system.["]

DOJ Complaint, *supra* note 54, ¶ 6 (second alteration in original); *see also id.* ¶¶ 7–8.

[66]The government plaintiffs also alleged a second way Netscape's browser software presented a threat to Microsoft—as a nascent platform itself:

> Second, Microsoft recognized that Netscape's browser was itself a "platform" to which many applications were being written—and to which (if it thrived) more and more applications would be written. Since Netscape's browser could be run on any PC operating system, the success of this alternative platform also threatened to reduce or eliminate a key barrier protecting Microsoft's operating system monopoly. This is the threat that Microsoft's CEO Bill Gates referred to as the threat that Netscape would "commoditize" the operating system.

*Id.* ¶ 9.

For its part, Microsoft advocated quite a different story that was comprised of three major components. First, although Windows had no doubt been a success, that success was attributable to Microsoft's innovations and responsiveness to consumer needs. It earned its commanding position in the market with superior products. A focal point of this component of its story was Microsoft's defense of the integration of its IE browser into Windows. Microsoft steadfastly maintained that Windows was but a single integrated program, and that Microsoft must remain free to serve consumers by adding "functionality" to Windows through "integration." In short, any effort to restrict its autonomy to evolve Windows in response to consumer demand would harm consumers, not serve them.[67]

A second major and related theme of Microsoft's narrative was that the government plaintiffs' actions were instigated by Microsoft's rivals and would serve them, not consumers.[68] Microsoft correctly observed that the government plaintiffs had relied heavily on information provided by Netscape, Sun, and others in formulating their cases. But Microsoft inferred from this a kind of "capture"—i.e., that the government plaintiffs had been manipulated into acting to protect competitors, not competition. This was a theme that Microsoft repeated throughout the case, and continues to advocate today, especially in Europe, that somehow the veracity of the government plaintiffs' complaints was undermined by the their reliance on the self-interested advocacy of Microsoft's rivals.[69]

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[67]Microsoft's principal economic expert witness, Richard L. Schmalensee, devoted a significant portion of his testimony to establishing the consumer benefits of Microsoft's integration strategy. *See* Schmalensee Testimony, *supra* note 56, at 102–25. He also argued that consumers had benefited from competition between Microsoft and Netscape. *Id.* at 126–60.

[68]*See, e.g.*, Press Release, Microsoft Corp., A Case of Trial in Error: The *Microsoft* Antitrust Lawsuit (Dec. 7, 1998), *available at* http://www.microsoft.com/presspass/features/1998/12-7trialdoc.mspx [hereinafter Press Release, A Case of Trial in Error] ("Microsoft Chairman and CEO Bill Gates told reporters today that the government's antitrust lawsuit benefits Microsoft's competitors, not consumers, and could end up undermining the future of the entire high-tech industry.").

[69]For one well-known exposition of this argument, see Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 33–39 (1984) (arguing that the identity of the plaintiff should directly influence courts in determining the validity of antitrust claims). This presumption against reliance on the complaints of rivals, however, can be faulted on a number of grounds. First and foremost, it tends to obfuscate the message itself, which may in fact have some validity regardless of the messenger's identity. Second, it also assumes that the audience for the message—in this instance the government—has no ability to discern the truth or falsity of the message. Finally, it ignores the fact that in the context of exclusionary conduct, complaints from a self-interested rival may be a necessary early trip wire to prevent injury to consumers. By the time consumers discover the problem—if they ever do—the damage is done and it may be too late to restore competition. For a further elaboration of these arguments, see Herbert Hovenkamp, *Antitrust's Protected Classes*, 88 MICH. L. REV. 1, 33-35 (1989) (arguing that competitor suits can contribute to optimal deterrence).

Finally, Microsoft challenged the heart of the government plaintiffs' story by questioning causation—the degree to which competition was in fact affected by any of its conduct. It argued, for example, that its actions never actually foreclosed Netscape from reaching end-users, who remained free to download Netscape's browser directly over the Internet. Moreover, in its view, the competitive decline of Netscape was largely attributable to the failings of the product itself and the superiority of IE. In other words, Microsoft argued that it had defeated Netscape through legitimate competitive means, such as a superior product. It also questioned whether Navigator and Java together ever would have developed into a full-blown alternative to its operating system, even if it had not undertaken any conduct directed at forestalling that result.[70]

More generally, Microsoft's principal economic expert sought to portray the software industry generally as dynamic and bereft of impediments to entry. To the contrary, he maintained that "[c]ompetition in the software industry is based on sequential races for the leadership of categories" of software, and that leaders are regularly displaced—leapfrogged—by new entrants with "killer applications."[71] In such an industry, no firm can truly exercise market power except in the most fleeting sense. At best, Microsoft's dominance of desktop operating systems would prove to be transitory, unless its products were truly superior and remained so.[72]

With these two competing narratives in place, the parties squared off on the more technical question: By what conduct, and with what effect, had Microsoft allegedly sought to terminate this nascent competitive threat to its core business?

### 2. *The Conduct*

The Justice Department's complaint focused on a three-year period, from May 1995 to May 1998, and described six types of conduct by Microsoft. Collectively, that conduct was referred to as the "browser war."[73]

First, as already mentioned, the government plaintiffs alleged that in a May 1995 meeting, Microsoft sought simply to divide markets with Netscape and call a halt to competition—but that overture was rejected.[74] When it was, Microsoft set about a broad-based effort to extinguish the threat from Netscape and Sun by cutting off or impairing their access to all of the most productive channels of distribution to consumers. A cornerstone of that effort was the development and introduction of Microsoft's own Internet browser, IE, and Microsoft's complete

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[70] *See, e.g.*, Schmalensee Testimony, *supra* note 56, at 161–71 ("Plaintiffs have offered no reliable economic evidence that consumers or competition have been harmed by any aspect of Microsoft's conduct.").

[71] *Id.* at 17–18.

[72] *Id.* at 100–01.

[73] DOJ Complaint, *supra* note 54, ¶ 69; *see also* States' Complaint, *supra* note 55, ¶ 50.

[74] DOJ Complaint, *supra* note 54, ¶¶ 70–74; States' Complaint, *supra* note 55, ¶ 43.

integration of IE into Windows 95 and then Windows 98. The effort also included exclusionary agreements with Internet access providers ("IAPs"), sometimes also referred to as Internet service providers ("ISPs") (such as AT&T Worldnet, MCI, and Earthlink), and online services providers (such as America Online and CompuServe), who agreed not to use, distribute or provide ready access to any Internet browser other than IE. These agreements to limit the use of rival browsers were in some cases secured by Microsoft's threat to withdraw their access to the Windows desktop—a critical way for them to reach potential customers.[75] The government plaintiffs also alleged that Microsoft entered into exclusionary agreements with Internet content providers (such as CNN, Disney, Hollywood Online, and CBS Sportsline). Again, Microsoft traded access to and desirable placement on the Windows desktop for commitments of exclusivity.[76]

It was also alleged that Microsoft had entered into agreements with computer OEMs that effectively restricted OEM ability to use or promote competing browsers by restricting their autonomy to configure Windows. For example, the government alleged that Microsoft restricted OEMs' ability to alter the Windows boot-up sequence or the pre-programmed Windows screens. According to the complaint:

> These contractual restrictions have (and were intended by Microsoft to have) two basic effects on competing browser suppliers. First, they enhance Microsoft's control over the screens presented to users and thus increase Microsoft's ability to require preferential treatment for Internet Explorer from ISPs and ICPs in return for such ISPs' and ICPs' access to the Windows desktop. Second, these contractual restrictions greatly limit an OEM's ability to modify or customize the screens or initial "boot-up" sequence on a new PC either in response to customer demand or in an attempt to differentiate their products, or to substitute or feature a non-Microsoft browser, alternative user interface, or other Internet offerings.[77]

The fifth and sixth categories of conduct specifically addressed Microsoft's integration of IE into Windows itself, and these were characterized as the "tying" claims.[78] First, the government plaintiffs alleged that Microsoft tied IE to Windows 95, a carryover claim from the Justice Department's failed effort to hold Microsoft in contempt for violating an earlier consent decree that restricted

[75] DOJ Complaint, *supra* note 54, ¶¶ 75–86.

[76] *Id.* ¶¶ 87–92.

[77] *Id.* ¶ 94; *see also* States' Complaint, *supra* note 55, ¶ 78. *See generally* DOJ Complaint, *supra* note 54, ¶¶ 93–102.

[78] The tying claims also could be characterized as exclusive dealing, as is often the case, because they effectively required OEMs to use IE exclusive of other Internet browsers.

Microsoft's licensing practices for Windows 95.[79] They also alleged that Microsoft planned to more deeply integrate IE into Windows 98, its then forthcoming and latest iteration of Windows.[80] The tying claims alleged two distinct anticompetitive effects: (1) by excluding competing, platform-neutral browsers like Navigator, Microsoft was seeking to protect its OS monopoly, and (2) Microsoft was also attempting to monopolize the separate market for Internet browsers.[81]

The antitrust doctrine known as "tying" seemed initially to be a good fit in describing Microsoft's decisions to incorporate IE into Windows and to make deletion of IE nearly impossible for either OEMs or consumers. In its simplest form, "tying" is the sale of a product on the condition that the buyer also purchase a second product. Its anticompetitive effects can be felt by consumers, who (1) might not want to purchase the second product at all, or (2) would prefer to purchase the second product from another supplier. Exclusionary anticompetitive effects can also flow to suppliers of the second product, whose ability to sell the second product may be impaired or in extreme cases entirely precluded by the tying arrangement.[82]

Tying has a long and well-developed history in the areas of both antitrust and intellectual property law.[83] Over many years, the Supreme Court developed a formula for judging tying that even included per se prohibition. To be deemed

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[79]*See* DOJ Complaint, *supra* note 54, at. ¶¶ 103–12. The effort is discussed *infra* notes 88−89.

[80]DOJ Complaint, *supra* note 54, ¶¶ 20, 113–23.

[81]*Id.* ¶ 117 ("Microsoft is tying its Internet browser software to the Windows 98 operating system in order to achieve a monopoly in the Internet browser market and to stifle the potential competition to Microsoft's operating system monopoly that competing Internet browsers might generate."). The States' Complaint added a distinct claim for allegedly unlawful "leveraging," i.e., that by its conduct, Microsoft was seeking to gain a competitive advantage in the market for browsers that might fall short of the "dangerous probability of success" requirement for attempted monopolization, but would still warrant condemnation as an independent offense. *See* First Amended Complaint, *supra* note 55, ¶¶ 91–92. The district court granted summary judgment on that claim, however, rejecting the notion that leveraging can constitute such an independent offense. United States v. Microsoft Corp., Nos. 98-1232 & 98-1233, 1998 WL 614485, at *26–27 (D.D.C. Sept. 14, 1998). In so holding, the district court correctly anticipated that the Supreme Court likely would reject the notion that competitive advantage alone could satisfy the requirements for a claim under Section 2. *See* Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, 540 U.S. 398, 415 n.4 (2004) (noting in dictum that to qualify as an antitrust offense under the Sherman Act, "leveraging" by a monopolist from one market into a second market must satisfy the dangerous probability requirement of the offense of attempted monopolization).

[82]*See* Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 10–11 & nn.15–16 (1984) (discussing congressional concerns about effects of tying in legislative history of Section 3 of Clayton Act, which specifically addresses tying of products, but finding it relevant to antitrust analysis of tying arrangements under Sherman Act as well).

[83]For a recent review of that history by the Supreme Court—especially as it involved the tying of unpatented to patented products—see Illinois Tool Works Inc. v. Independent Ink, Inc., 126 S. Ct. 1281, 1285–88 (2006).

"per se unlawful tying," the Court had held: (1) there must be two distinct products; (2) there must be a conditioned sale, i.e., the tying product must be available for sale only on the condition that the second product, the "tied" product, is also purchased; (3) the seller must possess market power in the tying product, without which the requisite "forcing" of the second product on the buyer would not be feasible; and (4) the arrangement has to affect a "substantial volume of commerce in the tied product."[84] When all of these conditions are met, tying can in theory be subjected to per se condemnation,[85] but a great deal of law and commentary grew up around each of its specific requirements, especially the "two product" and "conditioned sale" requirements.[86] There has also been significant criticism of the use of the per se standard, because economists have long recognized that tying can have a variety of procompetitive or competitively neutral effects.[87]

Regardless of the propriety of applying a per se rule, Microsoft's decision to develop a competing browser, Internet Explorer, and its subsequent decision to integrate IE into Windows, an operating system, appeared to involve a classic tie-in.[88] Netscape's Navigator Internet browser was invented and marketed as a stand-alone product. Operating systems and Internet browsers—Windows and IE—appeared to be two products. By virtue of the complete integration of IE into Windows, Windows was no longer available without a browser, hence Windows was being sold "on the condition that" the buyer also purchase IE. And in Windows, Microsoft arguably possessed market power in the market for desktop operating systems, such that it was capable of forcing IE on its customers, both OEMs and end-users. Consumers were forced to take IE, even if they had no interest in browsing. Consumers who wanted to browse had no alternative but to accept Microsoft's browser as part of Windows. And those who wanted to use an alternate browser, such as Netscape's Navigator, had to incur the additional transaction costs of locating and downloading it

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[84] *See Jefferson Parish*, 466 U.S. at 12–15; U.S. Steel Corp. v. Fortner Enters., 429 U.S. 610, 620–21 (1977); Fortner Enters. v. U.S. Steel Corp., 394 U.S. 495, 503 (1969); N. Pac. Ry. Co. v. United States, 356 U.S. 1, 5–6 (1958).

[85] *See Jefferson Parish*, 466 U.S. at 9–10 (discussing origins and history of per se prohibition of tying).

[86] *See id.* at 18–25 (discussing standards for distinguishing between functionally integrated product made up of multiple components and tying of two distinct products).

[87] For example, tying can result in significant efficiencies of production and distribution. For a brief summary of the pros and cons of tying, see ANDREW I. GAVIL ET AL., ANTITRUST LAW IN PERSPECTIVE: CASES, CONCEPTS AND PROBLEMS IN COMPETITION POLICY 710–14 (2002).

[88] For an analysis of Microsoft's tying of IE to Windows from the perspective of "innovation efficiencies," see John J. Flynn, *Antitrust Policy, Innovation Efficiencies, and the Suppression of Technology*, 66 ANTITRUST L.J. 487, 511–13 (1998). The D.C. Circuit Court of Appeals held that the tie of the browser and the operating system should be judged under a rule of reason. *See infra* note 109 and accompanying text.

successfully, and then hoping it would interoperate with Windows as smoothly as IE.

The government plaintiffs' initial frame on the Windows 98 case therefore included a significant emphasis on "tying."[89] This was evident in the complaints filed by the United States and the various states. But as we have already described, it would be overstating the importance of the tying claims to suggest that the government's case was grounded on a theory of tying alone. To the contrary, the tying claims followed extensive allegations with respect to Microsoft's other conduct in seeking to extinguish the nascent platform threat from Netscape and Sun. Moreover, the tying and other claims all shared a common factual core of allegations. The plaintiffs never had to face the question whether to bring just a "tying case" because much more was involved in Microsoft's effort to suppress the competitive threat it perceived from Netscape and Sun.

The government plaintiffs alleged that the sum total effect of Microsoft's actions was to "cut off their [Netscape's] air supply."[90] In the government's view, the "browser wars" thus constituted a classic tale of exclusion: by eliminating the most efficacious channels of distribution for a rival's product—or at least driving up the cost to OEMs and consumers of accessing it—

[89]The association of Microsoft's practice of integrating new programs into Windows with tying, however, did not originate with the 1998 prosecution. That prosecution was triggered by the expectation that Windows 98 would include a fully-integrated version of IE. By the time the Windows 98 case was filed in May of 1998, Microsoft and the Department of Justice were already engaged in litigation over the difference between "tying" and "integration" as those terms had been used in a consent decree entered in 1995. Under that decree, Microsoft was prohibited from tying, but was permitted to develop "integrated products." Final Judgment, United States v. Microsoft Corp., No. 94-1564, 1995 WL 505998, at *3 (D.D.C. Aug. 21, 1995). The government sought to hold Microsoft in contempt of the decree so as to preclude the integration of IE into Windows. Shortly after the 1998 case was filed, the court of appeals reversed a district court order which had enjoined Microsoft from licensing any operating system software, "including Windows 95 or any successor version," on condition that the licensee preinstall any Microsoft Internet browser software. *See* United States v. Microsoft Corp., 147 F.3d 935, 940 (D.C. Cir. 1998). The court of appeals also suggested that Microsoft's integration of the browser might be permissible under Section 1. *Id.* Microsoft invoked this ruling in support of its motion for summary judgment in the Windows 98 case, arguing that the court of appeals had in fact held that IE and Windows were a single, integrated product. *See* Press Release, Microsoft Asks Court to Dismiss Lawsuit, *supra* note 57 ("[A]s the June 23, 1998, Appeals Court decision made clear, Internet Explorer technologies are an integrated element of the Microsoft® Windows® operating system.").

[90]DOJ Complaint, *supra* note 54, ¶ 16 (quoting Steve Lohr with John Markoff, *Why Microsoft Is Taking a Hard Line with the Government*, N.Y. TIMES, Jan. 12, 1995, at D1, which in turn was quoting Paul Maritz, Microsoft's Group Vice President in charge of Platforms Group). The complaint did not quote Maritz directly for his "cut off their air supply" remark. At trial, an Intel executive testified that Maritz had made the remark at a meeting at Intel; Maritz denied doing so at trial, but testified in an earlier deposition that "'it's possible but I just don't recall.'" *See* Steve Lohr, *At Microsoft Trial, Accounts Differ on Dealings with Apple*, N.Y. TIMES, Jan. 26, 1999, at C4.

Microsoft sought to neutralize the rival's product as a competitive threat. The major twist to the traditional tying claim was in the significance of the second market, Internet browsers, to the first, desktop operating systems.

Microsoft did not deny much of the alleged conduct, especially the integration of IE into Windows, but it characterized that conduct much differently than did the government plaintiffs. For example, it viewed the 1995 meeting with Netscape in quite a different light, denying that it ever intended to divide markets. As to the bulk of the government plaintiffs' allegations, Microsoft responded with a single, focused theme: it was engaged in hard competition, not exclusionary practices, as the government plaintiffs urged. This has been a traditional and common refrain from defendants in monopolization cases.[91]

Microsoft sought to portray itself as an innovator out in front of its rivals, not an emulator struggling to catch up to them. Netscape had been dominant itself, and Microsoft had merely challenged that dominance with a superior product, IE. Critically, Microsoft maintained that by integrating IE into Windows it had produced a better operating system, at lower cost, with greater functionality—all to the benefit of consumers.[92] As noted above, Microsoft argued that the government plaintiffs' case was cobbled together from the complaints of rivals who were smarting from the stress of true competition. Microsoft had a more difficult time, however, addressing some of the other allegations of more aggressive conduct. Indeed, as we shall discuss, the district court and the court of appeals agreed that Microsoft had little or no justification for much of its conduct, which compromised its "hard competitor" narrative.

### *3. The Markets*

A second focal point of difference in the narratives presented by the government and Microsoft concerned the markets themselves, both their boundaries and their nature.

Central to the government's story was that Microsoft was indeed a monopolist in the "market" for "Intel-based PC operating systems worldwide"[93] in which it enjoyed a persistent market share in excess of eighty percent.[94] Microsoft vigorously contested what it viewed as a market defined by its own product. In its view, the relevant market was far more fluid, and included

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[91] *See, e.g.*, Gavil, *supra* note 14, at 34–36.

[92] Microsoft also argued that its efforts to develop IE and integrate it into Windows predated Netscape's existence, and that therefore its "integration" strategy could not be viewed fairly as a response to Netscape's success. *See* Proposed Findings, *supra* note 61 ("The factual record shows that Microsoft was already far along in its decision to integrate Internet support into Windows before Netscape even existed.").

[93] DOJ Complaint, *supra* note 54, ¶¶ 54–55, 57–60.

[94] DOJ Complaint, *supra* note 54, ¶¶ 2, 58.

Apple's Macintosh operating system ("Mac OS"), as well as numerous and evolving operating systems for other devices, such as personal digital assistants ("PDAs"), like the Palm handheld, and mobile telephones.[95] The governments also contended that "Internet browsers" was a second, distinct market.[96] Again, Microsoft contested the idea that browsers were a distinct market. As it had done in the consent decree contempt proceeding, it insisted that the browser was an integrated feature of Windows.

Perhaps more stunning was the contrast in portrayals of these various markets. For the government's part, the PC OS market was static, protected by significant entry barriers, and bolstered by network effects. Moreover, owing to Microsoft's durable position in that market, innovation was lacking. In short, the PC OS market had become non-responsive to consumer demand and virtually impenetrable through direct challenge. Hence the only route to challenge it was indirect, as in the case of growing a new platform through middleware, like Netscape's Navigator, aided by Sun's Java programming language.

Microsoft portrayed the markets as dynamic, and its own position as precarious, at best. Its expert economist argued that software markets generally were characterized by serial "races" for predominance, but that no winner was in any way guaranteed that it would emerge victorious from the next race.[97] With constant challenges from new approaches to computing, new devices, and numerous rivals, the market could "tip" against Windows at any time.[98]

### *4. The Antitrust System*

Finally, the parties presented dueling narratives as to the efficacy of antitrust, itself, as a tool up to the task of policing new economy industries. This debate took place in and out of the courtroom and included commentators and industry groups that both supported and opposed the action.

Microsoft and critics of the government's case persistently argued that antitrust was a clumsy, slow, and outmoded tool for evaluating the economics of the information age, and that the government plaintiffs' case would inhibit innovation and harm consumers. For example, its economic expert witness argued that the government plaintiffs' experts misapplied traditional economic

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[95]*See* United States v. Microsoft Corp., 253 F.3d 34, 52–53 (D.C. Cir. 2001).

[96]DOJ Complaint, *supra* note 54, ¶ 21 ("Internet browsers are separate products competing in a separate product market from PC operating systems, and it is efficient to supply the two products separately."); *see also id.* ¶¶ 56, 61–65.

[97]*See* Schmalensee Testimony, *supra* note 56, at 100–01.

[98]The debate between the government and Microsoft about the scope and nature of the relevant markets was largely carried on through the expert witnesses. *Compare* Fisher Testimony, *supra* note 56, at 22–34 (discussing Microsoft's market power and reasons therefor), *with* Schmalensee Testimony, *supra* note 56, at 16–101 (crediting Microsoft's lack of market power to "intense" nature of competition in microcomputer software industry and competition faced by Microsoft from other platforms).

thinking to Microsoft, because they "relied on textbook theories of competition that do not apply to, or explain the dynamics of, the microcomputer software industry."[99] Microsoft augmented the testimony of its expert with press releases and public statements that also sought to portray the government's prosecution as driven by the lobbying efforts of its rivals and likely to harm consumers, who had been well-served by Microsoft's products.[100] Economists portrayed as neutral and objective agreed that the case was ill-advised and ill-informed.[101]

The government and supporters of the prosecution responded that although Microsoft's products might be new economy, its motives and conduct—and the consequences of its conduct—were all quite traditional. To the extent the economics of the software industry presented new conditions, the antitrust laws were adequate to interpret those conditions—indeed, they helped to explain how Microsoft sought to exclude its rivals.[102] As the Assistant Attorney General in charge of the Antitrust Division declared on the day the cases were originally filed:

> [L]et me be absolutely clear: nothing we are doing here will or should prevent Microsoft from innovating or competing on the merits. What cannot be tolerated—and what the antitrust laws forbid—is the barrage of illegal, anticompetitive practices that Microsoft uses to

[99]*See* Schmalensee Testimony, *supra* note 56, at 100.

[100]*See, e.g.*, Press Release, A Case of Trial in Error, *supra* note 68 (arguing that seven weeks into trial "it is clear the government is serving the interests of Microsoft's competitors, and not acting on behalf of the millions of consumers, businesses and software developers that benefit from Windows"); Press Release, Microsoft Corp., Economic Experts Challenge Underlying Assumptions in Government's Case (Oct. 16, 1998), *available at* http://www.microsoft.com/presspass/features/1998/10-16econ.mspx [hereinafter Press Release, Economic Experts] (asserting that "[r]esearch shows direct and unwavering correlation between product quality and market share").

[101]*See* Press Release, Economic Experts, *supra* note 100 ("Several leading economic experts today told a group of journalists that the government's antitrust lawsuit against Microsoft is depending on theories that are not supported by the realities of the marketplace or by current economic research.").

[102]For a collection of essays debating the contrary economic views of the wisdom of the case (and prepared in part by the testifying experts), see DID MICROSOFT HARM CONSUMERS?: TWO OPPOSING VIEWS (David S. Evans et al. eds., 2000), *available at* http://www.aei-brookings.org/admin/authorpdfs/page.php?id=108. For another pointed exchange, see Ronald A. Cass & Keith N. Hylton, *Preserving Competition: Economic Analysis, Legal Standards and* Microsoft, 8 GEO. MASON L. REV. 1, 8–20 (1999), and Steven C. Salop & R. Craig Romaine, *Preserving Monopoly: Economic Analysis, Legal Standards and* Microsoft, 7 GEO. MASON. L. REV. 617, 619–45 (1999). *See also* John E. Lopatka & William H. Page, *Antitrust on Internet Time:* Microsoft *and the Law and Economics of Exclusion*, 7 SUP. CT. ECON. REV. 157, 194–96 (1999) (arguing that integration of IE into Windows was efficient, as were Microsoft's restrictive agreements).

> destroy its rivals and to avoid competition on the merits. That, and that alone, is what this lawsuit is all about.[103]

### *B. Deciding the Monopolization Case*

The Department of Justice's 54-page complaint culminated in four distinct legal claims under Sections 1 and 2 of the Sherman Act. The first alleged that Microsoft had violated Section 1 through exclusive dealing and other forms of exclusionary agreements.[104] The second claim alleged that PC operating systems and Internet browsers were distinct products that could be separately marketed efficiently and that Microsoft had tied them together in violation of Section 1.[105] The third claim arose under Section 2 and accused Microsoft of monopolizing the market for PC OSs.[106] The fourth and final claim alleged that Microsoft had attempted to monopolize the browser market, also in violation of Section 2.[107]

The district court found for the government plaintiffs on three of the four claims, rejecting only the exclusive dealing claim.[108] It ruled in favor of the government plaintiffs on the tying and attempt to monopolize claims, which were related.[109] In this section, we describe in detail the courts' treatment of the

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[103]Klein Statement, *supra* note 2, at 6.

[104]DOJ Complaint, *supra* note 54, ¶¶ 30–33.

[105]*Id.* ¶¶ 134–37. The tying claim was stated generally and was not expressly linked solely to the integration of IE into Windows.

[106]*Id.* ¶¶ 138–39.

[107]*Id.* ¶¶ 140–41.

[108]The exclusive dealing claim was rejected after trial on the ground that the plaintiffs had not proved sufficient foreclosure of the market. The district court held that the agreements did not "ultimately" deprive Netscape of the ability to reach "every PC user worldwide," and that Netscape could still get its product to consumers by mailing them copies of the program and by making Navigator available for download from the Internet, both of which Netscape had in fact done. United States v. Microsoft Corp., 87 F. Supp. 2d 30, 53 (D.D.C. 1999). Because Netscape could still use these other distribution channels, inferior though they were, to reach consumers, Netscape was not "actually shut out of the Web browser market." *Id.* at 51–54; *see also* United States v. Microsoft Corp., Nos. 98-1232 & 98-1233, 1998 U.S. Dist. LEXIS 14231, at *61 (D.D.C. Sept. 14, 1998) (holding on motion for summary judgment that for Section 1 violation plaintiffs would need to show that Netscape was excluded from "on the order of greater than 40%" of browser market and that this exclusion had "actual" adverse effect on competition). Although the government plaintiffs did not appeal the exclusive dealing claim, the court of appeals appeared to cast doubt on what it characterized as the "total exclusion test" used by Judge Jackson. *See* United States v. Microsoft Corp., 253 F.3d 34, 70 (D.C. Cir. 2001).

[109]The Justice Department's Section 1 tying claim, as pleaded, was focused on the anticompetitive effect on the browser market, *see* DOJ Complaint, *supra* note 54, ¶ 137, as was its fourth complaint for relief, alleging attempted monopolization of the browser market, *see id.* ¶ 141. *But cf.* First Amended Complaint, *supra* note 55, ¶ 95 (discussing tie results in regard to anticompetitive effects in markets for operating systems and browsers). After trial, the district court held that the "binding" of IE to Windows, first by contract and then by technical design, violated Section 1 of the Sherman Act. *See Microsoft*, 87 F. Supp. 2d at 46–51 & n.6 (recognizing effect of tie on operating system market). The district court also upheld the attempt

core of the case—the third claim that Microsoft monopolized the market for PC OS. As to that claim, the district court and the court of appeals overwhelmingly agreed that Microsoft had violated Section 2.

*1. The District Court Monopolization Opinion*

Although the case that the plaintiffs originally filed, particularly as set out in the Justice Department's complaint, focused on Microsoft's effort to win "the browser war," by the end of the trial the plaintiffs' case had expanded far beyond Microsoft's effort to suppress Netscape's browser. Included now was Microsoft's effort to suppress other competitive threats: Sun's Java technologies, Intel's Native Signaling Processing software, Intel's technical assistance to Sun, Apple's QuickTime software for multimedia playback, RealNetworks' streaming media technologies, and IBM's competing operating system and office productivity applications.[110]

The factual expansion of the case made clear that the focus of the plaintiffs' case was on Microsoft's broad effort to maintain its monopoly in the market for operating systems, rather than only on some specific anticompetitive acts. Nevertheless, even though the examples of exclusionary conduct had increased from those set out in the complaint, the basic monopolization theory of the original complaint was still in place, that is, that Microsoft sought to maintain its monopoly by suppressing any threat to the Windows operating system, whether the threat came from browsers or from any other (now generically named) "middleware."

A decision as to whether Microsoft violated Section 2 of the Sherman Act first depended on a finding that Microsoft had monopoly power in a "relevant market." The trial judge, Judge Jackson, took a straightforward approach, applying familiar antitrust principles. First, he defined the narrowest realistic market, Intel-compatible PC operating systems, based on his finding that there were "no products" to which a significant number of Intel PC users could switch to satisfy operating system functions "without incurring substantial costs" and his finding that no producer was likely to provide a "viable alternative" product "within a reasonably short period of time."[111] Second, he found that Microsoft had monopoly power in this market. Traditionally, monopoly power had been

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to monopolize claim. *See id.* at 45–46. The court of appeals reversed the tying claim on the ground that the district court inappropriately applied a per se rule. It remanded the claim for further proceedings under a rule of reason. *See Microsoft*, 253 F.3d at 89–95, discussed *infra* notes 190-91 and accompanying text. It also reversed, but did not remand, the attempt to monopolize claim, because in its view the government plaintiffs had failed to prove that "browsers" were a distinct relevant market. *See id.* at 81–84.

[110] *See* United States v. Microsoft Corp., 84 F. Supp. 2d 9, 34–43 (D.D.C. 1999) (stating findings of fact in paragraphs 93–132).

[111] *Id.* at 14.

inferred from the structure of the market and Jackson found that Microsoft had a "dominant, persistent, and increasing share of the world-wide market"—over ninety percent for "the last decade"—a share predicted to climb "even higher over the next few years."[112] Third, he found that Microsoft's market position was protected by high entry barriers, specifically, the "applications barrier to entry," which enabled Microsoft to exercise market power without attracting new competitors.[113]

The applications barrier to entry was particularly critical to Microsoft's durable monopoly position. Jackson explained the problem as follows:[114] Consumers purchase operating systems to enable them to run application programs with their computers. The more applications that can run on any given operating system, the more valuable that operating system will be to consumers and, therefore, the more willing consumers will be to purchase that particular operating system. This is an example of what economists call indirect network effects.[115] Independent software vendors ("ISVs") will have economic incentives to write software that is compatible with the most popular operating system (perhaps subsequently rewriting the software for other systems, but perhaps not because costs to "port" an application program from one system to another are high). Finally, putting the behavior of consumers and ISVs together, as ISVs write more software for a particular operating system, consumer demand for that system will then increase, which leads to the creation of more software written for that operating system, which leads to more demand for that product, and so on ("the positive-feedback loop," or, as Jackson called it, "the chicken-and-egg

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[112] *Id.* at 19. Even if operating systems for the Apple Macintosh had been included, Microsoft's share would have been "well above eighty percent." *Id.*

[113] *Id.*

[114] *Id.* at 18–22.

[115] Direct network effects are considered demand-side economies which arise when the benefit of a product to any one buyer increases with the number of other buyers. The network effects here are "indirect" because consumers do not benefit simply from multiple users of computers using the same operating system (any single user can run a computer without interoperating with other users). This is unlike a telephone network, for example, where consumers directly benefit when multiple users are connected on the same network. Consumers benefit indirectly when multiple users adopt the same operating system because more application programs will likely be available, now and in the future, for operating systems that have more users. *See, e.g.*, Gregory J. Werden, *Network Effects and Conditions of Entry: Lessons from the* Microsoft *Case*, 69 ANTITRUST L.J. 87, 90 (2001); Timothy F. Bresnahan, *Network Effects and Microsoft* 3–5 (Stanford Inst. for Econ. Policy Research, Discussion Paper No. 00-51, 2001), *available at* http://siepr.stanford.edu/papers/pdf/00-51.pdf. For further discussion of indirect network effects in operating systems, see Malcolm B. Coate & Jeffrey H. Fischer, *The Truth Is Out There: The* Microsoft *Case Meets Market Realities* 23 (Potomac Law & Econ., Working Paper No. 04-01, 2004), *available at* http://ssrn.com/abstract=638243 (explaining how use of Windows APIs allowed developers to save programming time by streamlining repetitive programming chores and creating applications that emulated the look and feel of other Windows applications).

problem").[116] With Microsoft Windows running on more than ninety percent of the world's PCs, literally tens of thousands of programs had been written specifically for Windows. Judge Jackson concluded that no consumer would likely purchase a non-Windows operating system absent an equivalent range of programs, and no ISV would likely undertake the considerable development costs of writing programs for a new operating system absent evidence of significant consumer demand for it.

Having found that Microsoft possessed monopoly power, Jackson turned to the evidence of Microsoft's conduct. Jackson sought to determine whether Microsoft had maintained its monopoly power in some improper way—through predatory or exclusionary behavior—or whether Microsoft's conduct should be viewed as "procompetitive" or, stated somewhat differently, "efficient" or the result of "sound business justifications."

The core claim of exclusionary conduct in the case involved Microsoft's response to the emergence of Netscape's Internet browser. And the core of that response involved Microsoft's integration of its Internet Explorer browser into the Windows operating system.

Jackson's findings began by describing the separate functionality provided by Internet browsers, pointing out that there was a demand for those browsers separate from the demand for operating systems. A "substantial percentage" of corporate consumers did not want browsers at all; operating system vendors, other than Microsoft, offered customers the ability to license an operating system without a browser; and Microsoft itself distributed IE separately from Windows.[117] Characterizing Microsoft's decision to integrate the two products as a decision to "bind" Internet Explorer to Windows (Microsoft's own documents talked about "binding" the two[118]), Jackson found that Microsoft acted for an anticompetitive purpose—"to prevent Navigator from weakening the applications barrier to entry."[119] Microsoft imposed integration first through contract, forbidding the OEMs from removing IE, and then technically, by placing code "specific to Web browsing in the same files as code that provided operating system functions."[120] Microsoft's "primary motivation" for putting browser-specific code into files that supported Windows' functionality, Jackson found, "was to ensure that the deletion of any file containing browsing-specific routines would also delete vital operating system routines and thus cripple Windows 95."[121]

Internet Explorer was even more "tightly bound" to the Windows 98 operating system. First, Microsoft decided not to provide users with an

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[116]*See Microsoft*, 84 F. Supp. 2d at 18.
[117]*See id.* at 48.
[118]*See, e.g.*, *id.* at 50.
[119]*Id.* at 49.
[120]*Id.* at 50; *see also id.* at 49.
[121]*Id.* at 50.

add/remove utility through which users could "remove" IE.[122] Second, even if a user chose a different "default" browser, Windows would override that choice in certain circumstances and launch IE instead, providing, in Microsoft's own words, "a jolting experience."[123]

Jackson concluded that "[n]o technical reason" justified Microsoft's refusal to license Windows 95 without IE, or to refuse to allow the OEMs to uninstall IE, or to refuse to meet consumer demand for a browserless Windows 98 when "it remains possible" for browsing functionality to be removed without adversely affecting applications running on Windows 98.[124] "As an abstract and general proposition, many—if not most—consumers can be said to benefit from Microsoft's provision of Web browsing functionality with its Windows operating system at no additional charge," Jackson wrote. However, there was "no consumer benefit" to Microsoft's "refusal to offer a version of Windows 95 or Windows 98 without Internet Explorer, or to Microsoft's refusal to provide a method for uninstalling Internet Explorer from Windows 98."[125]

Jackson viewed the bundling of IE and Windows as just one example of Microsoft's effort to exclude Netscape from the channels for distributing Internet browser software, particularly the most efficient channels, licensing to the OEMs and licensing to IAPs. The bundling also fit into a broader pattern of exclusionary conduct that Jackson found Microsoft pursued in an effort to suppress the threat that Netscape posed to the applications barrier to entry. This conduct included a variety of exclusive arrangements and financial inducements that Microsoft employed to secure loyalty from IAPs, ISVs, and OEMs. Microsoft "paid huge sums of money, and sacrificed many millions more in lost revenue every year,"[126] an investment, Jackson found, that was potentially profitable only because it protected the applications barrier to entry. Microsoft's conduct was not competitive, Jackson concluded. It was "predacious."[127]

Proof that a monopolist has engaged in conduct that meets the legal definition of predatory or exclusionary is generally sufficient to establish a violation of Section 2. Government plaintiffs, seeking equitable relief rather than monetary damages, need not prove the extent to which consumers were actually harmed by the conduct. But they do have to show that the monopolist's conduct

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[122]The effect of the add/remove utility is discussed *infra* note 150 and accompanying text.

[123]*See Microsoft*, 84 F. Supp. 2d at 51–53 (stating (1) release of Windows 98 was delayed so that it could be shipped with Internet Explorer 4.0 "tightly bound to it," *id.* ¶ 168, (2) there was no way to uninstall Internet Explorer 4.0 from Windows 98, *id.* ¶ 170, (3) "Internet Explorer [was] configured as the default browser," *id.* ¶ 171, and (4) Microsoft executive Brad Chase wanted the use of an alternate browser to be a "jolting experience," *id.* ¶ 172).

[124]For the ease of removing browser functionality, Judge Jackson relied on the testimony of Edward Felten, who developed a prototype browser removal program. *See id.* at 54–55.

[125]*Id.* at 55.

[126]*Id.* at 45.

[127]United States v. Microsoft Corp., 87 F. Supp. 2d 30, 44 (D.D.C. 2000) (stating conclusions of law).

harmed competition, not just competitors.[128] Under those circumstances, generalized harm to consumers is presumed.

Microsoft's consistent narrative was that there was no proof of harm to consumers, and hence the government plaintiffs had failed to prove causation. To the contrary, it argued that consumers had benefited from Microsoft's efforts, particularly with regard to Internet browsers, and that, in any event, consumers were not harmed by Microsoft's conduct directed at Netscape's Navigator and Sun's Java because neither was a real threat to Microsoft's position in the operating system market. Whether the conduct was "predacious" or not, there was no causal link between the conduct and Microsoft's ability to maintain its monopoly position.

Jackson did not ignore either the general thrust of Microsoft's argument about consumer injury or its more specific causation argument, although his findings reflected some tension between the view of Microsoft as a firm facing competition and Microsoft as a firm dominant in its market.[129] Thus, Jackson conceded that Microsoft's introduction of IE at no separate charge benefited consumers, increasing their familiarity with the Internet, reducing their costs, and providing Netscape with an incentive to improve Navigator.[130] Jackson also found that there was "insufficient evidence" to conclude that either Navigator or Java would have "ignited genuine competition" in the operating system market had Microsoft not engaged in any exclusionary conduct.[131] Nevertheless, Jackson found that consumers were harmed in many concrete ways. Consumers who wanted browserless operating systems could not get them from Microsoft; OEMs that wanted to simplify the boot-up process for their customers could not do so because of restrictions placed on them by Microsoft; consumers who preferred Navigator were forced either to pay some "substantial price" (acquisition by downloading, degraded system performance, and diminished memory capacity) or to forgo Navigator and stick with IE.[132]

More important, albeit more speculative, were Jackson's final conclusions with regard to the impact of Microsoft's conduct on innovation. Even if Navigator and Java might not have become effective competitors to Windows, Microsoft's efforts "hobbled a form of innovation" that would have "conduced to consumer choice" and would have brought about more competition and more innovation.[133] Microsoft's efforts, directed not only at Netscape, but also at firms such as IBM, Compaq, Intel, Apple, and Sun, ultimately conveyed a chilling

[128] *See* United States v. Microsoft Corp., 253 F.3d 34, 58–59 (D.C. Cir. 2001).

[129] Jackson's findings on consumer harm and causation are set out at the very end of his Findings of Fact. *Microsoft*, 84 F. Supp. 2d at 110–12. For his conclusions of law based on those findings, see *Microsoft*, 87 F. Supp. 2d at 44.

[130] *See Microsoft*, 84 F. Supp. 2d at 110–11.

[131] *Id.* at 112.

[132] *Id.* at 111.

[133] *Id.* at 111–12.

message to any firm with the potential to innovate in the software or computer industry: Microsoft would be willing to use its "prodigious market power and immense profits to harm any firm" that tried to challenge one of its core products.[134] The ultimate result of its conduct was that "some innovations . . . never occur for the sole reason that they do not coincide with Microsoft's self-interest."[135] Microsoft had "trammeled the competitive process through which the computer industry generally stimulates innovation"[136] Its actions warranted liability under Section 2 of the Sherman Act. The government plaintiffs' narrative had prevailed.[137]

### 2. *Judge Jackson's Remedy Order*

As the trial progressed, it became increasingly clear that the government plaintiffs' remedial goals would have to expand to accommodate the fact that Microsoft's conduct went well beyond its effort to suppress Netscape's competitive threat. A more far-reaching approach to Microsoft's conduct would be necessary if there was to be any likelihood that the court's remedial order would spark competition in the PC operating system market. The plaintiffs accordingly proposed to restructure Microsoft into two companies, one to develop, license, and promote operating systems for computers, the other to carry on the applications business.[138]

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[134]*Id.* at 112.

[135]*Id.*

[136]United States v. Microsoft Corp., 87 F. Supp. 2d 30, 44 (D.D.C. 2000).

[137]As one commentator has observed, "the government presented a more coherent and compelling narrative than did the defense in the Microsoft case. The prosecution's arguments coalesced in a single, dramatic story line—brimming with bad acts, guilty minds, and sympathetic victims—that helped the government win a stunning victory at trial." Newberg, *supra* note 14, at 209–10 (footnote omitted). Professor Newberg nevertheless criticizes the district court's reliance on that narrative, arguing that "[a]lthough there was nothing legally improper about the government's narrative construction of reality, on balance, the record suggests that it diminished the trial as an exercise in thoughtful and reasoned inquiry by encouraging the court to analyze the case in reductive terms." *Id.* at 211. We disagree with Professor Newberg's ultimate conclusion. To the contrary, the narrative—the original "frame"—was supported by substantial evidence and hewed closely to the legal requirements the government plaintiffs were required to prove. The importance of presenting such a coherent narrative is also discussed at *supra* note 63.

[138]United States v. Microsoft Corp., 97 F. Supp. 2d 59, 64 (D.D.C. 2000). "Operating systems" included not only operating systems for personal computers, but also operating systems for servers and handheld devices, such as personal digital assistants ("PDAs") and cell phones. *Id.* at 73. The "applications business" included everything else that Microsoft did. Some of the software products specifically listed as belonging in the applications company were Office, Internet Explorer, streaming audio and video software, various server software products, Microsoft's media player, Microsoft's Java Virtual Machine ("JVM"), and developer tools. *Id.* at 71. Also included were non-software businesses, such as MSN (Microsoft's Internet service),

The immediate question posed by the restructuring plan (beyond significant issues of practicality) was whether and how it would increase competition. After all, the day after the restructuring was complete, Microsoft would still have a monopoly in the PC operating system market and the applications barrier to entry would still be in place. How would this dramatic restructuring diminish Microsoft's monopoly power?

The theory advanced by the government plaintiffs for showing how the divestiture would lead to competition in the operating system market turned out to be similar to the one advanced at the liability trial. Navigator and Java were supposed to have reduced the applications barrier to entry by offering the possibility of cross-platform capability, but Microsoft kept them from playing that role. By the time the trial was over, however, Navigator was considered to be dead and Java had never achieved its cross-platform goal.[139] The theory of the break-up proposal was that the applications company would be the "new Netscape," performing the function that Netscape's browser had threatened to perform in 1995.[140] In this scenario, the keystone became Office, the critical program ("killer app," in the lingo of the day) for workers in the "knowledge industry."[141] Office already exposed APIs, developers were already writing to it, indeed, it was already the dominant productivity suite on the desktop. Once Office was freed from serving the monopoly-maintaining goals that Microsoft had pursued with Windows, market incentives would lead it toward cross-platform operation, expanding its market by seeking users of operating systems in addition to Windows. Evidence at trial had already shown how important Office was to another operating system, Apple's operating system for the Macintosh. If it was worthwhile to port Office to the Mac, wouldn't it be worthwhile now to port Office to other operating systems?

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MSNBC (Microsoft's programming content joint venture with NBC), Expedia (an Internet travel service), and Slate (an Internet magazine). *Id.*

[139]As of April 2000, Netscape had approximately a nineteen percent share of browser usage; Microsoft had approximately sixty-nine percent. *See* Declaration of Rebecca M. Henderson at 4, *Microsoft*, 97 F. Supp. 2d 59 (Nos. 98-1232 & 98-1233), *available at* http://www.usdoj.gov/atr/cases/f4600/4644.pdf [hereinafter Henderson Declaration] (redacted version only).

[140]For the development of the argument for viewing the new applications company as performing the role played by Netscape in the mid-1990s, see Declaration of Paul M. Romer ¶¶ 20–27, *Microsoft*, 97 F. Supp. 2d 59 (Nos. 98-1232 & 98-1233), *available at* http://www.usdoj.gov/atr/cases/f4600/4643.pdf [hereinafter Romer Declaration] (redacted version only). *See also* Henderson Declaration, *supra* note 139, ¶ 23 (comparing Office to Navigator).

[141]*See, e.g.*, Plaintiffs' Memorandum in Support of Proposed Final Judgment at 34, *Microsoft*, 97 F. Supp. 2d 59 (Nos. 98-1232 & 98-1233), *available at* http://www.usdoj.gov/atr/cases/f4600/4640.pdf [hereinafter Plaintiffs' Memorandum] (redacted version only) (discussing Office as "killer app"); Plaintiffs' Reply Memorandum in Support of Proposed Final Judgment at 17, *Microsoft*, 97 F. Supp. 2d 59 (Nos. 98-1232 & 98-1233), *available at* http://www.usdoj.gov/atr/cases/f4700/4771.pdf [hereinafter Plaintiffs' Reply] (discussing role of Office).

The particular focus of hope in this scenario was that the new applications company would port Office to Linux, the open-source operating system which had yet to make much of an inroad on the desktop computer market (it was doing better on servers where users were more technically-oriented).[142] The plaintiffs' theory was that Microsoft had no interest in porting Office when such porting might take sales away from Windows.[143] After a spin-off of Office, though, the new owners of the applications company would have no such hesitation. Corel had already ported its far less popular WordPerfect productivity suite to Linux. If Office were ported, however, many more users might be willing to adopt Linux, making Linux a far more effective challenger to Microsoft's position in the operating system market.

The theory for creating a separate applications company, with new market-driven incentives, actually fit well with one of the traditional goals of antitrust relief, to restore competitive conditions to what they would have been absent the anticompetitive behavior. Nothing could restore Netscape, but Office looked like a pretty good substitute, perhaps even a better candidate for being truly cross-platform middleware than Navigator ever was. The new applications company would have impressive financial resources (far greater than Netscape's ever were), skilled employees, and network ubiquity.[144] Even more interestingly, the new applications company would control the now-dominant Internet browser—Internet Explorer itself. To make matters better, although the decree allowed the operating system also to use IE, the operating system company was forbidden from improving it.[145] This meant that if the operating system company wanted to

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[142]For discussion of porting Office to Linux, see Plaintiffs' Reply, *supra* note 141, at 15–19; and Declaration of Carl Shapiro at 10, *Microsoft*, 97 F. Supp. 2d 59 (Nos. 98-1232 & 98-1233), *available at* http://www.usdoj.gov/atr/cases/f4600/4642.pdf. For a general discussion of porting Office and other applications, see Plaintiffs' Memorandum, *supra* note 141, at 33–34; Henderson Declaration, *supra* note 139, at 35; and Romer Declaration, *supra* note 140, ¶¶ 6, 26.

[143]Microsoft argued that it did not port Office to Linux because it would be "very time-consuming and expensive" and would make "no business sense." Defendant Microsoft Corporation's Summary Response to Plaintiffs' Proposed Final Judgment at 9–10, *Microsoft*, 97 F. Supp. 2d 59 (Nos. 98-1232 & 98-1233) (on file with author) [hereinafter Summary Response]; *see also* James V. Grimaldi, *Microsoft Defends Its Practices; CEO Ballmer Sees No Need to Change*, WASH. POST, Apr. 19, 2000, at E01 ("'I'll be sort of calculating: Our job is to serve customers and to make money,' Ballmer said. 'There are no customers today for Linux on the client [desktop computer], therefore there is no opportunity to make money. There is nothing in there that looks like a good opportunity for us.'").

[144]The new applications company would have had an estimated $8 billion in annual revenue and $3 billion in annual profits, far larger than many other companies (such as Novell and Adobe) selling software for the PC. *See* Romer Declaration, *supra* note 140, ¶ 17.

[145]Section 1.c.ii of the final judgment assigned to the applications company the rights to intellectual property used in both applications and operating systems, with a license back to the operating system company. *Microsoft*, 97 F. Supp. 2d at 64. For IE, however, the decree provided that the license "shall not grant the Operating Systems Business any right to develop, license, or distribute modified or derivative versions of the Internet browser." *Id.* Microsoft

upgrade its browser offering, it would have to develop a new browser that did not infringe on the intellectual property rights in IE, rights held by the applications company.[146]

Would the restructuring have worked? Were the assumptions too optimistic, the proposed competitive scenario too speculative? There is no way of answering these questions, but, in the end, the plaintiffs did not propose to force competition on the market. They only proposed to force Microsoft apart.[147] Plaintiffs acknowledged the uncertainty of the outcome, but chose to leave the results to market forces and market incentives.[148]

However, the decree did not rely solely on the restructuring. It also included transitional conduct provisions, set out in more detail than the basic divestiture plan. Nine categories of restrictions were provided, covering broad areas of Microsoft's business and behavior, including the critical issues of bundling and information disclosure.[149]

The interim provisions dealt with the bundling issue by forbidding Microsoft from "binding" a "Middleware Product" to a Windows operating

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criticized this provision as one that "would freeze all Internet support in Windows." Summary Response, *supra* note 143, at 16.

[146]For a more complete defense of the divestiture remedy by one of the economists involved in developing the remedy while he served as the Chief Economist at the Antitrust Division, see Timothy F. Bresnahan, *The Right Remedy* (Stanford Inst. for Econ. Policy Research, Discussion Paper No. 00-49, 2001), *available at* http://siepr.stanford.edu/papers/pdf/00-49.pdf.

[147]Not surprisingly, the proposal to restructure Microsoft triggered a lively debate. For a small sampling, contrast John E. Lopatka & William H. Page, *Devising a Microsoft Remedy That Serves Consumers*, 9 GEO. MASON L. REV. 691 (2001) (opposing structural relief), with R. Craig Romaine & Steven C. Salop, *Slap Their Wrists? Tie Their Hands? Slice Them into Pieces? Alternate Remedies for Monopolization in the* Microsoft *Case*, ANTITRUST, Summer 1999, at 15 (discussing various forms of structural relief). In an amici curiae brief submitted to Judge Jackson, four economists proposed a broader structural relief than did the government plaintiffs, arguing that in addition to separating the operating system from the applications company, the operating system company should then be split into three identical companies; these economists also called for Jackson to "conduct a thorough inquiry" into all the proposals. *See* Remedies Brief of Amici Curiae Robert E. Litan, Roger G. Noll, William D. Nordhaus & Frederic Scherer, *Microsoft*, 97 F. Supp. 2d 59 (Nos. 98-1232 & 98-1233), *available at* http://www.econ.yale.edu/~nordhaus/homepage/final microsoft brief with appendix.doc. Jackson noted that the government plaintiffs' proposal was less "radical" than the one advocated by the four economists. *Microsoft*, 97 F. Supp. 2d at 63.

[148]*See, e.g.*, Plaintiffs' Memorandum, *supra* note 141, at 34 (discussing potential competitive threat of Office and stating "[t]here is, of course, no guarantee that such competition will result"); Plaintiffs' Reply, *supra* note 141, at 16 ("Instead of forcing immediate entry and competition [in the operating systems market], the restructuring will enable the market to determine the rate of entry and the form of new competition.").

[149]Included were various non-retaliation and uniformity requirements, designed to ensure that Microsoft would treat equally various groups of customers (such as OEMs) and complementary product providers (such as ISVs). *See, e.g.*, *Microsoft*, 97 F. Supp. 2d at 66 (requiring uniform OEM terms); *id.* at 67 (discussing mandatory non-retaliation against ISVs).

system unless it offered an "otherwise identical" operating system in which all means of end-user access could readily be removed either by OEMs during the installation process or by end-users using the add/remove utility.[150] The decree did not require Microsoft to remove the "bound" product from the operating system (that is, to uncommingle the code that provided browser functionality), even though the plaintiffs acknowledged that the decree "might appropriately require" Microsoft to redesign its operating system product so that it did not contain browser code.[151] After all, the final judgment's antibundling requirement was imposed in the context of the broader structural remedy and was set to expire three years after Microsoft was effectively split in two (or ten years after entry of the decree, whichever came first).[152] Presumably, at that point market forces would be disciplining the new operating system company and a decision to bundle products into Windows would have to be taken with those market forces in mind (as well as with whatever deterrent effect would come from court decisions regarding the legality of such bundling). The decree also provided for a reduced royalty for OEMs that removed end-user access. This meant that OEMs would have an increased incentive to offer their customers a choice of middleware, since they would no longer be paying for Microsoft's product as well as the competitive alternative.[153]

The interim provisions also required compulsory disclosure of the APIs, "communications interfaces," and "technical information" that enabled interoperability between a broad range of Microsoft software products and the Windows operating system running on a PC.[154] Disclosure of interoperability

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[150]*Id.* at 68. The decree defined "binding" as including a product in an operating system so that it cannot readily be uninstalled; "Middleware Product" was defined to include specific products, such as Internet browsers and multimedia viewing software, plus any software that Microsoft distributed separately from an OS and provided functionality "similar to" that provided by middleware offered by a Microsoft competitor. *Id.* at 71–73. Section 3.f forbade contractual tying of Windows and any separately distributed Microsoft software product, whether that product was offered at a positive price or not. *Id.* at 68.

[151]*See* Plaintiffs' Memorandum, *supra* note 141, at 7. Plaintiffs stated that "the cost and burden of implementing and enforcing such a provision [requiring un-commingling] could be significant." *Id.*

[152]*See Microsoft*, 97 F. Supp. 2d at 66, 71.

[153]The decree provided a formula for computing the royalty reduction. *Id.* Note that the settlement of an earlier Justice Department contempt proceeding against Microsoft, arising out of tying IE and Windows 95, required Microsoft to permit OEMs to run the add/remove utility and remove the IE icon so that the OEM could choose a competing browser, but provided for no reduction in licensing fees. *See* Stipulation and Order at 1, United States v. Microsoft Corp., No. 94-1564 (D.D.C. Jan. 21, 1998), *available at* http://www.usdoj.gov/atr/cases/f1300/1333. htm. However, no OEM ever took advantage of this option. *See* David Bank, *Software: In the Microsoft Endgame, a Puzzle*, WALL ST. J., Apr. 24, 1998, at B1 (stating 1998 settlement produced no takers, in part because agreement failed to provide a price differential for a version of Windows without IE).

[154]*Microsoft*, 97 F. Supp. 2d at 67. The decree included interoperability between Microsoft applications software and the operating system, between Microsoft middleware and the

information would need to be made in a "timely manner," for example, when the information was disclosed to Microsoft's applications developers or when it was used by Microsoft in any released software form (even if the software were not in final form).[155] Compliance with this provision was to be facilitated by the establishment of a "secure facility" at which Microsoft would make Windows source code "and any related documentation" available to qualified representatives of OEMs, ISVs, or IHVs so that they could work with that code to ensure "effective" interoperability.[156]

The decree Judge Jackson entered was a strong one, to be sure. Jackson himself indicated that the decision to break up Microsoft was one that he had "reluctantly come to," but it was also one that he thought "imperative,"[157] both for administrative and substantive reasons. On the administrative side, Jackson believed that injunctive relief was likely to be contentious and ineffective. He pointed out that Microsoft had not conceded that it had violated the antitrust laws nor modified its current "business protocol" to alter what it had done in the past and "may yet do" in other markets in the future.[158] Perhaps more significantly, Microsoft had been "untrustworthy in the past" in complying with injunctive relief that he had ordered in an earlier proceeding (Jackson characterized Microsoft's efforts as "illusory" and "disingenuous"[159]). On the substantive side, Jackson pointed out that the provisions of the plaintiffs' proposed decree were the "collective work product of senior antitrust law enforcement officials of the United States Department of Justice and the Attorneys General of 19 states," officials who are "obliged and expected to consider—and to act in—the public interest"[160] Jackson also concluded that the plaintiffs' proposal "appears to the court" to address the principal objectives of a relief decree in an antitrust case—"to terminate the unlawful conduct, to prevent its repetition in the future, and to revive competition in the relevant markets."[161]

Judge Jackson reached these sweeping and critical conclusions regarding remedy, however, without conducting a separate remedies trial. Indeed, he was dismissive of Microsoft's objections to the lack of process accorded the remedy phase of the case, discounting the likely value of additional expert predictions about the consequences of various remedial approaches, and arguing in effect

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operating system, and between Microsoft operating systems installed on servers or handhelds and the desktop operating system. The decree used the term "Windows Operating System software," which was defined to include all successors to Windows 98. *Id.* at 74.

[155] *Id.* at 73–74.

[156] *Id.* at 67.

[157] *Id.* at 62.

[158] *Id.*

[159] *Id.* For the earlier proceeding, see United States v. Microsoft Corp., 980 F. Supp. 537 (D.D.C. 1997), *rev'd*, 147 F.3d 935 (D.C. Cir. 1998), discussed *supra* note 89.

[160] *Microsoft*, 97 F. Supp. 2d at 62–63.

[161] *Id.* at 63.

that additional proceedings would be a waste of time and merely delay the inevitable.[162] Moreover, in contrast to his opinion on liability, his opinion on remedy did not discuss the legal requirements developed in earlier Supreme Court and lower court decisions on the formulation of Section 2 remedies.[163] In fact, the opinion did not cite a single legal authority.[164]

While his frustration with the duration of the proceedings may be understandable, serious questions had been raised about the proportionality of the remedy to the offenses found, its administrability, and its likely effectiveness. He was ordering the break-up of one of the most successful firms in American history. A remedial proposal of such magnitude and potential consequences warranted a more careful analysis. Absent an evidentiary record to support the government plaintiffs' proposed remedy—and his endorsement of it—the order became seriously vulnerable to attack on appeal. Indeed, as we shall discuss, his decision to forego a more substantial remedies hearing would later be cited by the court of appeals as a basis for vacating his entire remedial order.[165]

### *3. The Court of Appeals' Monopolization Opinion*

As had the district court, the court of appeals commenced its analysis of the government plaintiffs' monopolization claim by analyzing Microsoft's alleged monopoly power in a relevant market.[166] Microsoft maintained as it had at trial that the relevant market was far broader than Intel-compatible PC operating systems, that there were no serious barriers to entering the business of developing various kinds of operating systems, and that therefore Microsoft lacked monopoly power.[167] It also asserted that its own conduct, particularly its investments in research and development and the low price for Windows, tended

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[162] *Id.* at 62. He sought to bolster that decision by asserting simply that the "[p]laintiffs won the case, and for that reason alone have some entitlement to a remedy of their choice." *Id.*

[163] One of the most prominent examples is the decision in *United States v. United Shoe Machinery Corp.*, where the Court held that a remedy in a Section 2 case must "terminate the illegal monopoly, deny to the defendant the fruits of its statutory violation, and ensure that there remain no practices likely to result in monopolization in the future." 391 U.S. 244, 250 (1968). Quoting this passage, the court of appeals would later note that "[t]he District Court has not explained how its remedies decree would accomplish those objectives . . . . Nowhere did the District Court discuss the objectives the Supreme Court deems relevant." United States v. Microsoft Corp., 253 F.3d 34, 103 (D.C. Cir. 2001).

[164] *See Microsoft*, 97 F. Supp. 2d at 61–63.

[165] *See Microsoft*, 253 F.3d at 101–03. Judge Jackson also faced charges of misconduct on appeal, when it was revealed that he had repeatedly met with journalists to discuss the cases while they were still pending before him. The court of appeals concluded that his conduct warranted disqualification on remand, although it also concluded that his actions did not warrant vacating his findings of fact and conclusions of law. *Id.* at 116–18.

[166] *See id.* at 81–84.

[167] *See id.* at 53–56.

to show that it faced intense competition.[168] After reviewing the record,[169] the court of appeals rejected Microsoft's position and accepted the plaintiffs', affirming "in its entirety" Judge Jackson's conclusion that Microsoft had monopoly power in the Intel-compatible PC operating system market.[170]

The court of appeals agreed that the relevant market was operating systems for Intel-compatible PCs. In its view, middleware was properly excluded from that market and Microsoft's share of that market was "predominant" at over ninety-five percent, or eighty percent if the Mac OS was included.[171] Critically, the court of appeals agreed that Microsoft's position was protected by the applications barrier to entry, accepting Jackson's explanation that consumer expectations about the breadth of current and future applications will lead them to prefer the dominant operating system even if no consumer uses all the applications that are available.[172]

Perhaps more importantly, the court also rejected Microsoft's assertion that circumstantial evidence of monopoly power based on market structure and market shares is inadequate to assess monopoly power in "dynamic" software markets.[173] Microsoft argued that only direct evidence of its behavior could prove that it possessed monopoly power, and that—in the long term—it in fact acted like a firm with no such power, constrained to price below the monopoly price and to innovate constantly.[174] These arguments were at the heart of Microsoft's narrative and the economic case that Microsoft had presented to Jackson and again to the court of appeals. However, the court of appeals kept its focus just where Jackson did—on the short run. Pointing out that only substitute products that might materialize "in the relatively near future" can effectively constrain a monopolist's ability to raise price above the competitive level, the court noted that Jackson's unchallenged findings provided "no reason" to believe that "prompt substitutes" for the Windows operating system were available.[175] Thus, analyzing the structure of the market, as Jackson did, was sufficient to show the existence of monopoly power "even in a changing market."[176] Moreover, the court agreed with Judge Jackson that, despite Microsoft's assertions to the contrary, its actual behavior "may well be sufficient to show the existence of monopoly power," for example, pricing without regard to rivals'

[168] *See id.* at 56–57.

[169] The court of appeals divided its consideration of the record relating to monopoly power into "circumstantial evidence," such as market shares in a properly defined relevant market, *id.* at 51–56, and "direct proof," such as Microsoft's actual exercise of monopoly power through its conduct, *id.* at 56–58.

[170] *Id.* at 51.

[171] *Id.* at 54.

[172] *Id.* at 50–56.

[173] *See id.* at 56.

[174] *See id.* at 56–57.

[175] *Id.* at 57–58.

[176] *Id.*

prices and taking actions that were rational only on the assumption that it possessed monopoly power.[177] Hence the direct evidence was consistent with and reinforced the structural evidence—Microsoft was indeed a monopolist.

Having affirmed Judge Jackson's conclusions regarding monopoly power, and having rejected Microsoft's arguments for a different evaluation of the constraints on its power, the court moved to the second part of the monopolization analysis: judging whether Microsoft had engaged in conduct that improperly maintained its monopoly position. It is at this point that the court of appeals' analytical approach diverged more substantially from Judge Jackson's, even though many of the results would be unchanged.

The court of appeals did two things differently than Judge Jackson. First, it adopted an overall rule-of-reason-type of approach for distinguishing between exclusionary and legitimate acts, an approach not used at the trial and not directly suggested by any of the parties. Second, despite referring to Microsoft's "pattern of exclusionary conduct,"[178] the court chose to break down Microsoft's behavior into discrete segments, each of which it analyzed individually. Jackson had integrated the story of Microsoft's behavior, showing Microsoft's systemic effort to maintain its monopoly in the operating system market. The court of appeals disintegrated the story, treating each action as relatively discrete and unconnected.

The court of appeals approached the core issue of bundling IE into Windows by examining three separate aspects of how Microsoft accomplished the bundling, rather than by asking whether bundling as a whole was a violation of Section 2. It found two of these aspects to be anticompetitive; the third was not.

The first anticompetitive act was not including IE in the add/remove utility in Windows 98, with the result that access to IE could not easily be blocked. The court concluded that Microsoft's action reduced competing browser usage, not by making IE more attractive but "through something other than competition on the merits."[179] This anticompetitive effect was not justified because there was no claim that omitting IE from the add/remove utility "achieves any integrative benefit."[180]

The second act was commingling the code that related to browser functions in files that had code relating to operating system functions. The effect of this commingling was that browser code (and hence IE itself) could not easily be removed without impairing the functionality of the Windows operating system. Although the court acknowledged that there was some contradictory evidence on whether Microsoft commingled code this way (there was some testimony that the *same* code provides Web browsing functionality and operating system

[177] *Id.*
[178] *Id.* at 58.
[179] *Id.* at 65.
[180] *Id.* at 66–67.

functionality), the court concluded that Jackson's finding on commingling was not clearly erroneous.[181] As with the omission from the add/remove utility, commingling was anticompetitive because it meant that IE could not easily be removed, which meant that it was less likely that either OEMs or consumers would attempt to install a second browser. Again, there were no procompetitive justifications. Microsoft made only "general claims" regarding the benefits of integration, claims that it neither specified nor substantiated, and it did not argue that commingling code "achieves any integrative benefit."[182]

The third act was designing Windows so that IE would be invoked at certain times despite the fact that the user had set a different browser as the default. This act, although anticompetitive, was justified technologically because Windows needed to invoke IE for certain functionality that Navigator did not support.[183] Because the plaintiffs failed to rebut this justification, the court concluded that Microsoft "may not be held liable for this aspect of its product design."[184]

The court applied the same approach to a number of Microsoft's other practices. For example, the court readily characterized as anticompetitive a variety of contractual practices which resulted in the contracting party's use of IE and Microsoft's Java Virtual Machine ("JVM") to the exclusion of Netscape's Navigator or Sun's JVM.[185] Included here was Apple's agreement to bundle IE into its operating system and make IE the default browser after Microsoft threatened to withhold support for developing Office for the Macintosh unless Apple agreed.[186] Similarly, the court condemned the threats that Microsoft made against Intel to convince Intel to stop developing a fast Sun-compliant JVM and Microsoft's efforts to deceive software developers by not

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[181] *Id.* at 66.

[182] *Id.* at 66–67.

[183] *Id.* at 67 (discussing use of Windows Help system and Windows Update).

[184] *Id.*

[185] *See id.* at 59–64 (forbidding removal of IE desktop icon or altering initial boot-up sequence); *id.* at 67–71 (discussing agreements with Internet access companies to limit distribution of Netscape); *id.* at 71–76 (explaining preferential access to technical information to software developers for writing software making IE the default browser and Microsoft's JVM the default JVM). The court upheld Microsoft's license restrictions prohibiting OEMs from automatically launching a substitute user interface on the completion of the boot-up process, reasoning that preventing a "drastic alteration" of the Windows desktop outweighed the marginal anticompetitive effects of the restriction. *See id*. at 63. For further exploration of Microsoft's intellectual property arguments and their resolution by the district court and court of appeals, see Harry First, Microsoft *and the Evolution of the Intellectual Property Concept*, 2006 WISC. L. REV. (forthcoming).

[186] *Id.* at 72–74.

telling them that Microsoft's Java development tools would create programs that were not fully cross-platform with programs developed with Sun's Java tools.[187]

The court's decision to characterize these practices as anticompetitive was based on an assessment that each one of them had a "substantial" impact on Netscape's or Sun's ability to gain sufficient usage share to become a platform that could threaten the applications barrier to entry. Indeed, the court was sensitive to the strategic importance of each of the affected channels of distribution (particularly the cost-efficient OEM channel) even though the cumulative market share of the channels foreclosed might not have reached the "roughly" forty or fifty percent that would have been required to show a Section 1 violation for exclusive dealing.[188] In so holding, the court of appeals' decision was consistent with Jackson's basic approach to explaining how the exclusionary agreements helped Microsoft maintain its monopoly, thereby violating Section 2.[189]

Thus, although the court of appeals took a different analytical approach to the Section 2 claim than Judge Jackson did, and did not find that all of Microsoft's conduct violated Section 2, it did accept Jackson's basic factual approach to Microsoft's conduct as well as his economic understanding of Microsoft's monopoly position, its conduct, and the effect Microsoft's conduct had on competition in the market. This was certainly a strong endorsement of the case the plaintiffs had proved at trial.

### 4. *Openings for Re-framing*

There was one significant area where the court of appeals disagreed with Jackson, the Section 1 tying claim. In a separate Section 1 analysis of the effects on the browser market of bundling Windows and IE, the court of appeals decided Jackson had erred in finding that Microsoft had committed a per se illegal tying violation. Instead, the court held, the tying claim should have been tried under a rule of reason.[190] The court's decision was grounded, in part, on its

[187] *Id.* at 76–78 (quoting Microsoft document expressing Microsoft's goal to "[k]ill cross-platform Java by growing the polluted Java market," a document not mentioned in the district court's opinion).

[188] *Id.* at 70–71. The question whether these exclusive dealing agreements violated Section 1 was not before the court of appeals because Judge Jackson's decision rejecting that claim, *see supra* note 108, was not appealed by the plaintiffs. Nevertheless, the court of appeals indicated that it did not endorse Jackson's approach to the question. *See* United States v. Microsoft Corp., 253 F.3d 34, 70 (D.C. Cir. 2001).

[189] *See Microsoft*, 253 F.3d at 70–72. On the OEM channel, see *id.* at 64.

[190] *Id.* at 84. Judge Jackson had never written that he was applying a per se test. He only stated that there were four necessary requirements for an illegal tie, whether the rule of reason or a per se test was applied. *See* United States v. Microsoft Corp., 87 F. Supp. 2d 30, 47 (D.D.C. 2000). His analysis followed the Supreme Court's approach in *Jefferson Parish Hospital District No. 2 v. Hyde*, 466 U.S. 2 (1984), which commentators have termed a "modified per se" approach. *See, e.g.*, Warren S. Grimes, *The Antitrust Tying Law Schism: A Critique of* Microsoft

view that applying a per se rule to tying in platform software markets would create an "undue risk" of error and of "deterring welfare-enhancing innovation."[191] The court also appeared to be concerned generally with the continued vitality of the traditional per se rule against tying, which had only narrowly survived the Court's review in *Jefferson Parish*, especially as it might be applied to platform software.

The adverse Section 1 tying decision, as well as the court's analytical approach to the Section 2 monopoly maintenance claim, had important negative consequences for the future of the case, even though the former related only to the browser market and the latter resulted in a finding of liability for monopoly maintenance These negative consequences arguably paved the way for the subsequent effort to re-frame the *Microsoft* litigation.

The first negative consequence came from the court's analytical approach to monopolization claims. Although the rule of reason construct is a sensible and historically grounded way to evaluate specific acts of a monopolist,[192] the court's application of that approach—examining each piece of conduct separately—failed to contextualize Microsoft's conduct. Even if Microsoft's "course of conduct" might not be reason for a separate finding of liability distinct from any of the individual acts (as the court of appeals held[193]), Microsoft's course of conduct does help explain why specific acts had an exclusionary effect. It also better identifies the competitive problem that Microsoft posed. Looking at each act separately—seeing the blades of grass, but not even the trees, let alone the forest—misses the broader picture and holds the potential for trivializing Microsoft's behavior.

The second negative consequence came from the way the court viewed the causal link between Microsoft's exclusionary acts toward Netscape and Sun and the maintenance of Microsoft's monopoly position. The court was willing to find Section 2 liability despite the unrealized potential of the competitive threat posed by Netscape and Sun—Microsoft did not have "free reign to squash nascent, albeit unproven, competitors at will," the court of appeals wrote[194]—but that was because a plaintiff seeking an injunction need show only a weak causal link

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III *and a Response to Hylton and Salinger*, 70 ANTITRUST L.J. 199, 201–02 (2002) (discussing "modified per se" approach and tying analysis). Nor did the plaintiffs ever mention "per se" in their brief. Nevertheless, Jackson's analysis did not consider efficiency justifications, nor did it require proof of any competitive impact beyond satisfying the requirement that a "substantial volume" of commerce be affected. *See Microsoft*, 87 F. Supp. 2d at 47.

[191] *Microsoft*, 253 F.3d at 89–90. The court of appeals also reversed Jackson's decision that Microsoft had violated Section 2 by attempting to monopolize the browser market, holding that the plaintiffs' proof of market definition and entry barriers protecting a "browser market" was inadequate. *Id.* at 81.

[192] *See supra* Part II.B.2 (discussing rule of reason in Section 2 cases).

[193] For the court of appeals' rejection of "course of conduct" as a separate ground for liability, see *Microsoft*, 253 F.3d at 78.

[194] *Id.* at 79.

between the specific conduct and the maintenance of monopoly power. The court indicated that the causal link was weak because there might have been no "actual loss to competition" from Microsoft's behavior.[195] Jackson, too, had found that it was unclear whether Netscape and Sun would actually have become genuine competitors in the operating system market, but Jackson had recognized that Microsoft's campaign against Netscape and Sun not only denied consumers certain specific benefits, but that it also conveyed an important lesson to firms that might seek to challenge Microsoft's core products. The court of appeals, however, implied that the "squashing" ultimately might not have mattered much to competition. The implication was that perhaps Microsoft really did not have as much to fear from Netscape as Gates and all his top executives thought and as a three-year campaign, "indefatigably pursued,"[196] would have indicated.

The third negative consequence was the impact of the court's liability decision on the district court's remedial order. Jackson's structural remedy was grounded in his view that Microsoft's course of conduct was systemic and that only a restructuring of the company held out hope for the emergence of competition in the operating system market. The court of appeals, however, had narrowed the monopolization case under the rule of reason scalpel, excising pieces here and there; had reversed and remanded the Section 1 tying claim as it related to the browser market; had reversed the attempt to monopolize the browser market claim; and had expressed uncertainty about the causal link between Microsoft's monopolizing conduct and actual harm.

These differences inevitably affected the court's treatment of the far-reaching remedial order when it turned to reviewing Jackson's decision to break up Microsoft. In vacating that decree, the court of appeals took the position that it had "drastically altered the District Court's conclusions on liability"[197] and had decided that "some—indeed most—of the findings of remediable violations do not withstand appellate scrutiny."[198] On remand, therefore, the district court

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[195] *Id.* at 80.

[196] *See* United States v. Aluminum Co. of Am., 148 F.2d 416, 431 (2d Cir. 1945).

[197] *Microsoft*, 253 F.3d at 105. The change in the bases of liability was one of four separate grounds the court gave for vacating the decree. The other reasons were Judge Jackson's failure to hold an evidentiary hearing on the plaintiffs' remedy proposal, his failure to explain adequately how the decree would achieve the objectives that antitrust decrees are supposed to accomplish, and the court of appeals' decision to disqualify Jackson from the case as of the date he entered the relief order because of his improper contacts with journalists during the pendency of the case. *See id*. at 107, 117; *supra* note 165.

[198] *Microsoft*, 253 F.3d at 105–07. This was a curious description for the court of appeals to give to its decision. True, if one counts by statutory violations, the plaintiffs were only one-for-three—the court of appeals affirmed one claim (maintenance of monopoly), vacated a second (tying), and reversed a third (attempt to monopolize the browser market). But the maintenance of monopoly charge was the core of the case. Indeed, in the monopoly maintenance case the court affirmed almost all of the district court's findings. Oddly enough, the court elsewhere described its changes to the district court's findings of liability in less dramatic terms. *See id.* at 98 ("[T]his Court has revised the scope of Microsoft's liability.").

would need to reconsider which of the conduct restrictions "remain viable" and whether the "sweeping equitable relief" of a structural remedy would be appropriate, particularly in light of whether there was a sufficiently strong causal connection shown between Microsoft's anticompetitive conduct and the maintenance of its monopoly position in the PC operating system market such that a divestiture remedy would be warranted.[199] The new decree, the court of appeals cautioned, "should be tailored to fit the wrong creating the occasion for the remedy."[200] Although the court of appeals did not say so directly, the unmistakable message was that the liability case was just not serious enough to warrant going beyond conduct relief.

### *C. Settling the Case*

#### *1. Regime Change*

As the government plaintiffs prepared for the remanded proceedings, more had changed than the vacating of the decree they had won in Judge Jackson's court. Between Jackson's decision in June of 2000 and the court of appeals' decision in June of 2001 had come a presidential election and with it a Republican administration in the White House. The new head of the Justice Department's Antitrust Division, Charles James, had been nominated twelve days before the government plaintiffs' appeal was argued to the D.C. Circuit; he was confirmed two weeks before the court handed down its opinion.[201] Although the election did not affect the positions argued by the Department of Justice before the court of appeals, it would certainly affect the continuation of the litigation, as the responsibility for that task now clearly fell to the new regime.

It would not have been rash to predict that the new regime would be more amenable to a settlement of the litigation than had been the Justice Department that brought the case and proposed the structural decree that Jackson had entered. Indeed, James had previously indicated a preference for conduct relief over structural relief in *Microsoft*,[202] a position that would appear to have been strengthened by the court of appeals' caution about the propriety of structural relief.

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[199] *See id.* at 105–07.

[200] *Id.* at 107.

[201] *See Senate Approves James as the Antitrust Chief at Justice Department*, WALL ST. J., June 15, 2001, at B.5.

[202] *See* John R. Wilke, *Bush's Likely Antitrust Pick Takes Cautious Path*, WALL ST. J., Feb. 13, 2001, at A4 ("'One thing that is very, very clear is that consumers have benefited by there being a common [software] platform,' Mr. James said in an interview on CNBC last year. 'If Microsoft were to be broken up, you would see divergence of that common platform.' He went on to say that 'at the end of the day, there are going to be conduct remedies' that would fall short of a breakup.").

What may have been a little more surprising, however, was the Justice Department's decision to announce publicly, before any substantive settlement talks had occurred, two major changes in its litigating position. First, the Justice Department announced that it would abandon its effort to obtain structural relief.[203] Instead of structural relief, it would seek an order "modeled after the interim conduct-related provisions of the Final Judgment previously ordered in the case."[204] Second, it would also give up any effort to retry the Section 1 tying claim that had been one of the critical aspects of its original complaint.[205]

This announcement was no run-of-the-mill tactical decision. President Bush had been briefed about the Justice Department's review of the case (by Alberto Gonzales, then White House Counsel) and was told of James's decision the day before it was announced. It was reported that the President had "no objections" to the decision to take these two items off the bargaining table.[206] Informing the White House of the decision to abandon structural relief and the tying claim does not necessarily show political interference with the case, of course. Nor was this the first time that the White House had been informed about important decisions in the *Microsoft* case (although it may have been the first time that any president was informed).[207] But the decision to inform the President is a good reminder of the case's political importance—in addition to its economic importance—and of the consequence that attended backing away from a break-up of Microsoft.

The announcement also had important implications for how the future remedy might be shaped. Although it may have sounded logical to model a conduct remedy after the conduct provisions of Jackson's decree, those provisions were not meant to carry the weight of restoring competition in the market, competition that Microsoft had been found to have suppressed. That goal was to be achieved through the break-up of Microsoft into two companies.

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[203] *See* Press Release, U.S. Dep't of Justice, Justice Department Informs Microsoft of Plans for Further Proceedings in the District Court (Sept. 6, 2001), *available at* http://www.usdoj.gov/atr/public/press_releases/2001/8981.htm.

[204] *Id.*

[205] *Id.*

[206] *See* John R. Wilke & Ted Bridis, *Regulators Won't Seek Microsoft Breakup—Antitrust Officials Will Ask for Broad Restrictions on Business Practices*, WALL ST. J., Sept. 7, 2001, at A3 ("President Bush said yesterday: 'I expect the Justice Department to handle that in a way that brings honor and thought to the process. I respect and hold our attorney general [John Ashcroft] in high esteem and I honor the work that he's done and I'm going to leave it at that.'").

[207] There are two reported occasions when the Clinton White House was informed about the case. One was on the day the complaint was filed (informing the White House Counsel's Office and Council of Economic Advisors). The other was in April 2000 after the Justice Department had decided on its remedy proposal and shortly before it was submitted to the district court (informing the White House Counsel's Office, Council of Economic Advisors, the Secretary of the Treasury, and the Chairman of the National Economic Council). *See* Jeffrey H. Blattner, The *Microsoft* Case and the Role of Elected Officials in Antitrust Enforcement 9 (Sept. 4, 2001) (unpublished manuscript, on file with author).

This meant that the conduct provisions of any new decree would need much more careful attention.

It is, of course, true that the court of appeals' opinion presented the government plaintiffs with difficult legal problems had they decided to pursue structural relief and the Section 1 tying claim. The court of appeals was, at best, skeptical of structural relief and had remanded the tying claim to be tried under a rule of reason with stringent restrictions on the government plaintiffs' ability to prove anticompetitive effects.[208] But difficult is not impossible.[209] And difficult does not mean that you take bargaining chips off the table before the bargaining begins. Subsequent events suggest another explanation for the Antitrust Division's decision not to pursue the tying claim: the new leadership simply did not believe in the claim.[210]

### *2. The Final Settlement Decree*[211]

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[208] *See* United States v. Microsoft Corp., 253 F.3d 34, 95 (D.C. Cir. 2001) (holding that, because plaintiffs had opportunity to prove existence of browser market, with entry barriers, at the original trial, but failed to do so, plaintiffs would be precluded from arguing a theory of competitive harm "that depends on a precise definition of browsers or barriers to entry—for example, network effects from Internet protocols and extensions embedded in a browser—other than what may be implicit in Microsoft's tying arrangement").

[209] The European Commission subsequently concluded that Microsoft had engaged in unlawful tying when it bundled its Windows Media Player with Windows, using a rule-of-reason-type approach. *See* Commission Decision, Case COMP/C-3/37.792 Microsoft (2004) 269, 271–73, *available at* http://europa.eu.int/comm/competition/antitrust/cases/decisions/37792/en.pdf [hereinafter EC *Microsoft* Decision]. That decision is currently on appeal to the Court of First Instance, and it remains to be seen whether the EC's analysis of tying will be upheld.

[210] *See infra* Part IV.C.2.

[211] Two decrees were ultimately entered by the district court. One decree was entered in the Justice Department's settlement, in which nine of the state plaintiffs joined. *See* United States v. Microsoft Corp., No. 98-1232 (CKK), 2002 U.S. Dist. LEXIS 22864 (D.D.C. Nov. 12, 2002) [hereinafter Final Settlement Decree]. A second decree was entered in the states' case as continued by the nine states that decided not to join the Justice Department's settlement. *See* New York v. Microsoft Corp., 224 F. Supp. 2d 76, 266–77 (D.D.C. 2002). There are some differences between the two decrees, most particularly the establishment of a Microsoft Compliance Committee in the non-settling states' decree and some different provisions regarding the compliance officer. *Compare Microsoft*, 224 F. Supp. 2d at 273, *with Microsoft*, 2002 U.S. Dist. LEXIS 22864, at *31. The district court judge, however, generally rejected a wide array of additional conduct relief proposed by the non-settling states. The Justice Department settlement itself went through some changes before it was submitted to the district court, and the district court made one change in the proposal (to make clearer its power to retain jurisdiction to issue further orders or directions, *see* United States v. Microsoft Corp., 231 F. Supp. 2d 144, 200–01 (D.D.C. 2002)). For expositional purposes, the settlement discussed in the text is the decree entered by the district court in the Justice Department suit.

The conduct issues that had been the focus of the parties in the litigation now became the focus of the settlement, although the decree did not cover every aspect of Microsoft's conduct that had either been litigated at trial or reviewed by the court of appeals.[212] The settlement thus had a series of provisions governing dealings with OEMs (general non-retaliation, requirement of uniform licensing, lifting of certain licensing restrictions on the boot-up process and icon displays[213]), restricting exclusive deals with various complementary product providers,[214] and forbidding retaliation against software and hardware developers for developing certain competing products.[215] All of these provisions were related either to Windows or to middleware products, and all had exclusions and provisos of varying clarity, for example, allowing Microsoft to enforce "any intellectual property right" (not otherwise limited) in a dispute with a software developer over the developer's support of competing software,[216] or allowing OEMs to provide desktop shortcuts for non-Microsoft middleware so long as the shortcuts do not "impair the functionality" (not otherwise defined) of the user interface.[217]

The critical issues remained ones that had been raised in the plaintiffs' original complaints—bundling "middleware" programs into the operating system and disclosure of information about the Windows operating system that makers of complementary software products needed.[218] On these two points the settlement produced rather mixed results.

Previous approaches to bundling had been fairly consistent. Rather than forcing Microsoft to unbundle "the program," the plaintiffs had originally sought to require Microsoft to allow OEMs to hide the program's functionality from consumer use by removing end-user access to it.[219] The hope was that this would

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[212]For example, Microsoft's conduct involving Java was covered by the settlement only inferentially, at best. *See* Memorandum of the United States in Support of Entry of the Proposed Final Judgment at 55, United States v. Microsoft Corp., No. 98-1232 (CKK) (D.D.C. Feb. 27, 2002), *available at* http://www.usdoj.gov/atr/cases/f10100/10143.pdf [hereinafter Memorandum of Justice Department]. Judge Kollar-Kotelly rejected an effort by the non-settling states to include a more specific Java remedy. *See Microsoft*, 224 F. Supp. 2d at 260–62.

[213]Final Settlement Decree, *supra* note 211, §§ III.A, B, C.

[214]These included OEMs, ISVs, IHVs, IAPs, and ICPs. *See id.* § III.D.

[215]*Id.* § III.F.

[216]*Id.* § III.F.3.

[217]*Id.* § III.C.3.

[218]*See* First Amended Complaint, *supra* note 55, at 35 (seeking licensing of interfaces and technical information to enable browsers and other complementary software to "run satisfactorily" with Windows); DOJ Complaint, *supra* note 54 and accompanying text.

[219]*See* DOJ Complaint, *supra* note 54, at 52 (seeking to forbid Microsoft from distributing, at a single price, a version of Windows bundled with IE unless OEM had option of deleting IE icon and "other means by which users may readily use IE to browse the web"). The government plaintiffs had also originally sought to require Microsoft to distribute Netscape with its Windows operating system for a three-year period. *See id.* at 51–52; States' Proposed Order, Motion for a Preliminary Injunction ¶ 2, *Microsoft*, No. 98-1233 (D.D.C. May 18, 1998) (on file with

remove the disincentive OEMs had for installing a competing middleware program, the disincentive being the increase in support costs that comes from consumer confusion when the OEM provides two (or more) programs that do the same thing.

The settlement followed the familiar pattern, but with further elaborations that made the approach even less likely to stimulate OEMs to choose non-Microsoft middleware. First, the settlement permitted Microsoft to provide end-users with a mechanism to "enable" access to the hidden Microsoft middleware, which could lead again to consumer confusion over having similar programs.[220] Second, the settlement allowed Microsoft, two weeks after the consumer first boots up a PC, automatically to sweep away the desktop icons and shortcuts provided by the OEM, replacing them with Microsoft's, so long as the user confirms the alteration.[221] Third, unlike the Jackson decree, there would be no reduction in royalty rates if the OEM disabled access to Microsoft middleware so that it could install a competitor's offering. This meant either that the OEM would be paying more if it offered competing middleware than if it did not, or that the competing middleware company would have to license the OEM its software royalty-free.

The remedy not chosen in the settlement was the obvious one—require Microsoft to offer an unbundled version of Windows. Unbundling might have been an even more logical remedy for the Section 1 tying claim had the Justice Department not dropped it,[222] but unbundling was also an appropriate choice for the Section 2 claim. The court of appeals had found that Microsoft's commingling of browser functionality code with operating system code was monopolizing conduct that violated Section 2, lacking any efficiency justification.[223] Even taking the narrowest "checklist" approach to remedy, which would have looked at each specific act the court of appeals had found

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authors) (requiring inclusion of Netscape browser and "one other commercially available internet browser").

[220] *Compare* Final Settlement Decree, *supra* note 211, § III.H.1, *with* EC *Microsoft* Decision, *supra* note 209, ¶ 852 ("The risk of increased support and training costs to be incurred by OEMs will continue to exist even if the Microsoft icon is hidden because WMP can be 'reactivated' by media files streamed from the Internet in Microsoft's Internet Explorer, the most widely used Web browser. Furthermore, Microsoft's continued ability to override the default setting for a non-Microsoft media player after the US Final Judgment (where the competing program does not provide a particular functionality) means that the possibility of increased support costs is not entirely eliminated even where an alternative player is set as the default player." (footnotes omitted)).

[221] *See* Final Settlement Decree, *supra* note 211, §§ III.H.1, .3.

[222] Note that the EC ordered the unbundling of the Windows Media Player from the Windows operating system, distinguishing its decision from the U.S. settlement on the ground that it was proceeding on a tying theory, unlike the United States which had dropped the Section 1 tying charge. *See* EC *Microsoft* Decision, *supra* note 209, ¶¶ 797–98.

[223] *See supra* note 181 and accompanying text.

improper and then enjoined it, the Department could quite properly have required Microsoft to "uncommingle."[224]

The case for requiring unbundling, however, would need to rest on more than what the court of appeals' opinion would have permitted the Department to do. This was particularly true given the presumed cost of requiring Microsoft to redesign Windows, a cost the government plaintiffs had acknowledged when they proposed the original decree to Judge Jackson.[225] Further, there was the technical problem in specifying exactly what code constituted "the browser" and how one would specify it in a way that would enable Microsoft to comply with an injunction that required such code to be removed from Windows without disabling it. This was no small point and, in fact, it was one of the points on which the non-settling states' request for unbundling ultimately foundered.[226] Nevertheless, in the final settlement decree itself, the Justice Department felt that "Microsoft Middleware" was sufficiently identified in terms of "software code" so that Microsoft could understand its obligations under the decree.[227] Further, the European Commission ("EC") was subsequently able to order Microsoft to unbundle the Windows Media Player ("WMP") (an order with which Microsoft eventually complied[228]), so it is not clear why unbundling would have been impossible to achieve. Indeed, since the decree was intended to apply to future versions of the operating system, future compliance would not require "unbundling" but, rather, would require Microsoft to offer a version without bundling the middleware in the first place.

The bottom-line question was not whether unbundling was costly, or whether it was technically feasible, or whether Microsoft would have been puzzled about how to take out the code it had put in, but whether there was reason to be concerned about any adverse competitive effects from the continued bundling of middleware code into the operating system so long as end-user access to the program were effectively blocked. The answer to this depends on how seriously one takes one of the central economic premises of the plaintiffs'

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[224] *See* Declaration of David S. Sibley at 17, tbl.3, United States v. Microsoft Corp., No. 98-1232 (CKK) (D.D.C. 2002), *available at* http://www.usdoj.gov/atr/cases/f10100/10143c.pdf (listing provisions in proposed final judgment that address anticompetitive acts found by district court and affirmed by court of appeals) (Department of Justice economic consultant).

[225] *See supra* note 151 and accompanying text.

[226] *See* New York v. Microsoft Corp., 224 F. Supp. 2d 76, 245–51 (D.D.C. 2002).

[227] *See* Competitive Impact Statement at 17–19, *Microsoft*, Nos. 98-1232 & 98-1233 (CKK) (D.D.C. Nov. 6, 2001), *available at* http://www.usdoj.gov/atr/cases/f9500/9549.pdf.

[228] *See* EC *Microsoft* Decision, *supra* note 209, ¶¶ 1011–17. Microsoft began complying with the unbundling requirement approximately one year after the Commission's original decision, offering a version of Windows called "Windows XP Home Edition N," the N standing for "not with Media Player," but the product has not been popular. *See* Steve Lohr & James Kanter, *Microsoft Facing Fines in Europe*, N.Y. TIMES, Dec. 23, 2005, at C1 (stating Microsoft indicates that no OEMs have asked for licenses for the product and retail sales "have been few"); *Microsoft Strikes Deal on Windows*, N.Y. TIMES, Mar. 28, 2005, at C8 (reporting agreement on name of new product, clearing way for its distribution).

case—the applications barrier to entry into the PC operating system market—and how important it might be to make every effort to lower that entry barrier so as to make entry easier. Leaving middleware code in the OS might very well mean that applications writers would continue to write to the code provided by that middleware and its APIs, even if the middleware (such as the IE browser) itself is not invoked by the end-user, thereby maintaining the advantage that Microsoft has over potential entrant operating systems producers with regard to the existence of a broad range of compatible applications. Objectors to the settlement had made this entry-barrier argument in support of code unbundling, but the Department brushed the argument aside, not by disputing possible anticompetitive effect but by asserting that a commingling theory of competitive harm was not based on the facts proved at trial (which were focused on consumer confusion) and that an unbundling remedy would impose an "artificial constraint" on software design, harming consumers and ISVs who had designed software relying on the present operating system code.[229] In other words, the Department chose not to lower the applications barrier to entry so that ISVs could continue to write to Windows rather than incurring the costs of writing to some other platform.

The other critical issue for remedy—requiring Microsoft to disclose information necessary for interoperability with Windows—had also been a matter of some contention between Microsoft and the government plaintiffs in earlier settlement negotiations,[230] even though there had been virtually no proof

[229] *See* Response of the United States to Public Comments on the Revised Proposed Final Judgment, United States v. Microsoft Corp., No. 98-1232 (CKK) (D.D.C. Feb. 27, 2002), ¶¶ 229-32, *available at* http://www.usdoj.gov/atr/cases/f10100/10145.pdf [hereinafter U.S. Response to Public Comment on Revised Proposed Final Judgment]. For arguments in favor of code unbundling, *see*, *e.g.*, Project to Promote Competition & Innovation in the Digital Age ("ProComp"), Comments to the Proposed Final Judgment In United States v. Microsoft Corporation, No. 98-1232, State of New York, et al. v. Microsoft Corporation, No. 98-1233, at App. A at ¶ 37 (Declaration of Kenneth Arrow) (Jan. 28, 2002), *available at* http://www.usdoj.gov/atr/cases/ms_tuncom/major/mtc-00030608; Comment of Robert E. Litan, Roger D. Noll, and William D. Nordhaus on the Revised Proposed Final Judgment, at 44-45 (Jan. 17, 2002), *available at* http://www.usdoj.gov/atr/cases/ms_tuncom/major/mtc-00013366.pdf. The European Commission subsequently ordered unbundling of Windows Media Player ("WMP") code from Windows, finding that hiding end-user access under the U.S. decree was not a sufficient remedy. *See* EC *Microsoft* Decision, *supra* note 209, ¶ 882 ("The possibility for OEMs to hide end-user access to WMP will not alter this mechanism. As long as the WMP code is present, content streamed from the Web or applications running on the client PC are able to call upon this code, whether end-user access is removed or not.").

[230] For example, the parties had engaged in negotiations relating to information disclosure during a mediation effort supervised by Judge Richard Posner, but the effort ended with the parties still apart on the scope and timing of these disclosures. *See* KEN AULETTA, WORLD WAR 3.0: MICROSOFT AND ITS ENEMIES 357–59 (2001).

at trial that Microsoft had denied interoperability information to competitors.[231] In the Jackson decree the interim API disclosure remedy covered interoperability between Windows and Microsoft applications, in addition to interoperability between Windows and Microsoft middleware, and required "timely disclosure" of APIs (when the APIs were used by Microsoft operating system developers in any test-released version or disclosed to Microsoft applications developers).[232] The settlement decree, however, pared back Microsoft's obligations, restricting the API disclosure provision to interoperation between Windows and "Microsoft Middleware" and delaying the disclosure obligation to later beta versions of the Microsoft products.[233] The settlement decree also created a new set of exceptions to Microsoft's disclosure obligations relating to various "security" issues, including anti-virus security, digital rights management, and authentication and authorization, allowing Microsoft to limit licenses of these security-related technologies to firms that are "authentic" and "viable."[234] And the decree confined API disclosure to a slightly more narrowly defined set of "Windows Middleware Products" than had previously been the case.[235]

Perhaps the most forward-looking provision of the settlement decree, however, was the one dealing with communications protocol licensing, specifically those protocols that Microsoft uses to control communication between desktop PCs and servers.[236] As with the issue of API interoperability, there had been no evidence submitted at trial that Microsoft had limited interoperability between servers and PCs. Nevertheless, server protocol disclosure had been in Judge Jackson's decree, although it had been lumped together with API disclosure in a single provision.[237] API disclosure focused on interoperability with the operating system running on the desktop, but protocol

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[231]The only evidence of such a denial was a four-month delay in 1995 in providing Netscape with a particular API, thereby excluding Netscape from most of the holiday season that year. *See* United States v. Microsoft Corp., 84 F. Supp. 2d 9, 33–34 (D.D.C. 1999). This incident was not mentioned in the court of appeals' decision.

[232]*See supra* note 64 and accompanying text.

[233]*See* Final Settlement Decree, *supra* note 211, §§ III.D, VI.R.

[234]*See id.* § III.J.2. For criticisms of these provisions, see Timothy F. Bresnahan, *A Remedy That Falls Short of Restoring Competition*, ANTITRUST, Fall 2001, at 69; and Letter from Rebecca Henderson, Professor of Mgmt., MIT Sloan Sch. of Mgmt. to Renata Hesse, Antitrust Div., U.S. Dep't of Justice, Tunney Act Submission Comments on the Proposed *United States v. Microsoft* Settlement 7–8 (Jan. 26, 2002), *available at* http://www.usdoj.gov/atr/cases/ms_tuncom/major/mtc-00030602.pdf.

[235]The settlement decree eliminated voice recognition software as a specific example of a middleware "product" and covered "networked audio/video client software," *see* Final Settlement Decree, *supra* note 211, § VI.K.2.a, rather than the broader "multimedia viewing software" (which would have including photograph and video viewing and editing software). *See also* United States v. Microsoft Corp., 97 F. Supp. 2d 59, 72 (D.D.C. 2000).

[236]The communication protocol licensing provision is Section III.E. *See* Final Settlement Decree, *supra* note 211, § III.E.

[237]*See Microsoft*, 97 F. Supp. 2d at 67.

disclosure was concerned with the link between desktop PCs and servers, acknowledging the fact that networks of computers, connected through servers, were playing an increasingly important role in the industry. Compulsory protocol disclosure could thus help the possibility that server operating systems might emerge as a form of "middleware" to which applications writers would write and which might then become a competitive platform to Windows.[238] Such disclosure might also do double duty, helping competition in server operating systems by preventing Microsoft from using its privileged connection to the PC to advantage its position in the server operating system market.[239]

Notwithstanding their benefits, the API and protocol disclosure provisions raised particularly difficult questions of implementation. Both involved disclosures that could directly help competitors and both involved highly technical issues of software programming and design. This meant not only that Microsoft had an incentive to avoid its obligations under the decree, it had an informational advantage over government enforcers who might try to check on compliance. A core concern in drafting any injunctive decree is the willingness of the defendant to comply fully with its obligations under the decree. Past experience had shown, however, that Microsoft was aggressive in its interpretation of court decrees and generally unwilling to acknowledge that its behavior was anticompetitive.[240]

One of the ways the Jackson decree had attempted to deal with the compliance problem as it related to information disclosure was to give OEMs and ISVs the right to "study, interrogate and interact with relevant and necessary portions of the source code and any related documentation" at a "secure facility."[241] The settlement withdrew that provision, instead establishing a three-

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[238]*See* New York v. Microsoft Corp., 224 F. Supp. 2d 76, 172–73 (D.D.C. 2002).

[239]*See* Memorandum of Justice Department, *supra* note 212, at 58–59 (stating protocol licensing provision "prevents Microsoft from incorporating into Windows features or functionality with which only its own servers can interoperate, and then refusing to make available information about those features that non-Microsoft servers need in order to have the same opportunities to interoperate with the Windows operating system"). The impact on the server operating system market was necessarily undercut by limiting disclosure to server-to-PC connections rather than including server-to-server connections, that is, networks of servers and desktop PCs. The European Commission case against Microsoft, which was addressed directly to competition in the server operating system market, includes server-to-server protocols. *See* EC *Microsoft* Decision, *supra* note 209, at 185.

[240]In his opinion entering final judgment, Judge Jackson had referred to both points. *See Microsoft*, 97 F. Supp. 2d at 62; *see also* James V. Grimaldi, *Microsoft Defends Its Practices; CEO Ballmer Sees No Need to Change*, WASH. POST, Apr. 29, 2000, at E1 (quoting Ballmer interview after Judge Jackson issued conclusions of law, but before entry of his final decree, as stating: "I do not think we broke the law in any way, shape or form . . . . I feel deeply that we behaved in every instance with super integrity. I'm not saying we don't talk tough, that people don't get a little 'grrrr' in their e-mail and all that . . . . Are we rough around the edges? Yes."); *supra* Part III.B.1.

[241]*See Microsoft*, 97 F. Supp. 2d at 67.

person "technical committee" composed of "experts in software design and programming," which would monitor Microsoft's compliance with the decree.[242]

The idea of having a technical committee to deal with issues of software design was not part of the Jackson decree. Adding it to the settlement decree was a significant improvement, but the mechanism had some important legal limitations. The technical committee's work was to remain confidential; the committee was to report its findings not to the court, but to the plaintiffs (every six months); no member of the committee could make any public statements about the committee's activities; its work product, findings, and recommendations would be inadmissible in any enforcement proceeding; and its members were forbidden from testifying in "any matter related to this Final Judgment."[243] This meant that unless the plaintiffs were dissatisfied with the committee's work, the public would hear nothing specific about any problems the committee has encountered; and even then its reports might not be publicly known if the court chose to keep them confidential under its protective order.[244]

The necessity for the technical committee mechanism underscored the fact that the decree would require ongoing regulation and supervision of Microsoft's behavior, but there was little in the decree to ensure that this regulation would produce prompt action by Microsoft to change its practices. Technical issues would inevitably take time to understand and resolve and the decree therefore provided for "voluntary dispute resolution" pursuant to which complaints could be submitted to the technical committee for its investigation; efforts would then be made to resolve these complaints informally (but with an allowance for Microsoft "to respond to the substance of the complaint").[245] These were certainly plausible provisions to include in a regulatory decree, but such provisions would take time and perhaps further delay compliance.

What the decree really lacked was incentives for Microsoft to comply. No benchmarks were provided by which the plaintiffs could measure Microsoft's compliance with any of the decree's provisions or with its possible objectives, nor were any specific penalties set out for failures to comply, such as a broader set of remedies that the plaintiffs could invoke in such a case.[246] Of course, a contempt proceeding was always possible in the event of non-compliance, but

[242]The technical committee's structure and duties are set out in § IV.B of the decree. *See* Final Settlement Decree, *supra* note 211, § IV.B.

[243]*See id.* §§ IV.B.8.c, 9; IV.D.4.

[244]*See id.* § IV.B.9 (stating "any report and recommendations prepared by the [technical committee] shall be treated as Highly Confidential under the Protective Order in this case" and not disclosed except as allowed under the Protective Order or further order of the court).

[245]*See id.* § IV.D.4.

[246]"Crown jewel provisions," which require a defendant to give up some additional asset if it is unable to comply with a decree's requirements within a given time, are a familiar part of merger decrees. *See* Joseph J. Simons, Dir., Bureau of Competition, Fed. Trade Comm'n, Negotiating Merger Remedies Statement 11, 22 n.31 (Apr. 2, 2003), *available at* http://www.ftc.gov/bc/bestpractices/bestpractices030401.pdf (explaining crown jewel provisions).

the Justice Department's inability to hold Microsoft in contempt of an earlier antitrust decree showed how difficult this approach would be.[247] Indeed, the only certain deadline Microsoft faced was the expiration of the decree itself—in five years, unless there were "a pattern of willful and systematic violations," in which case there might be a one-time extension for "up to two years."[248] Given this structure, it would hardly be surprising if Microsoft chose simply to play the clock out, doing as little as possible, as slowly as possible, to change its behavior.

## IV. RE-FRAMING THE *MICROSOFT* CASE

### *A. Introduction*

How is it possible to re-frame *Microsoft* as so serious a misstep in antitrust policy that it calls into question the relevance of Section 2, the doctrinal approach to monopolization problems, and the very institutions through which antitrust is enforced? After all, although Microsoft secured reversal of the district court's order that it be broken up as an integrated firm as well as reversal of some of the complaint's counts against it,[249] the government prevailed on its core claims under Section 2. A unanimous United States court of appeals, sitting en banc, concluded that Microsoft in fact possessed a monopoly in the market for Intel-compatible PC operating system software and that it violated Section 2 of the Sherman Act by monopolizing that market through a rather extensive series of acts that impaired its rivals and injured consumers without any efficiency justification. Indeed, to date no court or enforcement agency that has examined Microsoft's market power or conduct, in the United States or abroad, has fundamentally disagreed with those findings.

A re-framing effort, however, has proceeded in several stages since the court of appeals' decision. First, the re-framing began with the significant shift in the political environment in the United States when the Bush administration inherited the *Microsoft* case from the Clinton administration. Seizing on the re-framing possibilities suggested in the court of appeals' opinion itself, the Bush administration promptly settled the case on weak terms. If there was any doubt about the likely ineffectiveness of that final settlement decree, that doubt has been dispelled in the decree's post-settlement administration. Second, the effort

[247] *See* United States v. Microsoft Corp., 980 F. Supp. 537, 545 (D.D.C. 1997), *rev'd on other grounds*, 147 F.3d 935 (D.C. Cir. 1998) (denying Justice Department's motion for civil contempt for violating 1995 decree forbidding Microsoft from conditioning operating system license on licensing of another Microsoft product; although Microsoft required OEMs to license Windows 95 and Internet Explorer together, decree provision's exemption for integrated products was too ambiguous to hold Microsoft in civil contempt).

[248] *See* Final Settlement Decree, *supra* note 211, § V.

[249] *See supra* notes 197-98.

to re-frame *Microsoft* is shown in the Justice Department's defense of that settlement, including its unprecedented public lashings of foreign competition authorities that have pursued their own efforts to rein in Microsoft's market power and in the Department's advocacy of less stringent Section 2 standards. Third, there is the effort to re-frame the *Microsoft* case through the vehicle of the Antitrust Modernization Commission ("AMC"). It is to each of these three areas that this Article now turns.

## *B. Judging the Settlement*

### *1. Administering the Settlement Decree*

The final settlement decree's original termination date was November 12, 2007.[250] This meant that whatever impact the settlement decree was supposed to have was to take hold in a period of time shorter than the interim conduct provisions of Judge Jackson's decree—a decree whose conduct provisions were intended only as transitions to more permanent relief.[251]

What has been the record so far? To the extent that information has been placed on the public record, as of the early part of 2006 the experience of the parties in administering the decree shows that, contrary to the expectations of some critics of the settlement, many of its provisions have been implemented without apparently producing many serious complaints from concerned parties about non-compliance.[252] Only four "Consent Decree Compliance Advisories" have been issued by the Justice Department reporting on issues of concern

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[250]The decree was entered on November 12, 2002. *See* United States v. Microsoft Corp., No. 98-1232 (CKK), 2002 U.S. Dist. LEXIS 22864 (D.D.C. Nov. 12, 2002). By order dated September 7, 2006, portions of the decree were extended for an additional two years pursuant to an agreement struck between the government and Microsoft. *See* Modified Final Judgment, United States v. Microsoft Corp., No. 98-1232 (CKK), *available at* http://www.usdoj.gov/atr/cases/f218300/218339.htm. *See also infra* note 266 and accompanying text.

[251]For the term of Jackson's decree, see *infra* text accompanying note 267.

[252]As of October 2005, 593 complaints had been reported by the plaintiffs and Microsoft, but only fifty-four of them (approximately nine percent) were regarded as "substantial." These figures are compiled from the Joint Status Reports that Judge Kollar-Kotelly required the parties to file every six months in an effort to monitor the plaintiffs' enforcement efforts. *See* Joint Status Report on Microsoft's Compliance with the Final Judgments at 2, United States v. Microsoft Corp., No. 98-1232 (CKK) (D.D.C. July 3, 2003), *available at* http://www.usdoj.gov/atr/cases/f201100/201135.pdf [hereinafter Joint Status Report of July 3, 2003] (reporting district court order of May 14, 2003). Most often (but not always) Microsoft has joined in these reports. The Joint Status Reports, and other case filings, are posted on the Department of Justice Antitrust Division's website at http://www.usdoj.gov/atr/cases/ms_ index.htm.

regarding Microsoft's compliance with the decree.[253] The most significant complaint regarding compliance with the bundled middleware provision, for example, involved the "Shop for Music Online" feature of Windows XP, which invoked IE even when the user had set a different browser as the default. After the Justice Department discussed its "concerns" with Microsoft, Microsoft—"[w]ithout necessarily agreeing with the Department's position"—agreed to remove the override of the user's default browser by issuing a Windows "update" download.[254] One would be hard-pressed to argue that this violation shows anything more than Microsoft's continuing unwillingness to let go of its desire to use its operating system to invoke IE whether the consumer wants to or not. Stubborn behavior, perhaps, but the competitive effect of this particular violation is hard to discern.[255]

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[253]The Department of Justice and the nine settling states (the "New York Group") have issued these compliance advisories as part of their monitoring of Microsoft's implementation of the final settlement decree. *See* Press Release, Dep't of Justice, Microsoft Consent Decree Compliance Advisory (Aug. 5, 2002), *available at* http://www.usdoj.gov/atr/cases/f11600/11644.pdf (explaining in the Justice Department's first compliance advisory the advisory process under the decree).

[254]*See* Press Release, Dep't of Justice, Microsoft Consent Decree Compliance Advisory (Jan. 15, 2004), *available at* http://www.usdoj.gov/atr/public/press_releases/2004/202109.pdf (asserting violation of Section III.H, which governs non-Microsoft default middleware requirement). Similar issues appear to have arisen with regard to Windows Media Player and links to online music providers opened by users. *See* Joint Status Report on Microsoft's Compliance with the Final Judgment at 9, *Microsoft*, No. 98-1232 (CKK) (D.D.C. June 1, 2005), *available at* http://www.usdoj.gov/atr/cases/f209300/209307.pdf [hereinafter Joint Status Report of June 1, 2005] (indicating "discussion of this matter is on-going," but not providing further detail).

[255]Plaintiffs have also dealt with some complaints regarding Microsoft's licensing and distribution practices that have not been clear violations of the decree, but that Microsoft has modified, at least to some extent, in the course of the decree's administration. *See, e.g.*, Joint Status Report on Microsoft's Compliance with the Final Judgment at 12–13, *Microsoft*, No. 98-1232 (CKK) (D.D.C. Oct. 19, 2005), *available at* http://www.usdoj.gov/atr/cases/f212100/212195.pdf (reporting that Microsoft distributed CD containing copy of Windows Media Player to portable music player manufacturers on condition that manufacturers distribute it on an "exclusive basis"; following complaint, Microsoft notified manufacturers that they were not required to distribute Media Player exclusively even though,relations with portable music player manufacturers were not covered by the final settlement decree); Joint Status Report on Microsoft's Compliance with the Final Judgment at 6–7, *Microsoft*, No. 98-1232 (CKK) (D.D.C. July 9, 2004), *available at* http://www.usdoj.gov/atr/cases/f204500/204560.pdf [hereinafter Joint Status Report of July 9, 2004] (summarizing Windows licensing term forbidding OEMs from asserting patent infringement claims against Microsoft relating to licensed operating system). Microsoft agreed to remove the non-assertion term in future licenses, but not for aspects of Windows covered by current licenses. *Id.*, The government decided that this "adequately resolves any concerns relating to the non-assertion provision's consistency with the Final Judgments." *Id.* Note that Japan's Fair Trade Commission has charged that the non-assertion clause violates Article 19 of Japan's Antimonopoly Act (unfair methods of competition). *See* Press Release, Japan Fair Trade Comm'n, The JFTC Renders a

The most contentious part of decree enforcement has proven to be the protocol licensing requirement, something that the parties might not have predicted when agreeing to the settlement. From the simple matter of Microsoft's refusal to use Adobe Acrobat to image the documentation required by this provision (Microsoft instead had insisted on using its own HTML format for the documents, a format which had "usability" problems[256]) to the more serious matter of accurately documenting all the protocols, the project has proved enormously difficult and slow.

At first, Microsoft took on the obligation of documenting the protocols (along with the APIs[257]), but it later became clear that Microsoft would not complete the protocol project on its own within any reasonable period of time. The result was that in January 2005 the technical committee undertook a one-year project to assist in creating "prototype implementations" of each task undertaken by the protocols so as to be certain that the technical documentation is complete and accurate.[258] Microsoft agreed to cooperate with the technical committee on this project as well as to develop "protocol parsers" (a tool that formats network traffic, allowing more accurate protocol documentation) for all

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Recommendation to Microsoft Corp. (July 13, 2004), *available at* http://www.jftc.go.jp/e-page/pressreleases/2004/july/040713.pdf. Microsoft has contested this decision. *See Microsoft Decides to Defend Nap Provision in PC Maker Contracts before JFTC Tribunal*, 87 Antitrust & Trade Reg. Rep. (BNA) 126 (July 30, 2004).

[256] *See* Transcript of Hearing at 6–7, *Microsoft*, No. 98-1232 (CKK) (D.D.C. Feb. 9, 2005) [hereinafter Transcript of Hearing] (on file with author) ("HTML format used by Microsoft had some problems in terms of its usability. And my understanding is that Microsoft has agreed to use the Adobe PDF, understanding it's a competitor, but that it does meet the requirements identified by the Plaintiffs. And so they've agreed, as I understand, to offer the MCPP [Microsoft Communications Protocol Program] technical documents supported by an Adobe PDF [format].") (statement of Judge Kollar-Kotelly). Microsoft claimed the need to use its own version of HTML for digital rights management reasons. In addition to not supporting sophisticated search techniques, the plaintiffs claimed that the documentation could be read only with Internet Explorer. *See* Joint Status Report on Microsoft's Compliance with the Final Judgment at 4, *Microsoft*, No. 98-1232 (CKK) (D.D.C. Oct. 8, 2004), *available at* http://www.usdoj.gov/atr/cases/f205700/205751.pdf (listing concerns of plaintiffs regarding documentation).

[257] Microsoft stated in December 2002, shortly after the final settlement decree was entered, that the "vast majority" of the interfaces the decree covered were already documented "among the thousands" of APIs it had already made available to software developers. *See* Press Release, Microsoft Corp., Settlement Program Interfaces (Dec. 2002), http://msdn.microsoft.com/library/default.asp?url=/library/en-us/dnapiover/html/api-overview.asp. Microsoft subsequently identified "a few hundred undocumented Windows interfaces or parameters that were used by one or more of the Microsoft Middleware components," *id.*; these interfaces were then documented and made available online, *see id.* Microsoft reported 290 new APIs documented as of August 2002. Joint Status Report of July 3, 2003, *supra* note 252, at 22.

[258] *See* Joint Status Report on Microsoft's Compliance with the Final Judgment at 3, *Microsoft*, No. 98-1232 (CKK) (D.D.C. Jan. 25, 2005), *available at* http://www.usdoj.gov/atr/cases/f207200/207283.pdf (describing prototype agreement).

licensed protocols.[259] In November of 2005, however, Microsoft indicated to the court that it would be unable to complete its part of the project until July 2006—six months late and only sixteen months before the decree itself would terminate.[260] If anything, Microsoft's compliance with this part of the decree declined over time, leading the Justice Department and the states to complain in January of 2006 that Microsoft had "fallen significantly behind in responding to technical documentation issues" submitted to the technical committee and that Microsoft needed to "dramatically increase the resources devoted to responding to technical documentation issues" in order to get its performance "back on track."[261] The backlog of technical issues, the plaintiffs reported, "grows day by day" as the number of technical issues identified by the technical committee staff "is not declining."[262] Microsoft's response has been that the technical documentation required by the final settlement decree is of a "magnitude, scope, and complexity" that necessitates a "substantial—and ongoing—undertaking," and that it was having difficulty "finding and hiring competent employees with the necessary experience in and training for these highly-specialized tasks."[263]

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[259] *See id.* at 4 n.4 (explaining purpose of parsers); *see also* Joint Status Report of June 1, 2005, *supra* note 254, at 7.

[260] *See* Joint Status Report on Microsoft's Compliance with the Final Judgment at 5, *Microsoft*, No. 98-1232 (CKK) (D.D.C. Nov. 18, 2005), *available at* http://www.usdoj.gov/atr/cases/f213100/213109.pdf (agreeing that Microsoft would complete parser development by July 2006 rather than October 2006).

[261] *See* Plaintiffs' Response to Microsoft's Supplemental Status Report on Microsoft's Compliance with the Final Judgments at 2–3, *Microsoft*, No. 98-1232 (CKK) (D.D.C. Jan. 23, 2006), *available at* http://www.usdoj.gov/atr/cases/f214200/214204.pdf [hereinafter Plaintiffs' Response to Microsoft's Supplemental Status Report].

[262] *Id.* at 3.

[263] Supplemental Status Report on Microsoft's Compliance with the Final Judgments at 5, 8, *Microsoft*, No. 98-1232 (CKK) (D.D.C. Jan. 17, 2006) [hereinafter Microsoft's Supplemental Status Report] (on file with author). Microsoft's efforts have included running parser tests in its laboratories in India, *id.* at 4, and hiring a vendor-based team of eleven members in China to assist in writing parsers, *id.* at 3. However, the plaintiffs were highly critical of the test efforts at the India lab. *See* Plaintiffs' Response to Microsoft's Supplemental Status Report, *supra* note 261, at 3 (describing major flaws with testing procedure in India). In April 2006, Microsoft reported that it had upgraded executive oversight of the documentation effort and that it had added two additional programmer-writers and two managers to the seventeen full-time members of the "protocol documentation team," a team that was supplemented by the "almost [fifty] Microsoft employees" temporarily reassigned from other projects, including the next edition of Windows (Vista). *See* Microsoft's Supplemental Status Report, *supra* at 11. Although Microsoft reported these figures to indicate the substantial numbers of personnel assigned to the protocol compliance effort, its institutional commitment might also be judged by comparing those numbers to the number of people Microsoft employed at the time—61,000 people on a full-time basis, 24,000 of whom were involved in "product research and development." *See* Microsoft Corp., Annual Report for the Fiscal Year Ended June 30, 2005 (Form 10-K), at 19, *available at* http://www.microsoft.com/msft/ar05/downloads/MS_2005_10K.doc (reporting number of employees).

By May of 2006 the government plaintiffs had finally lost patience. In a joint status report filed with the district court the plaintiffs indicated that the parties' efforts to assure satisfactory technical documentation of the protocols had reached a "watershed" and that Microsoft's performance in documenting the protocols and resolving technical issues had been "disappointing."[264] A "new approach" was accordingly needed—or, in Microsoft-speak, a "broader 'reset'"-—under which Microsoft would rewrite "substantial portions" of the technical documentation on which it had already spent so much time.[265] Because a "significant amount of time" would be required to redo the documentation, the plaintiffs and Microsoft agreed to a two-year extension of the part of the decree that related to licensing the communications protocols, bringing the expiration of that part of the decree to November 2009.[266] In addition, Microsoft agreed that it would not oppose a further extension of this part of the decree for up to an additional three years, bringing the potential end-date of the communications protocol aspect of the decree to ten years from the date of its initial entry, the outside date specified in Judge Jackson's original decree for his "interim" conduct remedies.[267]

Microsoft is currently offering licenses for those communications protocols that it has documented,[268] but the actual utility of this licensing program is questionable. Initially, the licenses generated complaints because of their royalty rates and specific terms, which Microsoft subsequently modified to some extent.[269] As of May 2006, however, very few licenses had actually been taken (only twenty-six), fewer still were general server licenses that might have middleware capability (five), and only twelve software products had actually shipped using technology licensed under the decree's program.[270] It is not clear

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[264]Joint Status Report on Microsoft's Compliance with the Final Judgment at 3–4, *Microsoft*, No. 98-1232 (CKK) (D.D.C. May 12, 2006), *available at* http://www.usdoj.gov/atr/cases/f216100/216127.pdf [hereinafter Joint Status Report of May 12, 2006].

[265]*Id.* at 5–6.

[266]*Id.* at 7, 10. The remainder of Microsoft's obligations under the final settlement decree would still be set to expire on November 12, 2007. *See* Modified Final Judgment, *supra* note 250.

[267]*Id.* at 10–11.

[268]Microsoft posts its protocol licenses online. *See* http://members.microsoft.com/consent/Info/Default.aspx. Some of the content of this website, however, cannot be viewed with Netscape Navigator, and requires the use of Internet Explorer. *See id.*

[269]*See* Joint Status Report on Microsoft's Compliance with the Final Judgment at 7, *Microsoft*, No. 98-1232 (CKK) (D.D.C. Jan. 16, 2004), *available at* http://www.usdoj.gov/atr/cases/f202100/202129.pdf [hereinafter Joint Status Report of Jan. 16, 2004] (complexity of licensing provisions); Joint Status Report on Microsoft's Compliance with the Final Judgment at 16, *Microsoft*, No. 98-1232 (CKK) (D.D.C. Oct. 17, 2003), *available at* http://www.usdoj.gov/atr/cases/f201300/201386.pdf [hereinafter Joint Status Report of Oct. 17, 2003] (revising royalty rates).

[270]These figures are compiled from the Joint Status Reports filed between June 2, 2003 and May 12, 2006. Four of the five general purpose licensees are SCO, Unisys Corporation, Sun, and ONStor (the fifth is not identified by name), the most significant apparently being the

whether the lack of popularity of these licenses relates to their cost and terms, or is a result of server software firms choosing instead to use industry-standard protocols, or to develop their own.[271] Nevertheless, if the idea behind the protocol licensing program was that server-side competitors needed access to Microsoft's technology so as to ensure interoperability between servers and the Windows desktop, the paucity of actual licensing indicates either that the remedy was misplaced or that the delays and difficulties of implementation have thwarted the program's effectiveness.[272]

The bottom line of decree administration seems to be that the parties are very busy with the decree's implementation. Pursuant to the final settlement decree, Microsoft has set up an antitrust compliance program under which it has trained officers, directors, and employees around the world.[273] The technical committee has been busy dealing with numerous inquiries, most of which (outside the protocols area) apparently either were not problematic or were solved. The attorneys for the Justice Department and the states have been busy making certain that Microsoft complies with its obligations, with much time and

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agreement to license Sun, an agreement that required separate negotiation. *See* Joint Status Report of July 9, 2004, *supra* note 255, at 10 (noting Sun's separate agreement). Microsoft also offers a royalty-free protocol license, which is not part of the decree program but is offered on the Microsoft Developer Network; five such licenses have been identified. *See* Joint Status Report of May 12, 2006, *supra* note 264, at 17. To the extent different functional tasks of the licenses have been identified, media streaming has been involved more than any other function. *See* Joint Status Report of Jan. 16, 2004, *supra* note 269, at 5 (stating most of Microsoft's licensees intend to use communications protocols for streaming).

[271] *See* Joint Status Report of Jan. 16, 2004, *supra* note 269, at 7 (noting cost and limitations in licenses); Joint Status Report of Oct. 17, 2003, *supra* note 269, at 13–16 (availability of alternative protocols). A license under the program requires an up-front payment of $50,000, which is generally not refundable; this amount is then chargeable against subsequent royalties, if any. *See* Microsoft Communications Protocol Program, Entry Requirements, Section C-2, http://www.microsoft.com/about/legal/intellectualproperty/protocols/EntryRequirements.mspx (requiring prepaid $50,000 royalty); Microsoft Protocol License Agreement for Development and Product Distribution (Server Software), Exhibit C, § 1.1, http://www.microsoft.com/about/legal/intellectualproperty/protocols/LicenseAgreement.mspx (same).

[272] It may be that the protocol licensing provision also had a more narrow goal, which was simply to prevent Microsoft from altering its current protocols through the addition of encrypted code that could not be reverse-engineered. Because any encrypted protocols would have to be available for licensing, encrypting protocols as an exclusionary strategy (that is, for no technical reason) would not be a successful strategy for Microsoft to follow. It is not possible, of course, to know whether Microsoft might have pursued such an approach absent the decree, or whether the decree has kept Microsoft from including undisclosed encrypted code in its protocols.

[273] *See* Joint Status Report of July 3, 2003, *supra* note 252, at 20 (training OEM sales personnel in United States, Germany, Switzerland, Mexico, and Japan regarding obligations under the final settlement decree); *id.* at 26 (discussing 275 antitrust compliance training sessions since November 2001, involving more than 12,500 employees in more than 60 countries).

effort focused on implementing the protocols' disclosure and licensing provision.

However, because the decree did little to alter Microsoft's core business strategy, it is already apparent that the competition issues posed by the original case will necessarily recur. The next major version of Windows (Vista) is on its way, along with a new version of Internet Explorer (IE7), re-raising the old problems of default invocations of Microsoft programs and control over the boot-up process, as well as the potential for Microsoft to use the bundled-in IE to provide it with a competitive advantage—now in competing with Google in the search engine market.[274] Determining how Microsoft intends to comply with the decree in these new versions of Windows and IE, and then determining whether Microsoft has complied, will likely consume much of the time remaining for those provisions of the decree that relate to everything other than protocol licensing. If the decree expires without confronting these new iterations, as seems likely, future complaints, investigations, and possibly new litigation also seem likely.

*2. The Final Settlement Decree's Effect*

On February 9, 2005, Judge Kollar-Kotelly, the district judge who had approved and was overseeing the decree, held a conference in her chambers to discuss the progress of compliance with the decree. Present were counsel from the Department of Justice, the states, and Microsoft. At that point the decree's term was nearly half over.

After discussing a number of technical matters, Judge Kollar-Kotelly raised the "broader picture" issue: "[W]hat if any effect," she asked, "has this [decree] had on the marketplace generally?"[275] Counsel for the Justice Department responded:

> It is a question we ask ourselves relatively frequently, but don't have a particularly good answer for. I think part of the reason for that,

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[274] *See* Joint Status Report on Microsoft's Compliance with the Final Judgment at 10, *Microsoft*, No. 98-1232 (CKK) (D.D.C. Feb. 8, 2006), *available at* http://www.usdoj.gov/atr/cases/f214500/214518.pdf (complaining of ability of OEMs to customize first boot of Vista in light of Microsoft's planned "Welcome Center" interface to present users with setup options); s*ee also* Robert A. Guth & Kevin J. Delaney, *Pressuring Microsoft, PC Makers Team Up with Its Software Rivals*, WALL ST. J., Feb. 7, 2006, at A1 (pointing out that "the first few minutes after a consumer plugs in a new computer are critical for software makers" and describing Google's concern that IE defaults will send users to Microsoft's MSN search engine). The government plaintiffs subsequently decided that the default options in IE7 for a search engine were "easily changed" by OEMs and end users and that the plaintiffs accordingly had "concluded their work on this matter." *See* Joint Status Report of May 12, 2006, *supra* note 264, at 14.

[275] Transcript of Hearing, *supra* note 256, at 16.

> is there's been, as far as we're able to observe in the marketplace, no demonstrable change in the operating system market.
>
> That is, Microsoft continues to have a large share in that market. And [for] the MCPP [Microsoft Communications Protocol Program] licensees that are developing products so far . . . [w]e haven't seen them out in the marketplace in the same way that we saw Navigator coming in and potentially threatening that dominance on the platform.[276]

Counsel for the "California Group" of state plaintiffs (those that had continued to litigate the case after the settlement) added this:

> [A]ccording to the published data, Microsoft still has plus 90 percent of the Web browser market, so the market shares are at very high, monopoly levels still. And from what we can determine, no OEMs have actually incorporated Firefox [then a newly-released open source browser] into the product that they sell. These are mostly downloads by consumers.[277]

Counsel for Microsoft responded:

> [T]he rationale of the decree . . . was not to somehow hinder Microsoft or to limit its ability to compete, or ensure that its market share declined. It was instead to eliminate those issues that the Court had concluded amounted to a violation of section 2, and to go beyond that and create additional opportunities for third parties to compete effectively with Microsoft.
>
> That has been accomplished, I believe. . . . The question of whether third parties take advantage of those opportunities, how

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[276] *Id.* at 17.

[277] *Id.* at 23. The lawyer, Stephen Houck, was the only lawyer at the conference who had been involved in the case since its inception. Houck had signed the states' complaint on behalf of New York and had tried the case on behalf of the state plaintiffs. For subsequent browser market share estimates, see, for example, Gregg Keizer, *Firefox Momentum Slows*, INTERNET WK., Sept. 28, 2005, *available at* http://internetweek.cmp.com/news/171201754 (publishing estimate from WebSideStory for September 2005, showing 7.86% share for Firefox, 88.46 for IE). *See also* Net Applications, Market Share, http://marketshare.hitslink.com/report.aspx?qprid=0 (use calendar hyperlink in upper left to access monthly browser market share reports) (estimating Firefox share at 10.68%, and IE share at 83.88% for April 2006). According to Net Applications, market share for IE has been trending downward since May 2005, when its share was 87.23%; Firefox has been trending upward since the same date, when its share was 8.06%. *See* Net Applications, Top Browser Market Share Trend for May 2005 to April 2006, http://marketshare.hitslink.com/report.aspx?qprid=3 (use hyperlink calendar in upper left corner to access April report).

> effectively they take advantage of those opportunities, and whether Microsoft can compete on the merits and continue to be successful are all questions that it seems to me the marketplace has to answer as opposed to a court. So I think measured by that yardstick, I think the decree has been a success.[278]

Judge Kollar-Kotelly agreed with Microsoft. Stating that the purpose and focus of the decree was to "eliminate" barriers to entry, she pointed out with regard to the question whether companies in the marketplace choose to take advantage of the incentives provided in the decree, "I think Mr. Rule [counsel for Microsoft] is correct, the Court does not control [this]."[279] The decree identifies barriers to entry and sees that those "get eliminated." "Then we'll see what happens," Judge Kollar-Kotelly said, "[a]nd I have a feeling it's going to be a long-term process in terms of actually measuring what happens in the marketplace."[280] She concluded: "But if you're going to look at what I need to, which is what's happening within the decree and the provisions . . . [it] set out, I think we're moving along . . . ."[281]

Judge Kollar-Kotelly was correct, in a sense. Her role, in reviewing compliance with the decree that she entered, is to be sure that the decree's terms are being implemented and followed. She is also correct if she is saying that one of the purposes of the decree was to eliminate entry barriers, leaving it to the market to determine whether competition actually occurs.

On the other hand, the colloquy reveals just how far off track the remedy decree went. Not only are its provisions, in important ways, not as strong as the interim conduct remedy parts of the Jackson decree, but the decree itself makes no effort to establish any benchmarks for measuring the decree's effectiveness or for ensuring that the decree's provisions will bring competition to the market. Contrary to the suggestion from Microsoft's counsel, there are no yardsticks in the degree. The plaintiffs, and the judge, might be concerned about the decree's effects, but this turns out to be an off-point inquiry given the decree's provisions.

The settlement took a series of limited moves to address narrowly the specifics of Microsoft's conduct, but with limited ambition to change Microsoft's incentives. As such, the decree was never likely to produce much more than its own effort. The best the decree could do would be to stop Microsoft's retaliatory conduct and to get Microsoft to document and license a set of APIs and protocols, the latter coming, if ever, after great effort by the

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[278]Transcript of Hearing, *supra* note 256, at 29–30. The lawyer, Charles "Rick" Rule, had negotiated the decree directly with Charles James, the head of the Antitrust Division at the time of the settlement. *See* John Wilke, *Hard Drive: Negotiating All Night, Tenacious Microsoft Won Many Loopholes*, WALL ST. J., Nov. 9, 2001, at A1.

[279]Transcript of Hearing, *supra* note 256, at 31.

[280]*Id.*

[281]*Id.* at 31–32.

parties. However, neither APIs nor communications protocols were at the center of Microsoft's effort to suppress the competitive threat from the middleware programs of the day, Netscape's Navigator and Sun's Java. Perhaps they would be in the future, and perhaps access to both might help some future middleware to begin to break down the applications barrier to entry. Still, these efforts in the decree are so limited that it is hard to imagine that anyone involved in the settlement remotely thought that competition in the PC OS market would emerge as a result of putting these provisions in the decree.

Dealing with the applications barrier to entry, and Microsoft's relentless effort to suppress the competitive threat to its Windows operating system with which it was faced, required finding firms that might really have had the opportunity to break down that barrier or develop into a true competitive threat in the OS market. The most likely candidates at the time the case was litigated and at the time the case was settled were Linux and Microsoft's Office. However, the decree left Microsoft in control of Office by not pursuing a break-up and did precious little that might have helped Linux emerge as a true competitor in the desktop software market.[282] There is little surprise that the decree—to date and, likely, by the time most of the provisions of the decree expire in November 2007—will make no dent in Microsoft's power, or even in its fundamental business practices.[283]

It is as if the government and the court have lost faith in what the plaintiffs had shown at trial: that Microsoft had a durable monopoly in its operating system, would do all it could to maintain that monopoly, and that its monopoly would ultimately stifle competition and innovation in desktop operating systems and in complementary product markets. The settlement decree thus represents a

[282]One thing the decree might have done was take some action that would have resulted in having Office ported to Linux. The non-settling states proposed such a remedy (an auction for the right to port Office to Linux). However, the district court rejected this proposal as inconsistent with the "middleware" theory of liability, which focused on the ability of middleware to overcome the applications barrier to entry, not on actions that Microsoft took directly against competing operating systems. *See* New York v. Microsoft Corp., 224 F. Supp. 2d 76, 242 (D.D.C. 2002) (acknowledging that porting Office to Linux would remove market barriers for Linux, but asserting that the "middleware" theory under which plaintiffs prevailed "posits that third-party middleware which runs on multiple operating systems can overcome the existing applications barrier to entry by serving as a platform for other applications"). The decree did forbid Microsoft from restricting OEMs from offering "dual boot" PCs (that is, PCs that offer users the option of booting an operating system other than Windows). Although this provision could have helped Linux or other competing OSs, there is no indication that it has done so. *See* Coate & Fischer, *supra* note 115, at 81 (discussing importance of dual-boot computers); *see also supra* Part III.C (discussing settlement elaborations that made OEMs less likely to offer competing middleware programs).

[283]*See Media Player for Macs Won't Get Upgrades*, WALL ST. J., Jan. 16, 2006, at B3 (reporting that Microsoft will stop developing media player for Apple Macs so that it can "focus on efforts" for latest version of Windows, expected to be out later in 2006; in 2004, it stopped making IE for Macs but "recently said" it would continue to develop Office for Macs).

complete re-framing of the case, one set in motion by the court of appeals' decision itself in which the court eschewed an examination of Microsoft's conduct in its entirety, thereby throwing into doubt the causal link between any one act and Microsoft's ability to maintain its durable monopoly. This narrow focus re-framed the case from what had been presented at trial to a case in which the only problems were discrete acts, some bad, some not bad. If that's all there is, then (under the new frame) it is enough to stop these acts, at least for a while, and ultimately let Microsoft get on with its business—its assets and market position intact. In this way, the Microsoft case, paradoxically, becomes a small case about which the government plaintiffs, unfortunately, attempted to make a big deal (no doubt at the behest of Microsoft's less successful competitors), nearly wrecking one of the most important companies in the U.S. economy.

### *C. The Department of Justice's Public Defense of the Settlement*

The failure of the settlement to yield any significant competitive benefits comes as no surprise to its critics, who from the start questioned its limited scope, short term, and modest aspirations.[284] Nevertheless, the Justice Department has engaged in an ongoing campaign to defend and justify its settlement in bold terms. That effort commenced when the settlement was announced, continued through the required Tunney Act review proceedings, and persists to this day.

#### *1. Defending the Settlement at Home*

Pursuant to the provisions of the Tunney Act,[285] the Justice Department posted public notice of the settlement in the Federal Register and invited public

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[284] *See, e.g.*, Bresnahan, *supra* note 234, at 67 (explaining that the settlement "fails at its most basic task: it does not lower the entry barriers that protect the Windows monopoly"); Jonathan B. Baker & Andrew I. Gavil, *Ill-Gotten Gains: Toothless Settlement Lets Microsoft Keep Rewards of Monopolization*, LEGAL TIMES, Nov. 12, 2001, at 51, *available at* http://www.antitrustinstitute.org/recent/152.cfm ("[T]he proposed settlement will fail to restore competition in personal computer operating systems, where, it has been established, Microsoft acted unlawfully to maintain its monopoly."); Einer Elhauge, *Soft on Microsoft: The Potemkin Antitrust Settlement*, WKLY. STANDARD, Mar. 25, 2002, at 17–18, *available at* http://cyber.law.harvard.edu/msdoj/Elhauge-soft-on-ms.pdf (comparing *Microsoft* antitrust settlements to false villages constructed by Prince Potemkin to convince Catherine the Great that her policies were improving lives of Russian people). For a more recent critical assessment of the settlement, see HERBERT HOVENKAMP, THE ANTITRUST ENTERPRISE 300 (2005) (describing remedies in the consent decree as "too little, too late").

[285] Enacted as the Antitrust Procedures and Penalties Act, Pub. L. No. 93-528, 88 Stat. 1706 (codified at 15 U.S.C. §§ 16(b)–(h) (2000) and scattered sections of 15 U.S.C.). For an argument that the Tunney Act should not have been applied to the *Microsoft* case, see John J. Flynn & Darren Bush, *The Misuse and Abuse of the Tunney Act: The Adverse Consequences of the "Microsoft Fallacies,"* 34 LOY. U. CHI. L.J. 749, 750–51 (2003) (arguing that settlement was

comment. At the end of the required comment period it made some minor modifications to the decree[286] and responded at length to its critics.[287] It then submitted the decree for approval to Judge Kollar-Kotelly.

It was in this, the "Tunney Act phase" of the *Microsoft* proceedings that the Justice Department commenced its public defense of the settlement and the re-framing of *Microsoft*. To construct this new frame, the Department amplified some of the critical themes from the remedial portion of the court of appeals' decision and combined those with some of the themes Microsoft itself had been promoting throughout the case. It also added a dose of its own philosophy with respect to single firm behavior and antitrust generally.[288]

The Justice Department disregarded the overwhelming majority of the more than 30,000 Tunney Act comments that had been filed in response to the settlement on the ground that they were "short and non-substantive," focusing its response to the court on 47 comments that it deemed "major."[289] Embracing one of the key components of the narrative that had earlier been articulated by Microsoft, it then dismissed some of these major comments as the product of self-interested rivals:

> Many of the most detailed and substantive comments were submitted by Microsoft's competitors, who advocated more severe restrictions on Microsoft's practices in various middleware and other software markets. As explained in the Department's response to the comments, many of the remedial proposals advanced were outside of the realm of the violations sustained by the court, or would benefit individual companies, rather than consumers.[290]

More substantively, the Department, borrowing from the court of appeals' decision and again building on a post-appeal Microsoft refrain, expressed the

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not properly fashioned as a "consent decree" and, therefore, was not subject to procedures of the Tunney Act).

[286] *See* Press Release, Dep't of Justice, Justice Department Makes Modifications to Proposed *Microsoft* Settlement after Reviewing More Than 30,000 Public Comments (Feb. 22, 2002), *available at* http://www.usdoj.gov/atr/public/press_releases/2002/10148.pdf [hereinafter 30,000 Public Comments] (announcing modifications).

[287] *See* U.S. Response to Public Comment on Revised Proposed Final Judgment, *supra* note 229 (filing 248 pages responding to comments on proposal).

[288] Perhaps the two most revealing and critical contemporary documents in that regard are the U.S. Response to Public Comment on Revised Proposed Final Judgment, *supra* note 229, and press release from five days earlier, 30,000 Public Comments, *supra* note 286.

[289] *See* 30,000 Public Comments, *supra* note 286, at 2 (characterizing most comments as self-interested or non-substantive). The comments deemed "major" are collected at http://www.usdoj.gov/atr/cases/ms-major.htm.

[290] 30,000 Public Comments, *supra* note 286, at 2.

view that the scope of the offense upheld by the court of appeals was in fact narrow and that therefore only a narrow remedial response was in order:

> The Department said the settlement is a sound and appropriate response to the violations found by the District Court and affirmed by the Court of Appeals, recognizing those Courts' substantial narrowing of the case since its filing in 1998. In fashioning appropriate relief, the Department was legally bound to confine its remedial proposal to the sole basis of liability sustained by the Court of Appeals—i.e., specific acts by Microsoft to impede the emergence of middleware as a threat to the operating system monopoly.[291]

Despite this representation that the scope of the case had been narrowed and that hence the settled-for remedy was itself narrow, the Department then boldly declared that the settlement: "fully addresses Microsoft's unlawful conduct, prevents recurrence of similar conduct in the future, and ensures that consumers will benefit from a more competitive software market."[292] There was little evidence to support these exaggerated claims. Nevertheless, the Department would later repeat them when the court of appeals rejected efforts by the non-settling states to secure broader remedies[293] and in its criticisms of antitrust authorities abroad who sought to go further in an effort to achieve some genuine relief for competition.

The Department's defense of the settlement in the Tunney Act proceedings can be faulted on two grounds, one dealing with accuracy and the other with candor. First, inclusion of the district court in the statement—"those *Courts'* substantial narrowing of the case since its filing in 1998"[294]—cannot be reconciled with the broadening of the case as it evolved at trial and with Judge Jackson's ultimate decision. It is especially inconsistent with Judge Jackson's ultimate conclusion that Microsoft should be broken in two. There had been no progressive narrowing of the case by the courts; instead there had been an abrupt and limited narrowing of the case by the court of appeals.[295]

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[291] *Id.*

[292] *Id.* at 1.

[293] *See, e.g.*, Press Release, Dep't of Justice, Statement by Assistant Attorney General R. Hewitt Pate Regarding Microsoft Settlement (Jun. 30, 2004), *available at* http://www.usdoj.gov/atr/public/press_releases/2004/204452.pdf [hereinafter Pate Statement Regarding Settlement] ("The Court's forceful decision confirms what the Department has been saying all along—our settlement protects the public by providing a full and effective remedy for Microsoft's anticompetitive conduct.").

[294] 30,000 Public Comments, *supra* note 286, at 2 (emphasis added).

[295] It is certainly true that the court of appeals itself characterized that narrowing in more sweeping terms. *See* United States v. Microsoft Corp., 253 F.3d 34, 105 (D.C. Cir. 2001). But the court of appeals in fact affirmed the core of the government's case and was itself guilty of some exaggeration in seeking to diminish the basis of liability in the context of its analysis of

The second criticism goes to simple honesty. It is quite clear in retrospect that the leaders of the Bush Antitrust Division who settled the case simply did not agree with their predecessors on the wisdom of bringing the case or the possibility of implementing a useful remedy. With the broad and unanimous affirmation of the district court's monopolization conclusions by the court of appeals, however, the Justice Department's new leadership found itself in something of a quandary: how to disavow a victory that it did not believe in? Its preferred solution was to ignore some of the significant findings of the district court and court of appeals and use the court of appeals' isolated language on remedy somewhat out of context to denigrate the case as a whole. At that point, rather than seeking to publicly disclose and defend its views, the leadership chose the public relations route: declare, and keep declaring, that the settlement would in fact bring significant benefits to consumers. It was a fitting *political* solution: claim little ability to act, do very little, and nevertheless claim sweeping benefits from your actions. In contrast to the willingness of the head of the Antitrust Division a generation earlier to engage in a public discussion of the merits of the Division's then-controversial decision to drop the long standing IBM prosecution, the officials who settled the *Microsoft* case preferred Washington spin.[296]

### 2. *Attacking More Aggressive Enforcement Efforts Abroad*

The combination of *Microsoft* revisionism and more general skepticism about the utility of public enforcement directed at monopolists has led to extraordinary public criticisms by U.S. antitrust officials of non-U.S. competition authorities who are also investigating and attempting to rein in Microsoft. These undiplomatic public criticisms risked inflaming relationships between U.S. and foreign competition authorities and potentially undermined the credibility of U.S. enforcement officials. They also appear to be quite obvious efforts to defend the weak remedies accepted by the Department of Justice in settlement of the litigation with Microsoft. To the degree they have also heightened the perception that there is a serious divide between the United States and other enforcers with regard to the basics of the analysis of exclusionary conduct by monopolists, they have tended to obfuscate the fact that there is a vibrant and critical debate proceeding within the United States about the current

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remedy. *See supra* note 198. The essential point here is that the Justice Department was itself inclined to view the case more narrowly, and it found some justification for doing so by reading the court of appeals' decision for all it was worth. That the court of appeals appeared to be signaling that the most drastic remedy—breakup—was unlikely to be justified did not necessarily mean that the weakest one imaginable was.

[296] *See In re* IBM Corp., 687 F.2d 591, 593–94 (2d Cir. 1982) (discussing terms of Stipulation of Dismissal of thirteen-year-old prosecution of IBM and quoting public statements made by head of Antitrust Division, William F. Baxter, defending decision to drop case).

U.S. administration's antitrust enforcement policies with regard to monopolization.

The first such incident occurred when the European Commission issued the decision in its five-year investigation of Microsoft's practices in Europe on March 24, 2004.[297] Although that case did not focus on the browser wars, it did focus in part on Microsoft's analogous conduct when Microsoft responded to the development of RealNetworks's media player by developing its own media player and then bundling it into Windows. The case also focused on Microsoft's expansion into server software, where its desktop dominance with Windows once again gave it an inherent competitive advantage over rivals owing to superior interoperability between Windows and Microsoft's own server software.[298] Significantly from the point of view of remedy, and in contrast to the final outcome in the U.S. case, the EC specifically found that Microsoft had unlawfully tied its media player to Windows.[299] The Commission's remedy had three components: (1) a significant fine; (2) disclosures that would facilitate interoperability between non-Microsoft work group servers and Windows PCs; and (3) unbundling—Microsoft was required to prepare a version of Windows without its own Windows Media Player so that choices about bundling would again be driven by OEMs and consumers rather than Microsoft.[300]

The U.S. Department of Justice's response can only be described as defensive, patronizing, and tactless.[301] It is also revealing of the true views of the Department's leadership with regard to the *Microsoft* case and of tying as an antitrust offense.[302]

Demonstrating little deference for its European counterpart and little attention to the differences between the U.S. and EC cases,[303] the statement

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[297]*See* Press Release, European Comm'n, Commission Concludes on Microsoft Investigation, Imposes Conduct Remedies and a Fine (Mar. 24, 2004), *available at* http://europa.eu.int/rapid [hereinafter Commission Concludes on Microsoft Investigation] (select "Search complete database," enter "IP/04/382" in "Reference" box, and click "Search" button).

[298]*Id.* at 1–2. For the Commission's full decision in the case, see EC *Microsoft* Decision, *supra* note 209.

[299]Commission Concludes on Microsoft Investigation, *supra* note 297, at 1.

[300]*Id.* at 2.

[301]*See* Press Release, Dep't of Justice, Assistant Attorney General for Antitrust, R. Hewitt Pate, Issues Statement on the EC's Decision in Its Microsoft Investigation (Mar. 24, 2004), *available at* http://www.usdoj.gov/atr/public/press_releases/2004/202976.pdf [hereinafter Pate Statement on EC Decision].

[302]The EC's decision, however, is currently on appeal to the Court of First Instance, where oral argument was conducted during the week of April 24–28, 2006. Press Release, Microsoft Corp., Microsoft Files Appeal in European Commission Case (Jun. 8, 2004), *available at* http://www.microsoft.com/presspass/press/2004/jun04/06-08appealeccpr.mspx. It remains to be seen, therefore, whether the EC's analysis of tying will be upheld in whole or part.

[303]One such difference, and a critical one, was that the pure tying claim was never fully resolved in the United States, whereas the EC undertook a complete rule-of-reason-type inquiry and concluded that Microsoft's tying of its media player to Windows was anticompetitive under European Union ("EU") competition laws. *See supra* notes 208–10 and accompanying text.

appears designed first and foremost to defend the U.S. settlement's approach by attacking the EC's as excessive and unwarranted. Asserting that the U.S. settlement "provides clear and effective protection for competition and consumers," it chastised the EC for the extent of the fine it imposed and for its unbundling remedy with respect to media players.[304] The statement touted the settlement's approach of simply prohibiting "anticompetitive manipulation of icons and default settings" as superior to the EC's choice of unbundling, which it derisively labeled as "code removal."[305] Closely tracking a major Microsoft theme, the Department asserted that inclusion of media player in Windows was a "product enhancement," and "[i]mposing antitrust liability on the basis of product enhancements and imposing 'code removal' remedies may produce unintended consequences."[306] It continued: "Sound antitrust policy must avoid chilling innovation and competition even by 'dominant' companies. A contrary approach risks protecting competitors, not competition, in ways that may ultimately harm innovation and the consumers that benefit from it."[307]

With no evidence to support its assertion of superior results, the Department went on to proclaim that "[t]he U.S. experience tells us that the best antitrust remedies eliminate impediments to the healthy functioning of competitive markets without hindering successful competitors or imposing burdens on third parties, which may result from the EC's remedy."[308] This assertion appears hollow in light of the admission by Justice Department attorneys—just eleven months later—that the decree had resulted in no demonstrable effect on the operating system market.[309]

In a revealing portion of the statement, the Assistant Attorney General also criticized the magnitude of the EC's fine:

> While the imposition of a civil fine is a customary and accepted aspect of EC antitrust enforcement, it is unfortunate that the largest antitrust fine ever levied will now be imposed in a case of unilateral competitive conduct, the most ambiguous and controversial area of antitrust enforcement. For this fine to surpass even the fines levied against members of the most notorious price fixing cartels may send an unfortunate message about the appropriate hierarchy of enforcement priorities.[310]

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[304]The statement also expressed a grudging acceptance of the disclosure requirements designed to facilitate interoperability, which paralleled similar provisions in the U.S. settlement. *See* Pate Statement on EC Decision, *supra* note 301, at 1–2.

[305]*Id.* (internal quotation marks omitted).

[306]*Id.* at 2.

[307]*Id.*

[308]*Id.* at 1.

[309]*See supra* note 276 and accompanying text.

[310]Pate Statement on EC Decision, *supra* note 301, at 2.

The assertions ignore equally standard competition policy concerns that inform the amount of fines, such as the extent and severity of the defendant's unlawful activities and the amount required to achieve deterrence tailored to the pockets of the specific transgressor. The EC noted some of these points in justifying its choice of fine level:

> This illegal conduct has enabled Microsoft to acquire a dominant position in the market for work group server operating systems, which are at the heart of corporate IT networks, and risks eliminating competition altogether in that market. In addition, Microsoft's conduct has significantly weakened competition on the media player market.
>
> The ongoing abuses act as a brake on innovation and harm the competitive process and consumers, who ultimately end up with less choice and facing higher prices.
>
> For these very serious abuses, which have been ongoing for five and a half years, the Commission has imposed a fine of € 497.2 million.[311]

The Department's harsh statement reveals the core beliefs of the then-Assistant Attorney General about the very basics of Section 2 enforcement. In his view, "unilateral competitive conduct" is the "most ambiguous and controversial area of antitrust enforcement." But the issue in *Microsoft* did not concern unilateral *competitive* conduct – it concerned unilateral *anti*-competitive conduct. More importantly, although there surely are types of unilateral conduct that are competitively ambiguous and controversial, such as refusals to deal with rivals, there was nothing subtle or "ambiguous" about much of Microsoft's conduct. To the contrary, the facts as proved at trial and upheld on appeal established a brash and far-ranging plan to eliminate competition through exclusionary means. The same was true in Europe.

Building on its criticisms of the European Commission, the Department subsequently lashed out at the Korean Fair Trade Commission ("KFTC") in December 2005, in response to the KFTC's announced decision to order significant changes in Microsoft's marketing practices in Korea.[312] After a lengthy investigation, the KFTC concluded that Microsoft had abused its dominant position in violation of the Korean Monopoly Regulation and Fair

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[311] *See* Commission Concludes on Microsoft Investigation, *supra* note 297, at 2.

[312] *See* Press Release, Dep't of Justice, Statement of Deputy Assistant Attorney General J. Bruce McDonald regarding Korean Fair Trade Commission's Decision in Its *Microsoft* Case (Dec. 7, 2005), *available at* http://www.usdoj.gov/atr/public/press_releases/2005/213562.pdf [hereinafter McDonald Statement].

Trade Act.[313] The KFTC cited three specific practices: (1) Microsoft's tying of its Windows Media Service to the Windows Server operating system, "where Microsoft has market dominance"; (2) tying Windows Media Player to the Windows PC operating system, "where Microsoft has monopoly power"; and (3) tying of its instant messaging program to the Windows PC operating system, "where Microsoft has monopoly power."[314] According to the KFTC, these practices

> eliminated competition and exacerbate monopolization of tied product market including streaming media server, streaming media player and instant messenger. Such practices raised entry barrier of the tying product market, namely the PC Server operating system and PC operating system, which led to restriction of market competition and obstruction of consumer welfare.[315]

To remedy these violations, the KFTC imposed a fine on Microsoft of 33 billion won (approximately U.S. $31 million).[316] As to the tying violations, it also ordered a number of changes in Microsoft's server and desktop operating systems. First, it ordered Microsoft to unbundle Windows Media Service from the Windows Server operating system.[317] Second, with regard to the tying of Microsoft's instant messenger and Windows Media Player to the Windows PC OS, it ordered Microsoft to produce two versions of Windows—one with both Windows Media Player and its instant messenger stripped out, and a second that would include two new features to be developed: "Media Player Centre" and "Messenger Centre," which would permit consumers to access and download the media players and instant messaging software of their choice.[318]

Without comment on the merits of the KFTC's analysis of Microsoft's conduct and its consequences, as it had done with the EC, the Antitrust Division harshly criticized the KFTC's decision to require Microsoft to unbundle its media player:

> The Antitrust Division believes that Korea's remedy goes beyond what is necessary or appropriate to protect consumers, as it requires the removal of products that consumers may prefer. The Division continues to believe that imposing 'code removal' remedies that strip

[313] For an English-language copy of the KFTC's *Microsoft* decision, see Korea Fair Trade Comm'n, The Findings of the *Microsoft* Case (Dec. 7, 2005), *available at* http://ftc.go.kr/data/hwp/micorsoft_case.pdf [hereinafter Korea Fair Trade Comm'n Findings].

[314] *Id.* at 1.

[315] *Id.* at 1–3.

[316] *Id.* at 4–5.

[317] *Id.* at 3.

[318] *Id.* at 3–4.

> out functionality can ultimately harm innovation and the consumers that benefit from it. We had previously consulted with the Commission on its Microsoft case and encouraged the Commission to develop a balanced resolution that addressed its concerns without imposing unnecessary restrictions. Sound antitrust policy should protect competition, not competitors, and must avoid chilling innovation and competition even by 'dominant' companies. Furthermore, we believe that regulators should avoid substituting their judgment for the market's by determining what products are made available to consumers.[319]

The Department also expressly tied its criticism to its previous expression of disapproval for the EC:

> The European Commission adopted a similar approach in its challenge to Microsoft's bundling Windows Media Player. Since then, demand in Europe for the version of the operating system with the media player code removed has been lackluster, suggesting limited effect on competition from the type of unbundling remedy the Korean Fair Trade Commission is pursuing.[320]

And the Department once again revealed its defensiveness, insisting that its own decree was a superior approach:

> Addressing Microsoft's exclusionary conduct, the United States' final judgment provides clear and effective protection for competition and consumers. Microsoft is prohibited from preventing computer manufacturers and end users from choosing alternatives to software like Windows Media Player and Windows Messenger. The United States continues to be active in its enforcement of Microsoft's compliance with the judgment, and this work has resulted in substantial changes to Microsoft's business practices.[321]

This criticism of the KFTC is odd in several respects. First, it is inaccurate and inconsistent. The EC had not, strictly speaking, ordered Microsoft to unbundle—it specifically permitted Microsoft to continue marketing its Media

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[319]McDonald Statement, *supra* note 312, at 1.

[320]*Id.*

[321]*Id.* The statement closed with an obligatory expression of continued interest in cooperation with the KFTC on competition policy issues: "Notwithstanding today's divergence, it is important to emphasize the overall strong and positive relationship between the U.S. and Korea on matters of competition policy." *Id.* at 2. However, the not-so-implicit message was patronizing: "The Justice Department will continue to work constructively with Korea to develop sound antitrust enforcement policies that benefit consumers in both countries." *Id.*

Player bundled with its Windows operating system, but it also required Microsoft to offer an unbundled version to provide OEMs and consumers with the option of purchasing Windows without Media Player. The Department was correct that the remedy to date appears to have been a failure in the sense that there has been little interest in licensing the unbundled version. However, that lack of interest may be largely due to the fact that there was no requirement that the stripped version be licensed with more favorable pricing. Priced equally, the choice between the bundled and unbundled product is no choice at all—indeed it is a perverse one from the point of view of the economics of exclusion, because it perpetuates Microsoft's strategy of raising rivals' costs to gain access to the desktop.

Second, the KFTC chose a different and more tailored path than the EC, one that the Department failed to acknowledge. With respect to Microsoft's bundling of its Windows Media Service with its Windows Server operating system, the KFTC ordered Microsoft to unbundle—period. For tying its Windows Media Player and instant messaging to its Windows PC operating system, the KFTC took a different approach. Like the EC, it ordered Microsoft to produce two versions of its PC operating system, but instead of requiring an equally priced bundled and unbundled version, it required an unbundled version—for consumers that prefer not to have instant messenger or a media player—and another version to include "Media Player Centre" and "Messenger Centre."[322]

These two new two additions to Windows would "contain links to web-pages that allow consumers to download competing media players and instant messengers, so that competing softwares can be equally installed into Windows PC operating system."[323] They would function as portals to the competitive offerings of many suppliers, including Microsoft. Instead of being literally bound to Microsoft's offerings, consumers would make their own choices conveniently from the desktop. Although the KFTC could be faulted for foisting a choice upon consumers that some might not want, it tried to devise a remedy that would directly lower the transaction costs associated with accessing alternative media players and instant messenger software and thus to neutralize any inherent benefit Microsoft possessed by virtue of its monopoly control of the desktop. Not content to ignore the installed base of customers with bundled software, the remedy also called for Microsoft to provide Media Player Centre and Messenger Centre via CD or Internet updates, so all Windows users would benefit from the newly accessible alternatives.[324]

This was an original and creative effort to remedy Microsoft's conduct, one that warranted at least careful consideration and perhaps praise, rather than

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[322] *See supra* notes 317–18 and accompanying text.
[323] Korea Fair Trade Comm'n Findings, *supra* note 314, at 3–4.
[324] *Id.* at 4.

condemnation. It recognized in part that the EC approach was not working to reinvigorate competition impaired by Microsoft's conduct, but also recognized that neither was the United States' "hands off the software" approach in the context of browser competition. The KFTC's approach was similar in spirit but less invasive than the "must-carry" remedy that was originally sought by the government plaintiffs in the U.S. *Microsoft* case.[325]

The Antitrust Division's attacks on the EC and KFTC are revealing—and troubling—in a number of respects. First and foremost, they illuminate a major shift in viewpoint at the U.S. agency as to the use of Section 2 to police unilateral conduct, one that invokes spoken and unspoken presumptions about dominant firms and the efficacy of antitrust itself. Section 2 standards are "ambiguous" and there is a significant danger that remedies will chill, rather than promote innovation. In this context, antitrust enforcers should proceed with caution, because dominant firms, too, can be the source of innovation. More credence is now given to the danger that government agencies (perhaps even the Justice Department itself?) will be captured by self-interested rivals, whose interests lie in hampering their dominant rival, not promoting the interests of consumers. Two more implicit messages also can be discerned: (1) antitrust agencies (especially non-U.S. agencies) will not be able to tell the difference between good and bad conduct by dominant firms, i.e., false positives are likely to occur and are likely to undermine competition, not promote it, and (2) foreign enforcers should be especially deferential to the United States once it has imposed a remedy on one of its nationals.

These new articles of faith, however, are not immutable truths of antitrust enforcement. For the most part they are non-empirical assertions that reflect the specific views of a particular, conservative political and economic ideology. If the past is any indication of the future, those views will change over time as political control shifts in Washington. Furthermore, to the extent they reflect a kind of American antitrust imperialism, they threaten to undermine U.S. relations with other market-based economic systems throughout the world. When wielded like weapons, they are especially corrosive of the ability of new and emerging antitrust agencies throughout the world to develop the respect and expertise needed to build confidence for competition in their home markets.

The Department's aggressive criticisms can also be faulted on their own terms. For example, the Department's reference to the ineffectiveness of the

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[325] *See supra* note 219. Later efforts by the non-settling states and by Sun in its private suit to persuade U.S. courts to impose must-carry remedies on Microsoft were unsuccessful. *See* Massachusetts v. Microsoft Corp., 373 F.3d 1199, 1231–32 (D.C. Cir. 2004) (affirming district court's rejection of non-settling states' request for "must-carry" remedy that would require Microsoft to distribute Sun's Java runtime environment with Windows or IE on the ground that it was "'market engineering' . . . aimed at benefiting a specific competitor"); *In re* Microsoft Corp. Antitrust Litig., 333 F.3d 517, 527–31 (4th Cir. 2003) (reversing district court's preliminary order requiring Microsoft to distribute Sun's Java for lack of sufficient showing of present and future harm).

European unbundling decree falls squarely into the category of "people in glass houses shouldn't throw bricks." Judged by the same criteria, the Department would be—and has been— hard pressed to demonstrate that the remedial approach in its consent decree has had any salient effect on operating system or Internet browser competition. Second, the decision to publicly "dress down" the KFTC threatened to undermine the domestic standing of the Korean agency, but ironically, more so the Justice Department's own credibility. By unleashing such a direct criticism of the KFTC, based on a defense of Microsoft's interest in maintaining autonomy in the design of its software—despite its abuse of that autonomy—the Department cast itself as a public apologist for Microsoft, a firm that it was supposedly determined to continue supervising in part under the provisions of the U.S. consent decree. Similarly, reports surfaced that the Department had intervened on behalf of Microsoft at the EC, when Microsoft complained that it was being unfairly denied access to documents it needed in connection with its appeal of the EC's 2004 order.[326] Ironically, the Department of Justice later extended a back-handed compliment to EC enforcers when it admitted that the EC's efforts at forcing Microsoft to disclose communications protocols had resulted in documentation of "vastly improved quality" compared to what had been done in the U.S. case and that the United States would now work with the EC and its technical consultant to "build on" the EC's efforts.[327]

### *D. The Antitrust Modernization Commission: Microsoft's End Game?*[328]

In fall of 2002, Congress created the Antitrust Modernization Commission.[329] By its legislative charge, the AMC has been directed:

> (1) to examine whether the need exists to modernize the antitrust laws and to identify and study related issues;
> (2) to solicit views of all parties concerned with the operation of the antitrust laws;
> (3) to evaluate the advisability of proposals and current arrangements with respect to any issues so identified; and

[326]Bloomberg News reported in March 2006 that the Justice Department had sent a memorandum to the EC stating that Microsoft's complaints raised "substantial concerns." *See* U.S. Backs Microsoft in EU Dispute, L.A. TIMES, Mar. 31, 2006, at C7. The Bloomberg report went on to indicate that the United States' EU mission in Brussels was being led by C. Boyden Gray, a former White House counsel who had also lobbied on behalf of Microsoft in the United States when it was being prosecuted by the Justice Department. *Id.*

[327]*See* Joint Status Report of May 12, 2006, *supra* note 264, at 7–8, 10 n.7; *see also* Mary Jacoby, *EU's Microsoft Stance Has U.S. Fan*, WALL ST. J., May 22, 2006, at B6.

[328]Professor Gavil is currently serving as an informal and unpaid advisor to the Antitrust Modernization Commission.

[329]Antitrust Modernization Commission Act of 2002, Pub. L. No. 107-273, §§ 11051–60, 116 Stat. 1856 (to be codified at 15 U.S.C. § 1 note).

(4) to prepare and submit to Congress and the President a report . . . .[330]

In its first public hearing on July 15, 2004, however, a more particularized agenda surfaced when the Act's principal advocate, Rep. F. James Sensenbrenner, Jr., the Chair of the House Judiciary Committee, appeared and testified before the Commission.[331] He outlined four priorities for the Commission: (1) the "modern" economy, making specific reference to the "increasingly information-driven digital economy;"[332] (2) the "intersection of the antitrust and intellectual property laws;"[333] (3) the "conflicting [international] antitrust regimes" that subject global American firms to "multiple and potentially discriminatory enforcement burdens;"[334] (4) "the relationship between Federal and State antitrust enforcement efforts"[335]; (5) "the continued application of the antitrust laws in regulated industries"; and (6) the "extended periods of time" required for civil merger enforcement investigations.[336] All of these suggestions were eventually endorsed by the AMC as part of its agenda of items for study.[337] In addition, the AMC decided to examine the standards for judging exclusionary conduct under Section 2 of the Sherman Act and the role that direct and indirect purchaser actions play in private enforcement.[338]

Only a truly naive antitrust observer could fail to acknowledge the correlation between Microsoft's encounter with the antitrust system and the

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[330] *Id.* § 11053.

[331] Sensenbrenner began with an assertion of prerogative with respect to the AMC's agenda: "As the principal author of this legislation, I appreciate the opportunity to clarify some of the areas that I believe deserve attention." Antitrust Modernization Comm'n, Public Meeting Transcript at 5 (July 15, 2004), *available at* http://www.amc.gov/pdf/meetings/040715_Meeting_Transcript_reform.pdf.

[332] *Id.*

[333] *Id.*

[334] *Id.* at 6. In this regard, Rep. Sensenbrenner cited two specific examples, one of which was the *Microsoft* case in Europe; citing the settlement of the U.S. prosecution, he argued: "it appears that the European authorities do not accept the settlement, and as a result of that failure to accept the settlement, there is a different antitrust case that presently is winding its way through the European Union enforcement mechanism." *Id.* In his view, the continuation of the European case demonstrated a lack of appreciation for comity. *Id.* He continued: "I would hope that the Commission would look into this very serious issue because if this type of discriminatory treatment is allowed to continue, American-based industry is put at substantial risk, and American jobs are placed in jeopardy." *Id.*

[335] *Id.* at 8. ("While I believe that the States have a vital antitrust enforcement role, interstate commerce may be adversely affected by the divergent and sometimes inconsistent antitrust standards.").

[336] *Id.* at 9.

[337] *See* Memorandum from Andrew J. Heimert, Executive Director and General Counsel, to All Commissioners Regarding Study Groups (Feb. 25, 2005), http://www.amc.gov/pdf/meetings/list_of_study_groups_rev.pdf.

[338] *Id.* at 5.

agenda of the AMC.[339] Indeed, it would be difficult to imagine an agenda more closely tailored to ensuring that Microsoft would never again face the same system of antitrust enforcers, public and private, domestic and international, and the same antitrust legal standards. Throughout the *Microsoft* litigation, the company continuously argued that the courts were ill-equipped to understand the problems of the "new economy," including the role of intellectual property rights. Microsoft chaffed at having to face not only the federal government, but the states and European antitrust authorities, and it was vexed at the thought of resolving scores of indirect purchaser actions filed in state courts. And it of course has resisted characterization of its conduct as "exclusionary."

Although it is too early to judge whether the AMC will in fact be Microsoft's end-game, there is reason for concern that the AMC will contribute to the re-framing effort. Microsoft failed, at least in part, to prevail under the current antitrust rules and institutions, but the AMC may seek to alter both and, in so doing, assure that Microsoft will never again have to face the same system, rules, and institutions.

## V. CONCLUSION

A persistent theme that emanated from Microsoft and other opponents of the government's prosecution of Microsoft was that antitrust enforcement was a crude and slow tool, ill-suited for the fast-paced and changing markets of the information age. Entranced by the myth of the "new economy" (a narrative unto itself), many presumed that, owing to the fast pace of technological change, the evolution of the software industry would easily outpace antitrust litigation. The industry, it was believed, was operating on "Internet Time"; the courts were operating on "Legal Time."[340] Looked at it this way, the economic forces of the market would prove to be far more agile at disciplining Microsoft's excesses than would courts or enforcers.

The passage of time since the government brought its case in May 1998 strongly suggests otherwise. Today, more than a decade after the Justice Department reached its first consent decree with Microsoft, Microsoft's share of the Intel-compatible PC operating system market remains above ninety percent. Similarly, despite the more recent challenge from Mozilla's Firefox Internet browser, Microsoft's share of the browser market remains above eighty percent.[341] The hailstorm of innovation once predicted by Microsoft's own

[339] For a discussion of Microsoft's hand in the make-up and agenda of the AMC, see Jonathan Krim, *A Less-Public Path to Changes in Antitrust*, WASH. POST, May 12, 2005, at E1.

[340] *See* MICHAEL A. CUSUMANO & DAVID B. YOFFIE, COMPETING ON INTERNET TIME *passim* (1998) (describing competition between Netscape and Microsoft).

[341] Ironically, just as Netscape and other non-Microsoft Internet browsers once served as a critical vehicle for delivering access to Java-based programs to end-users, today the Internet browser has become an essential vehicle for accessing Internet search engines, such as Google.

witnesses—from the Internet, from Linux, and from more limited operating systems like the Palm OS—simply has not developed into any serious challenges to Microsoft's market hegemony. Technological advances have surely been significant in that time, but from an antitrust perspective, little of importance has changed.

In another sense, these critics may well have been right. Antitrust *did* move too slowly—or, more accurately, in the end too timidly—to protect competition. The nascent competitive threat of Netscape's Navigator and Sun's Java was successfully extinguished by Microsoft. Although it is possible that the competitive promise of Navigator and Java might never have matured into a significant threat to Microsoft's OS monopoly, we will never know what alternate market might have evolved but for Microsoft's exclusionary campaign.

The *Microsoft* prosecution thus provides an answer to a question that is critical for monopolization cases: When an incumbent, dominant firm directs strategic conduct at its smaller rivals and succeeds in impairing their ability to compete, or, perhaps, totally excludes them from the market, who should bear the risk of judicial error—the predator or the prey? The answer that the *Microsoft* prosecution gives—which is part of this case's durable meaning—is that the emergence of a new competitive threat to an entrenched and dominant firm is a competitive moment that warrants protection. Excess caution by enforcers and courts at that moment—for fear of a "false positive"—inherently favors the incumbent at the expense of competition. Ironically, such caution reflects a policy of protecting competitors—dominant ones—rather than competition.[342] An approach more sensitive to both the cost of lost competition and the difficulty of reconstructing it once vanquished would recognize, as did the D.C. Circuit in *Microsoft*, that to some degree "the defendant is made to

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The profitability of search engines has in turn led to renewed competition in the development of browsers, and has led Microsoft to introduce its latest iteration of Internet Explorer—IE7—as a stand-alone program that incorporates Microsoft's own search engine. Indeed, it has led to complaints by Google and others that Microsoft has once again sought to build in preferences for its own search engine. *See* Steve Lohr & John Markoff, *New Microsoft Browser Raises Google's Hackles*, N.Y. TIMES, May 1, 2006, at A1. In its May 12, 2006 Status Report, the Justice Department indicated it had reviewed the new browser and saw no antitrust problem in how it handles search engines. *See* Joint Status Report of May 12, 2006, *supra* note 264, at 14 ("As Microsoft's implementation of the search feature respects users' and OEM's default choices and is easily changed, Plaintiffs have concluded their work on this matter."); *see also* Steve Lohr, *U.S. Says Microsoft Browser Is No Threat to Competition*, N.Y. TIMES, May 13, 2006, at C3 (reporting Google's disagreement with Microsoft's characterization of the default change as "simple"); *supra* note 274.

[342]"As litigation stretches on—perhaps with no interim injunctive relief—the competitive moment that brought forth the rival may be lost, and along with it the prospect of new or improved products and services. Later remedies will likely prove inadequate to restore the competition that may have been lost." Gavil, *supra* note 14, at 80; *see also* Flynn, *Antitrust Policy*, *supra* note 16, at 896–910 (exploring importance of protecting competition "as a process").

suffer the uncertain consequences of its own undesirable conduct."[343] Such a realization would be wholly consistent with the original frame of the case, but wholly inconsistent with the philosophy of the case's re-framers.

There is a larger lesson from the *Microsoft* prosecution, as well. Taking on monopoly firms that are important to the economy is no easy task. The very exercise of private power that leads public enforcers to intervene remains available to make victory difficult and to re-frame even successful public enforcement efforts. While acknowledging these difficulties, the durable meaning of *Microsoft* must also include an understanding that the use of public power to control private power is at the core of antitrust's objectives; and that employing such public power—or staying one's hand—is ultimately a political, as well as a legal, act affecting not only our economy, but also the balance of public and private power in our society.

[343] United States v. Microsoft Corp., 253 F.3d 34, 79 (D.C. Cir. 2001) (quoting 3 PHILIP AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 651c (2000)).