United States v. Microsoft - The Antitrust Saga Continues

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Introduction

"Federal antitrust enforcement agencies are more active now than they have been in more than fifteen years."[(1)] This seems to be particularly accurate in the computer industry with the Department of Justice's (DOJ) pursuit of Microsoft and the Federal Trade Commission's (FTC) action against Intel. This article will briefly review antitrust law, and will then revisit antitrust enforcement in the computer industry against Microsoft, including the investigation initiated in 1990 by the FTC, the shift to the DOJ in 1993, the complaint and proposed consent judgment filed in July 1994, the decisions by the district court[(2)] and the United States Court of Appeals for the District of Columbia in 1995.[(3)] The DOJ renewed this pursuit in October 1997 and in May 1998, the DOJ and twenty states filed action against Microsoft. In June 1998, the D.C. Circuit Court of Appeals lifted a preliminary injunction on Microsoft as the DOJ had not shown a reasonable probability of success on the merits.[(4)] This article examines the case against Microsoft until the October 19, 1998 trial, which was ongoing at the time of this publication. This author will conclude with recommendations and predictions concerning the pending litigation.

Antitrust Law

Federal antitrust law in the United States was initiated in 1890 with the enactment of the Sherman Act, which was passed without any allocation of funds for its enforcement.(5) Section one of this act prohibits any contract, combination, or conspiracy in restraint of trade or commerce.(6) The first price-fixing case to reach the U.S. Supreme Court under this section, *United States v. Trans-Missouri Freight Association*, held that all contracts are included under the language of the section, and "no exception or limitation can be added without placing in the act that which has been omitted by Congress."(7)

Section two of the Sherman Act prohibits monopolization or attempted monopolization, combination or conspiracies to monopolize commerce.(8) The following examples illustrate the Court's various attempts to apply these doctrines. In 1911, the U.S. Supreme Court held that the Standard Oil Company of New Jersey illegally monopolized the petroleum refining industry.(9) Two weeks later, the Supreme Court used the rule of reason analysis against American Tobacco for monopolizing the tobacco products and cigarette markets.(10) In 1918, however, the U.S. Supreme Court held that United Shoe Machinery Company did not monopolize because a five company merger involved producers of complementary machines, and found that their large market share was due to superior efficiency and ownership of patent rights.(11) In 1920, the U.S. Supreme Court held that U.S. Steel also did not monopolize under the Sherman Act, stating that mere size is not an offense and that

the law requires overt actions.[12] In 1946, however, the U.S. Supreme Court in *American Tobacco Company v. United States* reversed this trend.[13] In *United States v. Griffith Amusement Company* in 1948, the Court stated that specific intent to achieve monopoly power need not be proved if monopoly power has resulted.[14] In another case against United Shoe Machine Corporation, the Court in 1954 found that the company held a monopoly on the market.[15]

According to the Supreme Court in *United States v. Grinnell Corporation*, monopolization, under section two of the Sherman Act, requires the possession of monopoly power in the relevant market and the willful acquisition or maintenance of that power, as distinguished from growth or development as a consequence of a superior product, business acumen, or historical accident.[16] In *Brown Shoe Company v. United States*, the court declared that the relevant market has two components: the relevant product market and the relevant geographic market.[17]

Sherman Act violations are felonies punishable by fines and sentences,[18] by civil actions brought by the DOJ,[19] and by private actions that may result in treble damages.[20] Violations may be investigated by the FTC or the Antitrust Division of the DOJ. The Federal Trade Commission Act, passed in 1914, created the FTC and gave it broad advisory and regulatory functions.[21]

The Clayton Act, also passed by Congress in 1914, added specificity to antitrust law by prohibiting any of the following if the effects may be to substantially lessen competition or tend to create a monopoly in any line of commerce: under

section two, the use of discriminatory prices in the sale of commodities;[22] under section three, exclusive dealings and tying contracts;[23] and under section seven, the acquisition of stock or other share capital of another corporation.[24] Tying arrangements condition the purchase of one product on the purchase of another.[25] Tying arrangements may violate both section one of the Sherman Act and section three of the Clayton Act.[26] According to the Supreme Court in *Eastman Kodak Company v. Image Technical Services, Incorporated*, tying arrangements are per se illegal if the seller has appreciable economic power in the tying product's market and a significant amount of interstate commerce is affected.[27]

The Clayton Act has been amended by Congress on numerous occasions. The Robinson-Patman Act altered section two. Section two states that a seller in commerce may not discriminate directly or indirectly in price between purchasers of goods of like grade and quality if the effect is to substantially lessen competition or to tend to create a monopoly, or to injure, destroy, or prevent competition with the seller or anyone who knowingly receives the benefits, or with customers.[28] Discriminatory promotional payments or services not made available to all competing customers on proportionally equal terms are prohibited.[29] Buyers are liable for knowingly inducing or receiving unlawful discriminatory prices.[30] The FTC was granted enforcement power and the authority for establishing criteria for determining the reasonableness of quantity discounts and establishing price dealings. The DOJ was also granted enforcement power.

The Celler-Kefauver Act of 1950 changed section seven of the Clayton Act to state that Ano corporation subject to the jurisdiction of the FTC shall acquire the whole or any part of the assets of another corporation engaged also in commerce where . . . the affect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."[31] The Telecommunications Act of 1996 modified this section very slightly.[32]

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Microsoft Corporation designs and sells operating systems (software that acts as the central nervous system for a personal computer) and applications software (software which operates on top of the operating system and enables the user to perform a variety of functions, such as word processing, spreadsheets, and database management). Microsoft's share of the operating systems market is consistently well above 70%. Microsoft's MS-DOS has been used in 120 million personal computers as of June 30, 1993; Microsoft's Windows, a user-friendly graphical user interface, has been used in approximately 50 million personal computers.[33] The DOJ alleged in 1997 that Microsoft has enjoyed for some time a virtual monopoly in the operating systems market, with a market share approaching 80%.[34]

The costs of producing software are almost exclusively in the design, and marginal costs (the cost of producing one extra unit) are virtually zero. The software

market is characterized by increasing returns, resulting in natural barriers to entry into the industry.(35)

The Federal Trade Commission began investigating Microsoft in 1990.(36) According to Microsoft, the FTC considered a wide range of practices, including: that Microsoft gave its own applications software developers the information about Microsoft operating systems software before Microsoft provided this information to other applications developers; that Microsoft announced that it was developing a nonexisting version of operating software to dissuade original equipment manufacturers (OEMs) from procuring a competitor's operating system; that Microsoft required OEMs that licensed Microsoft operating systems software to also license Microsoft applications software; and that Microsoft licensed its operating systems on a per processor basis, which means the license required the OEM to pay Microsoft a royalty for all computers of the type specified in the license. Microsoft further asserts that the FTC expanded its investigation to include every aspect of Microsoft's business, including operating systems software, applications software, and peripherals. In late 1993, the FTC commissioners were deadlocked in a two-to-two vote with one member abstaining, so no administrative action was filed by the FTC against Microsoft.

In an unprecedented move, the DOJ's Antitrust Division revived the investigation, and amassed one million pages of documents, conducted over 100

interviews, and spent 14,000 attorney hours and 3,600 economist hours in their eleven-month investigation of Microsoft.[37]

In June 1994, Microsoft and the DOJ initiated settlement negotiations. According to former DOJ Antitrust Division Attorney Anne Bingaman, at the end of negotiations she was within twenty minutes of suing Microsoft, as there was an attorney in federal court with a complaint against Microsoft if negotiations broke down; Microsoft founder Bill Gates agreed to the proposed consent judgment.[38]

On July 15, 1994, the United States filed a complaint[39] charging Microsoft with monopolizing interstate commerce in the market for personal computer operating systems, and entering into unlawful contracts and combinations which unreasonably restrain trade in interstate commerce in personal computer operating systems, thus violating the Sherman Antitrust Act, Sections one[40] and two.[41] The United States and Microsoft filed the proposed consent judgment the same day,[42] which was significantly and substantially narrower than the complaint.[43] This proposed final judgment covered Microsoft's operating system software MS-DOS 6.22, Microsoft Windows 3.11, Windows for Workgroups 3.11, Windows 95, and predecessor and successor versions of these products.[44]

Under the consent decree, Microsoft is enjoined from entering into any licensing agreement exceeding one year for any covered product. This period may be extended for an additional year on the same terms at the sole option of the original equipment manufacturer (OEM), who licensed the operating systems to include them

in the personal computers they make.[45] Microsoft is also enjoined from entering into licensing agreements that prohibit or restrict the OEM's licensing, sale, or distribution of any non-Microsoft operating system.[46] Microsoft may not enter into any per processor license;[47] Microsoft may enter into only per copy licenses.[48]

An important provision of the consent decree states that Microsoft may not enter into any licensing agreement whose terms are conditioned upon the licensing of any other covered product, operating system software product, or other product. Under the consent decree, however, Microsoft is not prohibited from developing integrated products. This section arose from a 1993 complaint filed with the Directorate General IV of the European Union by Novell. During the June 1994 negotiations with the DOJ, Microsoft proposed a joint settlement, and the three sides signed a stipulation agreeing to the entry of the consent decree, including this provision.[49]

Under the consent decree, Microsoft may not enter into any agreement conditioned upon the OEM not licensing, purchasing, using, or distributing any non-Microsoft product. Microsoft may not enter into any license agreement containing a minimum commitment.[50] The consent decree further states that Microsoft's revenue for any covered product shall not be derived from other than per copy[51] or per system licenses. In any per system license: Microsoft may not require as a condition for the license or for a volume discount, any OEM to include more than one of its personal computer systems; Microsoft may not charge royalties for any covered product unless

the personal computer system is designated by the OEM in the license agreement or in a written amendment; and the license agreement shall not impose a penalty for any OEM choosing at any time to create a new system.(52)

Under the consent decree, OEMs that currently have a license agreement inconsistent with any provision of the consent decree may, without penalty, terminate or negotiate with Microsoft to amend the license agreement to eliminate the inconsistent provisions. If an OEM has a license agreement that is inconsistent with any provision of the final judgment, Microsoft may enforce a per processor license as a per system license for all existing models that contain the microprocessor type(s) specified in the license agreement, except those models that the OEMs opt in writing to exclude. Microsoft, however, may not enforce prospectively any minimum commitment.(53)

Concerning nondisclosure agreements, Microsoft may not enter into any which extend beyond the soonest of: the commercial release of the product covered by the nondisclosure agreement; an earlier public disclosure authorized by Microsoft; or one year. Nondisclosure agreements may not restrict any person subject to the agreement from developing software products that would run on competing operating systems software. A nondisclosure agreement may not restrict any activities of any person to whom no information under the agreement has been disclosed. The final judgment ends 78 months after its entry.(54)

Under the Antitrust Procedures and Penalties Act, known also as the Tunney Act, the proposed consent decree and a competitive impact statement were published in the Federal Register, with 60 days for comment;[55] five comments were filed within the comment period. Two status hearings were held on September 29, 1994[56] and November 2, 1994. At the November 2 hearing, U.S. District Court Judge Sporkin gave interested parties until December 5, 1994 to request participation at the January 20 hearing. Only Idea Associates (IDEA) requested participation. On January 10, 1995, anonymous entities filed an objection to the proposed final judgment, arguing that Microsoft's anticompetitive behavior enabled it to achieve a monopoly in the operating systems market for IBM-compatible personal computers, and that this would enable Microsoft to maintain its monopoly in the operating systems market and leverage itself to monopolize the applications and other software markets. Thus, the anonymous amici, who alleged that they feared retaliation, argued that under established economic theory, the proposed decree would neither result in an increase in competition in the operating systems market, nor prevent Microsoft from monopolizing the remainder of the software industry, as Microsoft pursues a vertical integration strategy, and predatorily bundles and unbundles its products.[57] The district court allowed these anonymous entities to participate without a hearing, over objections by both the DOJ and Microsoft.

On January 18, 1995, the U.S. responded in a brief, arguing that the district court should reject the position of the amici and enter the proposed consent

decree.[58] On January 20, 1995, Judge Sporkin convened a hearing on whether the proposed final judgment was in the public interest, the standard under the Tunney Act. Anne Bingaman, former Associate Attorney General for the Antitrust Division of the DOJ, represented the United States and argued that the district court should sign the consent decree, as it is within the public interest, and explained the standard under the Tunney Act. Judge Sporkin responded, "Can I use my own pen to sign the decree or is the government going to supply that? I mean, I got to have some role here." Attorney Bingaman responded that the proposed settlement appropriately remedied the anticompetitive effects challenged in the complaint, and concluded that the settlement would eliminate artificial barriers that Microsoft had erected. All anticompetitive practices except one were addressed, according to Attorney Bingaman, and the only practice not addressed was volume discounting, which is standard practice in America. Attorney Bingaman also objected to the anonymous amici's brief of January 10, 1995, which came long after the period for public comment expired on October 18, 1994.[59]

An attorney for IDEA was allowed to intervene at the January 20, 1995 hearing to argue that the consent decree was not in the public interest and was not retroactive concerning royalties. An attorney for the unnamed amici stated that they appeared anonymously for fear of retaliation by Microsoft. An attorney for the Computer and Communications Industry Association (CCIA) argued at the hearing that the consent decree is not in the public interest as it does not go far enough. An attorney for

Microsoft claimed that they did not make false or misleading announcements of products that didn't exist. Further, "Microsoft does not believe, and it is abundantly supported by authority, that its licensing practices were anticompetitive or unbundled." Nonetheless, Microsoft agreed to the consent judgment which they believed provided more relief than the government could have won at trial.(60)

On February 14, 1995, Judge Sporkin held that the consent judgment was not in the public interest, the standard of review under the Tunney Act.(61) The judge rejected the judgment as being too narrow.(62) Before addressing this issue, however, Judge Sporkin had to decide whether the three opposed groups, the anonymous groups, CCIA, and IDEA, would be allowed to participate. Under the Tunney Act,(63) the court permitted IDEA and CCIA to participate, not as intervenors, but in a manner and extent to serve the public interests as the court deemed appropriate,(64) and the court permitted the anonymous entities to file the memorandum of amici curiae in opposition to the proposed final judgment.(65)

The district court held that the proposed decree was not in the public interest for four reasons.(66) First, the government failed to provide the court with the proper information needed to make a public interest determination. Second, the decree was too narrow; it covered only MS-DOS and Windows, not all of Microsoft's operating systems, which Judge Sporkin had expressed concern about. Third, the decree did not constitute an effective antitrust remedy. Fourth, the enforcement and compliance mechanisms were not deemed satisfactory. The court stated, "The picture that emerges

from these proceedings is that the U.S. government is either incapable or unwilling to deal effectively with a potential threat to this nation's economic well being . . . It is clear to this court that if it signs the decree presented to it, the message will be that Microsoft is so powerful that neither the market nor the government is capable of dealing with all of its monopolistic practices."(67)

Both the United States and Microsoft appealed. Microsoft's appellate brief alleged that the district court erred in refusing to enter the consent decree, which would make other antitrust defendants wary of entering into consent decrees.(68) Further, Microsoft alleged that the district court improperly sought out and considered extrajudicial sources of information, such as the book, *Hard Drive*, an expose of the Microsoft corporation.(69) Due to the consideration of extrajudicial information, Microsoft requested that the case be remanded to another district judge.(70)

In the United States' appellate brief, the government alleged that the district court vastly exceeded its authority and threatened substantial damage to the public interest in antitrust enforcement.(71) The final judgment, or the consent decree, was within the reaches of the public interest, and the district court's justifications for holding to the contrary were legally insufficient.(72)

At oral argument before the United States Court of Appeals for the District of Columbia Circuit on April 24, 1995, the government argued that the decree should be entered, as a matter of law.(73) The district court, according to the government,

exceeded its authority under the Tunney Act. Microsoft joined the U.S. in that argument, conceded that Microsoft's products were "popular," and claimed that Microsoft was doing a service to the public by making products available that people want to buy.(74) CCIA stated that the proposed decree was not in the public interest as there was not enough information to make that determination. Moreover, it did not state adequate relief, as the barriers to entry were not addressed. IDEA also objected to the consent decree as an ineffective remedy because it lacked retroactive relief, such as a refund of prepaid royalties.(75)

On June 16, 1995, the D.C. Circuit held that the proposed consent decree was in the public interest under the Tunney Act, and that the district court had exceeded its authority in holding to the contrary.(76) The court of appeals reversed the district court's decision and remanded the case to the chief judge of the district court for reassignment to another judge to enter an order approving the decree.(77)

The D.C. Circuit stated that the heart of this case was the proper scope of the public interest inquiry by the district court. When Congress passed the Tunney Act, it intended that the district court should make an independent determination of whether a proposed consent decree was in the public interest, instead of being a judicial rubber stamp of the decree.(78) The difficulty with the above legislative history was the lack of useful precedent of an appellate court affirming a district court's rejection of a consent decree as not being in the public interest.(79) The most prominent post-Tunney Act consent decree, agreed to by AT&T, was modified by the district court with both

parties' agreement. Also, with acquiescence by both parties, nonparties were allowed to intervene. Although the judgment was affirmed by the U.S. Supreme Court, three justices dissented, expressing concerns about the Tunney Act's constitutionality and the implication of the Court's decision.(80)

In determining whether a consent decree is in the public interest under the Tunney Act, a district court may consider the decree's competitive impact and the impact on the general public.(81) The Act authorizes the district judge to take testimony of government officials as the court may deem appropriate.(82) The D.C. Circuit Court of Appeals agreed with the United States, however, in rejecting the district court's efforts to reach beyond the complaint to evaluate claims that the government did not make.(83) The district judge is authorized to review only the decree, not the actions of the government.(84) According to the D.C. Circuit Court of Appeals, a district court may properly inquire about product lines covered in the decree(85) as well as compliance measures.(86)

Since the district judge exceeded his authority, however, the case was remanded with instructions to enter the proposed decree. To reassign the case to a different judge on remand as Microsoft requested, the court of appeals simply had to find that the facts might reasonably cause an objective observer to question the judge's impartiality, not actual bias or prejudice. The circuit court found that Judge Sporkin's actions could cause a reasonable observer to question whether Judge Sporkin would have difficulty putting his previous views and findings aside. The circuit court stated

that Judge Sporkin did the following: inquired into allegations outside the complaint; relied on the book *Hard Drive*, which examined the growth of Microsoft, including allegations of vaporware or preannounced software that was not yet in marketable form; did not fulfill his duty to consider the impact of the anonymity of the amici; accepted ex parte submissions; and made several comments which evidenced his distrust of Microsoft's lawyers and showed his poor view of Microsoft's practices.(87) Therefore, the case was remanded to a different district court judge for signature.(88)

In April, 1995, the DOJ filed suit under section 7 of the Clayton Act.(89) to enjoin Microsoft from acquiring its competitor in the financial applications software market, Intuit Corporation.(90) Intuit's Quicken had 69% of the market share of the personal finance checkbook software market in 1994; Microsoft Money had 22%. The DOJ alleged in the complaint that the effect of the proposed acquisition would be to substantially lessen competition in that market. Microsoft then dropped its acquisition bid.

According to the DOJ in its May 1998 complaint, Microsoft executives visited Netscape in May 1995 and offered Netscape the following deal: if Netscape would not compete in the operating systems or browser markets for Windows 95, then Microsoft would not compete in the production of browsers for platforms other than Windows 95.(91) Netscape refused this alleged deal; this author sees no reason why Netscape

would have accepted it. In 1998, the DOJ termed this a Ablatant and illegal attempt to monopolize the Internet browser market."[92]

In August 1996, Netscape Communications Corporation reportedly sent a letter to the Department of Justice alleging that Microsoft engaged in conduct that violated both the consent decree and antitrust laws. The letter, written by Netscape counsel Gary Reback, alleged that Microsoft offered inducements to OEMs to make competitors' browsers less accessible to users than Microsoft's own browser, Internet Explorer. It was also alleged that Microsoft targeted Internet Service Providers with inducements. Microsoft's response refuted these claims and called the letter Aa series of wild and irresponsible allegations that have no basis in law or fact."

In October 1997, the DOJ asked a federal court to hold Microsoft in contempt of the 1995 consent decree for requiring OEMs to license and distribute Microsoft's web browser Internet Explorer (IE) as a condition of licensing Windows 95. By forcing OEMs to license and distribute Internet Explorer on every PC with Windows 95, Microsoft not only violated the consent decree, but also sought to thwart incipient competition and thereby protect its operating system monopoly, according to the DOJ.[93] Under the consent decree, Microsoft was prohibited from forcing OEMs to license "other" Microsoft products in order to purchase the Windows operating system.[94] The government contended that Internet Explorer is a separate and distinct "other product," not an "integrated product" allowed under the consent decree.

Microsoft was not prohibited from developing integrated products, under the consent decree.(95)

The government further contended that Microsoft's overly broad nondisclosure agreements threatened the ability of the court to enforce and the U.S. to determine and secure Microsoft's compliance with the consent decree. The DOJ asked that Microsoft cease and desist from requiring OEMs to license Internet Explorer as a condition of obtaining Windows 95. The DOJ asked for a civil contempt order and a fine of $1 million for every day after the court order that Microsoft fails to carry out the court's order.

Microsoft's reaction to the complaint was "astonishment." Microsoft held that IE was an allowed integrated product. The DOJ knew since 1994 that Microsoft intended to include Internet-related technologies in Windows 95 and, according to Microsoft, that Microsoft would decide, along with market forces, what features would be included in its operating system. Further, according to Microsoft, the DOJ's original complaint made no reference to tying; the tying question was raised in the 1994 EU investigation. In December 1997, District Judge Jackson prospectively preliminarily enjoined Microsoft from conditioning the licensing of Windows 95 or any successor version on the inclusion of Internet Explorer, as the court found that the DOJ had a substantial likelihood of success on the merits, and the balance of harms also favored the issuance.(96) The court didn't hold Microsoft in civil contempt, however, as there was not clear and convincing evidence that Microsoft had violated a

clear and unambiguous prohibition in the consent decree.[97] Whether Microsoft actually violated the consent decree would be decided later. The court appointed Lawrence Lessig as a Special Master to receive evidence and legal authority and propose findings of fact and conclusions of law for consideration by the court.[98] Microsoft claimed that it was in full compliance in good faith with the consent decree and that none of the DOJ's arguments as to why Microsoft should be held in contempt had merit. After the court issued the injunction, Microsoft and the DOJ entered a stipulation that Microsoft would be in compliance with the injunction if it extended the option to OEMs of running the Add/Remove Programs utility with respect to IE 3.x or removing the IE icon from the desktop and from the Programs list in the Start menu and marking the file IEXPLORE.EXE "hidden."[99] However, Microsoft also appealed the December 1997 district court ruling.

Microsoft also filed a motion to stay the proceedings before the Special Master as there were no exceptional conditions to warrant one and, according to Microsoft, Professor Lessig was biased against Microsoft. Microsoft submitted e-mails between Lessig and Netscape that, according to Microsoft, showed bias by discussing the difficulties Lessig had installing Internet Explorer. The DOJ opposed Microsoft's motion to stay further proceedings before the Special Master as complex issues and conditions of urgency supported reference to the Special Master. The district court rejected Microsoft's request in January 1998.

To avoid being held in contempt of court, Microsoft agreed in January 1998 to offer the latest version of Windows 95 without requiring easy access to IE. In February 1998, the D.C. Circuit Court of Appeals temporarily suspended the Special Master until an April 1998 hearing. Also in February, the DOJ expanded its investigation of Microsoft by sending civil subpoenas to MCI Communications Corp., America Online Inc., and other Internet Service Providers, reportedly requesting documents and contracts with Microsoft. Japan's antitrust agency, the Fair Trade Commission, was also investigating Microsoft's Tokyo unit for suspected infringement of antitrust laws. In February 1998, Caldera amended its complaint in *Caldera, Inc. v. Microsoft Corp.*, pending in district court in Utah, to allege Sherman Act violations based on Microsoft's alleged monopolization of the MS-DOS operating system software market and functionally equivalent software.(100) Caldera acquired DR-DOS from Novell and markets a successor product, Open DOS.

On May 12, 1998, the D.C. Circuit Court of Appeals granted a stay of the preliminary injunction insofar as it related to Windows 98,(101) paving the way for the release of Windows 98 in June 1998. The court of appeals stated that the DOJ presented no evidence that Windows 98 was not an exempt integrated product. The court parenthetically stated that there was not evidence presented at all about Windows 98, so far as the court knew.

Later that week, when negotiations deadlocked between Microsoft and DOJ's Antitrust Division head Joel Klein, the DOJ and twenty states filed suits against

Microsoft on May 18, 1998, alleging Sherman Act sections 1[(102)] and 2[(103)] violations. The DOJ claimed that agreements that Microsoft made with Internet Service Providers (ISPs), Internet Content Providers (ICPs), and others under which those companies agreed not to license, distribute, or promote non-Microsoft products violated section 1 of the Sherman Act, as the agreements restrained trade and competition in the Internet browser and operating system markets.[(104)] Similarly, agreements made with OEMs restricting modification or customization of the PC boot-up sequence and screens also violated section 1, according to the DOJ. The tying of IE to the Windows operating system was also a section 1 violation because it prevented customers from selecting an Internet browser and foreclosed competing browsers from a channel of distribution, thereby reducing competition in the browser market. In an unusual request for relief, in addition to a request for a preliminary and permanent injunction against the above-mentioned behavior, the DOJ requested that Microsoft be required to include a Netscape Internet browser with any operating system that included Microsoft's browser software.[(105)]

Twenty states also filed suit alleging that Microsoft illegally tied other software to Windows and unlawfully monopolized the market for its office productivity suite.[(106)] The states also alleged violations of their unfair competition laws.

In Washington, D.C., in May 1998, District Judge Jackson consolidated the federal and state government complaints and scheduled both for trial in September

1998.[107] Microsoft's request for extended discovery was denied, as was the DOJ's request for injunctive relief in advance of the June 1998 release of Windows 98.

In June 1998, the D.C. Circuit Court of Appeals gave Microsoft a stunning victory when it reversed the preliminary injunction prohibiting Microsoft from requiring OEMs who license Microsoft's operating systems software to license Microsoft's Internet browser as well. The appeals court found that the district court erred procedurally in entering a preliminary injunction without notice to Microsoft and also erred substantively in the implicit construction of the consent decree.[108] Since the preliminary injunction was issued without adequate notice to Microsoft[109] and was based on an erroneous reading of the section of the consent decree relating to "integrated" versus "other" products,[110] and since the DOJ had not shown a reasonable probability of success on the merits,[111] the preliminary junction was lifted.

Concerning the Special Master, the court of appeals vacated the reference, as nothing remotely "exceptional" warranted one in this case, and thus the reference to the Master was an imposition of a surrogate judge on the parties, and was either a clear abuse of discretion or an exercise of wholly nonexistent discretion.[112] Thus, Microsoft's claims that the Special Master was biased were not reached.

The dissenter in the court of appeals departed from the majority in the interpretation of the consent decree. The dissenter believed that the majority opinion unnecessarily narrowed the scope of inquiry of the district court on remand, as the

majority gave only one reasonable interpretation of the "integrated" versus "other" products clause, and this interpretation was inconsistent with some precedent. The dissent suggested a balancing approach which was rejected by the majority. According to the dissent, the real question to be explored on remand to determine whether a violation of the consent decree had occurred was whether the new combination of formerly separate functionalities still contained an "other" product, or if the two functionalities had been blended or "integrated" to an extent that they lost their former identities and became one product.(113)

On August 11, 1998, District Judge Jackson allowed intervenors and members of the public to be admitted to depositions, including the deposition of Bill Gates,(114) under 15 U.S.C. § 30, the Publicity in Taking Evidence Act of 1913. The next day Judge Jackson denied Microsoft's motion for a stay pending appeal of the order.(115)

On September 14, 1998, District Judge Jackson denied most of Microsoft's motion for summary judgment.(116) The complaints by the states and the Department of Justice alleged that Microsoft:

> unreasonably restrained competition by "tying" its Internet browser to Windows 98; unreasonably restrained competition by entering into "exclusive dealing" arrangements with various Internet providers; unreasonably restrained competition by imposing "boot and start-up screen" restrictions on original equipment managers (OEMs); illegally maintained a monopoly in its operating

system software through various exclusionary and predatory practices, including, but not limited to, the tying and exclusive dealing arrangements; and attempted to monopolize the market for Internet browsers.

On all of these counts, the court found material issues of fact genuinely in dispute, so summary judgment was denied. The states raised a separate claim of monopoly leveraging. Under this theory, a seller who has a monopoly in one product violates section 2 of the Sherman Act when it uses a tie-in to obtain a competitive advantage in a second market, even if there has not been an attempt to monopolize the second market. Summary judgment was granted to Microsoft on this claim, as the continuing viability of the monopoly leveraging theory was in serious doubt, according to the court.

Conclusion

The majority opinion in the Court of Appeals for the D. C. Circuit in June 1998 was binding only with respect to the preliminary injunction and the special master. Technically, it had no effect on the larger case filed in May 1998. The Court of Appeals for the D.C. Circuit stated that "the proceedings below may continue," but "the Department [of Justice] may well regard further pursuit of the case as unpromising, especially given the alternate avenues developing in its recently launched separate attacks on Microsoft's practices."(117)

The majority in the court of appeals found an interpretation of the consent decree's language concerning "integrated" versus "other" products which the majority thought was both consistent with antitrust tying law and the parties' intent. Under this interpretation, to be used on remand, integration may be considered genuine if it is beneficial to a purchaser combination. The court of appeals specifically stated, however, that in making this inquiry, the court should embark on a product design assessment. (118) In this particular instance, the majority stated that "it seems clear that there is a reason why the integration must take place at Microsoft's level."(119) While the court of appeals was inclined to conclude that Windows 95 with IE is a genuine integrated product, the factual conclusion is left to the district court on remand.

The court of appeals thus sent a strong message in the *United States v. Microsoft* case filed in 1997. The larger case brought by the DOJ and the states remains, and trial began October 19, 1998. Some of the allegations in the May 1998 DOJ complaint, such as the 1995 proposal to divide the browser market,(120) if proven, are more serious against Microsoft, and go beyond merely providing a better product at a better price, as Microsoft contends that they are doing. In any event, Microsoft faces a serious risk by going to trial, as section 5(a) of the Clayton Act allows any private litigant to introduce findings from the trial as prima facie evidence, if Microsoft loses or settles after the trial started.(121)

ENDNOTES

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1. Steven Sunshine & Charles Biggio, *Antitrust Investigations Can Delay or Kill Deals*, Nat'l.L.J., Apr. 15, 1996, at C20.

2. United States v. Microsoft Corp., 159 F.R.D. 318 (D.D.C. 1995). *See infra* notes 61-67 and accompanying text.

3. United States v. Microsoft Corp., 56 F.3d 1448 (D.C. Cir. 1995). *See infra* notes 75-88 and accompanying text. *See* Jay Dratler, Jr., *Software: Microsoft As an Antitrust Target: IBM in Software?* 25 SW. U. L. Rev. 671 (1996); Daniel J. Gifford, *Software: Microsoft Corporation, the Justice Department, and Antitrust Theory*, 25 SW. U. L. Rev. 621 (1996).

4. United States v. Microsoft Corp., 147 F.3d 935 (D.C. Cir. June 23, 1998) (Nos. 97-5343, 98-5012). *See infra* notes 108-113 and accompanying text.

5. Marc Allen Eisner, Antitrust and the Triumph of Economics 50 (1991).

6. 15 U.S.C. § 1 (1994) states:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign

nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

7. United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 328 (1987). In this case, eighteen railroads entered into agreements establishing freight rates. These agreements were held to be illegal, per se. *Id.*

8. 15 U.S.C. ' 2 (1994) states:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

9. United States v. Standard Oil Co., 221 U.S. 1 (1911).

10. United States v. American Tobacco Co., 221 U.S. 106 (1911). American Tobacco engaged in such activities as excluding rivals from wholesalers, buying out rivals, and predatory pricing. *Id.*

11. United States v. United Shoe Mach. Co., 247 U.S. 32, 37-38 (1918).

12. United States v. U.S. Steel Corp., 251 U.S. 417 (1920).

13. American Tobacco Co. v. United States, 328 U.S. 781 (1946).

14. United States v. Griffith Amusement Co., 334 U.S. 100 (1948).

15. United States v. United Shoe Mach. Corp., 347 U.S. 521, 521 (1954).

16. United States v. Grinnell Corp., 384 U.S. 563, 570-71 (1966).

17. Brown Shoe Co. v. United States, 370 U.S. 294, 324 (1962).

18. 15 U.S.C. §§1-2 (1994).

19. 15 U.S.C. §4 (1994).

20. 15 U.S.C. §26 (1994). Because of treble damages, 95% of all antitrust actions in the U.S. are instigated by private parties. James Levinsonn, Competition Policy and International Trade 9 (1994).

21. 15 U.S.C. §§ 41-58 (1994).

22. 15 U.S.C. §' 13 (1994).

23. 15 U.S.C. § 14 (1994) which states:

> It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor,

> or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplier, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

24. 15 U.S.C. § 18 (1994). See Brown Shoe Co. v. United States, 370 U.S. 294 (1962), for a discussion of this section.

25. Northern Pac. Ry. v. United States, 356 U.S. 1, 5-6 (1958).

26. Kelly A. O'Connor, *Emerging Antitrust Issues Affecting the Computer Industry*, 17 Hastings Comm. & Ent. L.J. 819, 821 (1995). In a civil antitrust action, Datagate, Inc., an independent service organization that provided service and repair for computer hardware, sued Hewlett-Packard under the Sherman Act section one for an illegal tying arrangement. The Ninth Circuit Court of Appeals stated that the essential characteristic of a per se illegal tying arrangement is that the seller makes use of its market power in the tying product to coerce the buyer to purchase the tied product. The Ninth Circuit reversed the district court, which held that a tying arrangement imposed on only a single customer was insufficient under *Jefferson Parish Hospital District No. 2 v. Hyde*, 466 U.S. 2, 16 (1984). The Ninth Circuit held that Jefferson

Parish did not create a "single purchaser" rule of general applicability, and remanded. *Datagate, Inc. v. Hewlett-Packard Co.*, 60 F.3d 1421, 1428 (9th Cir. 1995).

27. Eastman Kodak Co. v. Image Technical Services, Inc., 504 U.S. 451, 462 (1992). The Court held that Kodak's nearly 100% control of the parts market and 80-95% control of the service market was sufficient evidence of monopoly power. The relevant market included only those companies that serviced Kodak Machines because service and replacement parts for Kodak machines were not interchangeable with other brands. *Id*. at 481-82.

28. 15 U.S.C. §' 13(a) (1994) states:

> It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or present competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided,* That nothing herein contained shall prevent differentials which

make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: *Provided, however*, That the Federal Trade Commission may, after due investigation and hearing to all interested parties, fix and establish quantity limits, and revise the same as it finds necessary, as to particular commodities or classes of commodities, where it finds that available purchasers in greater quantities are so few as to render differentials on account thereof unjustly discriminatory or promotive of monopoly in any line of commerce; and the foregoing shall then not be construed to permit differentials based on differences in quantities greater than those so fixed and established: *And provided further*, That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade: *And provided further*, That nothing herein contained shall prevent price changes from time to time where in response to changing conditions affecting the market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned.

29. 15 U.S.C. §13(d)-(e) (1994) state:

> (d) It shall be unlawful for any person engaged in commerce to pay or contact for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities.
> (e) It shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing, handling, sale, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms.

30. 15 U.S.C.§13(f) (1994) states:

It shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section.

31. 15 U.S.C. §18 (1994 & Supp. 1996), as amended by the Telecommunications Act of 1996, states:

No person engaged in commerce or in any activity affecting commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another person engaged also in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

No person shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of one or more persons engaged in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition, of such

stocks or assets, or of the use of such stock by the voting or granting of proxies or otherwise, may be substantially to lessen competition, or to tend to create a monopoly.

This section shall not apply to persons purchasing such stock solely for investment and not using the same by voting or otherwise to bring about, or in attempting to bring about, the substantial lessening of competition. Nor shall anything contained in this section prevent a corporation engaged in commerce or in any activity affecting commerce from causing the formation of subsidiary corporations for the actual carrying on of their immediate lawful business, or the natural and legitimate branches or extensions thereof, or from owning and holding all or a part of the stock of such subsidiary corporations, when the effect of such formation is not to substantially lessen competition.

Nor shall anything herein contained by construed to prohibit any common carrier subject to the laws to regulate commerce from aiding in the construction of branches or short lines so located as to become feeders to the main line of the company so aiding in such construction or from acquiring or owning all or any part of the stock of such branch lines, nor to prevent any such common carrier from acquiring and owning all or any part of the stock of a branch or short line constructed by an independent company where there is no substantial competition between the company owning the branch line so constructed and the company owning the main line acquiring the property or an interest therein,

nor to prevent such common carrier from extending any of its lines through the medium of the acquisition of stock or otherwise of any other common carrier where there is no substantial competition between the company extending its lines and the company whose stock, property, or an interest therein is so acquired.

Nothing contained in this section shall be held to affect or impair any right heretofore legally acquired: *Provided,* That nothing in this section shall be held or construed to authorize or make lawful anything heretofore prohibited or made illegal by the antitrust laws, nor to exempt any person from the penal provisions thereof or the civil remedies therein provided.

Nothing contained in this section shall apply to transactions duly consummated pursuant to authority given by the Secretary of Transportation, Federal Power Commission, Interstate Commerce Commission, the Securities and Exchange Commission in the exercise of its jurisdiction under section 79j of this title, the United States Maritime Commission, or the Secretary of Agriculture under any statutory provision vesting such power in such Commission or Secretary.

32. The Clayton Act section 3 was amended in 1996 by removing the "Federal Communications Commission" from the list of agencies in the last paragraph. 47 U.S.C. § 152 (b)(3) (Supp. 1996).

33.United States v. Microsoft Corp., 159 F.R.D. 318, 322 (D.D.C. Feb. 14, 1995). *See generally* Amy C. Page, *Note, Microsoft: A Case Study in International Competitiveness, High Technology, and the Future of Antitrust Law*, 47 Fed. Comm. L.J. 99 (1994).

34. United States v. Microsoft Corp., 980 F. Supp. 537, 539 (D.D.C. 1997).

35. United States v. Microsoft Corp., 56 F.3d 1448 (D.C. Cir. 1995). Economies of scale exist when average or unit costs fall as the firm expands total output within a given time period. Increasing returns to scale, or economies of scale, come into full play only when a large enough number of units is being produced to make it worthwhile to set up a fairly elaborate productive organization. Paul Samuelson, Economics 25-26 (1985). The two main reinforcing reasons for large barriers to entry in the operating systems market are: first, consumers want personal computers with operating systems that will run a large range of applications programs; and second, applications software developers do not want to develop applications for operating systems that are not largely used by consumers. United States v. Microsoft Corp., 159 F.R.D. 318, 323 (D.D.C. 1995).

Courts hearing antitrust cases may consider particular circumstances of an industry and adjust their rules to the peculiarities of an industry as recognized in a regulatory statute. Philip Areeda & Donald Turner, Antitrust Law ' 223D (1978).

See Adolph C. Iannacgone and Linda Volonio, *Marginal Cost and Relevant Market Determinations in Information Technology Antitrust Cases*, 18 Rutgers Computer & Tech. L.J. 681 (1992).

36. United States v. Microsoft Corp., 159 F.R.D. 318, 321 (D.D.C. 1995). The FTC's vote was split two-to-two, twice, so no action was taken.

37. United States v. Microsoft Corp., 56 F.3d 1448 (D.C. Cir. 1995).

38. Transcript of Hearing before District Judge Sporkin on January 20, 1995, United States v. Microsoft Corp., 980 F. Supp. 537 (D.D.C. 1997) (No. 94-1564). According to the legislative history of the Tunney Act, 15 U.S.C.§16 (1994), the Act encourages settlement of antitrust actions, as consent decrees, as opposed to decrees entered as a result of litigation, are not available as prima facie evidence against defendants in subsequent private antitrust cases. H.R. Rep. No. 93-1463 (1974), *reprinted in* 1974 U.S. Code Cong. & Admin. News 6537. The Tunney Act, 15 U.S.C.§ 16(a) (1994) states in pertinent part:

> A final judgment or decree heretofore or hereafter rendered in any civil or criminal proceeding brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any action or proceeding brought by any other party against such defendant under said laws as to all matters respecting which said judgment or decree would be an estoppel as between the

parties thereto: *Provided*, That this section shall not apply to consent judgments or decrees entered before any testimony has been taken . . . .

39. The primary allegations in the complaint concern licensing agreements between Microsoft and original equipment manufacturers (OEMs), and nondisclosure agreements between Microsoft and other developers of applications software. Applications software runs on top of the personal computer's operating system and enables the computer user to perform a variety of tasks, including word processing, database management, and spreadsheets. Applications software developers need information about an operating system's codes to design applications software. Complaint for violations of sections 1 and 2 of the Sherman Act, United States v. Microsoft Corp., 159 F.R.D. 318, 322 (D.D.C. 1995).

In addition to these allegations, the complaint also alleges that Microsoft uses exclusionary and anticompetitive contract terms to maintain their monopoly. *Id.*

40. The Sherman Act § 1, 15 U.S.C. §' 1 (1994). *See supra* note 6.

41. The Sherman Act § 2, 15 U.S.C. §2 (1994). *See supra* note 8. *See generall*y, Tracy R. Lewis & Dennis A. Yao, *Some Reflections on the Antitrust Treatment of Intellectual Property*, 63 Antitrust L.J. 603 (1995).

42. Proposed Final Judgment and Competitive Impact Statement for United States v. Microsoft Corp., 59 Fed. Reg. 42,845-42,857 (1994). If approved by the federal court, the consent judgment will be entered as a final judgment. The vast number of civil

actions brought by the DOJ are concluded by consent judgment. Thomas Vakerics, Antitrust 2-43 (1985).

43. United States v. Microsoft Corp.,159 F.R.D. 318, 319 (D.D.C. 1995).

44. Covered products do not include customized versions of these products, Windows NT Workstation or Windows NT Advanced Server. Proposed Final Judgment and Competitive Impact Statement for United States v. Microsoft Corp., 59 Fed. Reg. 42,845, 42,851, 42,854 (1994).

45. Id. at 42,851. There may be no penalty if an OEM elects not to renew the license. Id. at 42,851. Microsoft previously used three to five year license terms.

46. Id. at 42,852. Operating systems software acts as the central nervous system for a personal computer, linking up the keyboard, monitor, disk drive, and other components. Id. at 42,852.

47. Id. at 42,851. The final judgment defines a per processor license as an agreement under which Microsoft requires the OEM to pay Microsoft a royalty for all personal computer systems of a certain microprocessor type specified in the agreement, regardless of whether the OEM actually sells the PCs using that chip with a Microsoft operating system included. Id. at 42,851. According to Attorney Bingaman for the Justice Department, Microsoft first used the per processor license in 1988. In 1989, it constituted 20% of OEM sales. In 1990 it increased to 22%. In 1991, it was 27%. In 1992 and 1993 it jumped to 50% and 60% . Transcript of Hearing before District

Judge Sporkin on January 20, 1995, United States v. Microsoft Corp., 980 F. Supp. 537 (D.D.C. 1997) (No. 94-1564).

48. Proposed Final Judgment and Competitive Impact Statement for United States v. Microsoft Corp., 59 Fed. Reg. 42,845, 42,852 (1994).The final judgment defines a per system license as an agreement under which the OEM pays Microsoft a royalty for all personal computer systems which bear a particular model name(s) or number(s) which are included in the licensing agreement, at the OEM's sole option. Id. at 42,852.

49. This is a key provision in the subsequent litigation. United States v. Microsoft Corp., 147 F.3d 935, 945-46 (D.C. Cir. 1998). See Laura E. Keegan, Comment, The 1991 U.S./EC Competition Agreement: A Glimpse of the Future Through the United States v. Microsoft Corp. Window, 2 J. Int'l. Legal Stud. 179 (1996); Joel Klein & Preeto Bansal, International Antitrust Enforcement in the Computer Industry, 41 Vill. L. Rev. 173 (1996).

50. Proposed Final Judgment and Competitive Impact Statement for United States v. Microsoft Corp., 59 Fed. Reg. 42,845, 42,855(1994). A minimum commitment means an obligation of an OEM to pay Microsoft a minimum amount, regardless of actual sales. Nothing in the consent judgment prohibits Microsoft and an OEM from developing non-binding estimates to calculate royalties. Id. at 42,855.

51. *Id.* at 42,855. A per copy license calculates royalty payments by multiplying the number of copies of each covered product by the per copy royalty rate agree upon. Id. at 42,855.

52. *Id.* at 42,855.

53. *Id.* at 42,855-56.

54. The 78-month limit on the final judgment may have been in response to a consent decree agreed to by the United States and IBM. in 1956 that was lifted in May 1997. United States v. IBM, 1997 WL 217588 (S.D.N.Y. 1997).

The consent decree also contains a reporting section to attempt to secure compliance with the agreement. At Microsoft's request, the E.C. participated in this agreement. The provisions are virtually identical.

55. Proposed Final Judgment and Competitive Impact Statement for United States v. Microsoft Corp., 59 Fed. Reg. 42,845, 42,845 (1994). The Tunney Act is found at 15 U.S.C. §16 (1994). Section (b) states:

> Any proposal for a consent judgment submitted by the United States for entry in any civil proceeding brought by or on behalf of the United States under the antitrust laws shall be filed with the district court before which such proceeding is pending and published by the United States in the Federal Register at least 60 days prior to the effective date of such judgment. Any written comments relating to such proposal and any responses by the United States thereto, shall also be filed with such district court and published by the United States in the Federal Register within such 60-day period. Copies of such proposal and any other materials and documents which the United States considered a determinative in formulating such proposal, shall also be made available to the

public at the district court and in such other districts as the court may subsequently direct. Simultaneously with the filing of such proposal, unless otherwise instructed by the court, the United States shall file with the district court, publish in the Federal Register, and thereafter furnish to any person upon request, a competitive impact statement which shall recite--

(1) the nature and purpose of the proceeding;

(2) a description of the practices or events giving rise to the alleged violation of the antitrust laws;

(3) an explanation of the proposal for a consent judgment, including an explanation of any unusual circumstances giving rise to such proposal or any provision contained therein, relief to be obtained thereby, and the anticipated effects on competition of such relief;

(4) the remedies available to potential private plaintiffs damaged by the alleged violation in the event that such proposal for the consent judgment is entered in such proceeding;

(5) a description of the procedures available for modification of such proposal; and

(6) a description and evaluation of alternatives to such proposal actually considered by the United States.

56. See Natalie L. Krodel, Comment, The Tunney Act: Judicial Discretion in United States v. Microsoft Corporation, 62 Brook. L. Rev. 1293 (1996). At the September 29,

1994 hearing, District Court Judge Sporkin referred to a book that claimed that Microsoft predatorily preannounced products with the intent to freeze out competitors. Transcript of Hearing before District Judge Sporkin on September 29, 1994, at p. 16, lines 21-22, United States v. Microsoft Corp., 980 F. Supp. 537 (D.D.C. 1997) (No. 1564). The book Judge Sporkin referred to was Hard Drive. James Wallace & Jim Erickson, Hard Drive: Bill Gates and the Making of The Microsoft Empire (1992).

57. Memorandum of Amici Curiae at 7-8, 51-52, United States Microsoft Corp., 159 F.R.D. 318, 327 (D.D.C. 1995). See also, Heart and Tirale, "Vertical Integration and Market Foreclosure," Brookings Papers of Economic Activity (1993).

58. Memorandum of the United States, United States v. Microsoft Corp., 159 F.R.D. 318 (D.D.C. 1995).

59. Transcript of Hearing before District Judge Sporkin on January 20, 1995, United States v. Microsoft Corp., 980 F. Supp. 537 (D.D.C. 1997) (No. 1564). Attorney Bingaman also told Judge Sporkin that she was the Article II executive branch prosecutor, and he was the Article III judge. In these roles, she decides what makes a winning case, and if she doesn't "want to file it, nobody can make me file it." Also, she has the option not to agree to a modified decree. Judge Sporkin again raised the book Hard Drive at this hearing. See supra note 56. See generally Arrow and the Ascent of Modern Economic Theory (George Feiwel ed., 1987); arrow and the foundations of the theory of economic policy (George Feiwel ed., 1987).

60. Transcript of Hearing before District Judge Sporkin on January 20, 1995, United States v. Microsoft Corp., 980 F. Supp. 537 (D.D.C. 1997) (No. 1564). CCIA has about 25 members who are manufacturers/providers of computer products, software, or computer services.

61. The Tunney Act, 15 U.S.C. § 16(e) (1994) states:

> Before entering any consent judgment proposed by the United States under this section, the court shall determine that the entry of such judgment is in the public interest. For the purpose of such determination, the court may consider--
>
> (1) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration or relief sought, anticipated effects of alternative remedies actually considered, and any other considerations bearing upon the adequacy of such judgment;
>
> (2) the impact of entry of such judgment upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

62. United States v. Microsoft Corp., 159 F.R.D. 318 (D.D.C. 1995).

63. The Tunney Act, 15 U.S.C. § 16(f) (1994) states:

> In making its determination under subsection (e) of this section, the court may--

(1) take testimony of Government officials or experts or such other expert witnesses, upon motion of any party or participant or upon its own motion, as the court may deem appropriate;

(2) appoint a special master and such outside consultants or expert witnesses as the court may deem appropriate; and request and obtain the views, evaluations, or advice of any individual, group or agency of government with respect to any aspects of the proposed judgment or the effect of such judgment, in such manner as the court deems appropriate;

(3) authorize full or limited participation in proceedings before the court by interested persons or agencies, including appearance amicus curiae, intervention as a party pursuant to the Federal Rules of Civil Procedure, examination of witnesses or documentary materials, or participation in any other manner and extent which serves the public interest as the court may deem appropriate;

(4) review any comments including any objections filed with the United States under subsection (d) of this section concerning the proposed judgment and the responses of the United States to such comments and objections; and

(5) take such other action in the public interest as the court may deem appropriate.

64. United States v. Microsoft Corp., 159 F.R.D. 318, 326 (D.D.C. 1995). The court states that while the Justice Department objected to these motions as untimely under

15 U.S.C.§16(b), see supra note 25, the lack of any demonstrated prejudice along with the need for a thorough review were factors in favor of allowing the motions under 15 U.S.C. § 16(f), see supra note 63, although untimely filings ordinarily should not be condoned.

65. United States v. Microsoft Corp., 159 F.R.D. 318, 327 (D.D.C. 1995).

66. *Id*. at 332. The district court states that in reading this public interest determination, it is not for the court to determine whether the settlement is the best possible, but the court should play an independent role as opposed to serving as a rubber stamp. The courts have considered markets and practices outside the scope of the complaint in some instances. Concerning the first reason for finding that the proposed consent decree was not in the public interest; the court found that the parties did not create the necessary record to make this determination. The court must be told at minimum: the broad contours of the investigation; the conclusions reached by the government; areas discussed and negotiated in settlement discussion; and future plans of the government. The court stated that the government failed to fully apprise the court. Concerning the second reason for finding that the proposed consent decree was not in the public interest, the court found that the decree was too narrow and might cause endless debate concerning whether a new operating system would be covered by the decree. Concerning the third factor, that the decree is an ineffective remedy, the court cites Professor Arrow's affidavit that the operating systems market is an increasing returns market. Since the proposed remedy is prospective, it does not

dislodge the monopoly power that Microsoft gained due to artificial barriers that it erected. The court stated that the decree is too little, too late, and merely tells the defendant to go and sin no more. Concerning the fourth factor, the court stated that without a compliance mechanism, the court cannot find the decree in the public interest. While the government was willing to accept an internal compliance mechanism, Microsoft was not. *Id.* at 338.

67. *Id*. at 337.

68. Brief for Microsoft Corp. at 17, United States v. Microsoft Corp., 56 F.3d 1448 (D.C. Cir. 1995) (Nos. 95-5037, 95-5039).

69. *Id*. James Wallace & Jim Erickson, Hard Drive: Bill Gates and the Making of the Microsoft Empire (1992). See supra note 56. This book discusses the FTC investigation of Microsoft at 372-74, 377-78.

70. Brief for Microsoft Corp. at 36, United States v. Microsoft Corp., 56 F.3d 1448 (D.C. Cir. 1995) (Nos. 95-5037, 95-5039). Microsoft also requested that the submission of the anonymous amici and CCIA be stricken from the record for failure to comply with the Tunney Act. *Id.*

71. Brief for the United States at 6, United States v. Microsoft Corp., 56 F.3d 1448 (D.C. Cir. 1995) (Nos. 95-5037, 95-5039). The U.S. stated that the district court's action, if left to stand, would greatly decrease the likelihood of settling future antitrust cases, because future participants would be reluctant to enter into consent decrees that district courts may not uphold. *Id.*

72. *Id.* at 28.

73. Transcript of Oral Argument before the D.C. Circuit on April 24, 1995, United States v. Microsoft Corp., 56 F.3d 1448 (D.C. Cir. 1995) (Nos. 95-5037, 95-5039).

74. Id. at 22.

75. Id. at 37-38. The court questioned IDEA if this couldn't be the subject of private litigation. Id.

7 76. United States v. Microsoft Corp., 56 F.3d 1448 (D.C. Cir. 1995). The court stated that it had jurisdiction over the appeal. Both parties appealed this, but Microsoft further appealed the participation by the anonymous entities and the CCIA. The Circuit Court stated that it was doubtful whether the court would have jurisdiction unless both parties appealed, but it was unnecessary to decide whether Microsoft could have appealed the one issue independently since the issue came before the court as part of the record. Id. at 1456-57. See Symposium, Microsoft and the U.S. Department of Justice, 40 Antitrust Bull. 257 (1995).

77. United States v. Microsoft Corp., 56 F.3d 1448, 1465 (D.C. Cir. 1995).

78. H.R. REP. NO. 93-1463, at 6 (1974), reprinted in 1974 U.S. Code Cong. & Admin. News 6535, 6536-38. One of the abuses sought to be remedied by the Tunney Act was judicial rubber stamping. The House Committee agreed with the Senate that the court must obtain the necessary information to make the public interest determination.

79. United States v. Microsoft Corp., 56 F. 3d 1448, 1458 (D.C. Cir. 1995).

80. Maryland v. United States, 460 U.S. 1001, 1002, 1005 (1983).

81. The Tunney Act, 15 U.S.C. §' 16(e) (1994). See supra note 61.

82. 15 U.S.C. §' 16(f). See supra note 63.

83. United States v. Microsoft Corp., 56 F.3d 1448, 1459 (D.C. Cir. 1995). The court stated that "Congress surely did not contemplate that the district judge would . . . redraft the complaint himself."

84. Id.

85. Id. at 1461-62. Amici suggested that this was ambiguous.

86. Compliance measures were the fourth grounds for the district judge rejecting the decree. United States v. Microsoft Corp., 159 F.R.D. 318, 332 (D.D.C. 1995). Judge Sporkin's concerns about compliance, however, exceeded any legitimate concerns, according to the circuit court. United States v. Microsoft Corp., 56 F.3d 1448, 1462 (D.C. Cir. 1995).

87. United States v. Microsoft Corp., 56 F.3d 1448, 1463-65 (D.C. Cir. 1995).

88. *Id.* at 1451.

89. *See supra* note 24. The Antitrust Division, however, withdrew its Civil Investigative Demand on July 22, 1995 concerning Microsoft's entry into the online information service market with the introduction of Windows 95.

90. Complaint for Injunctive Relief Against Combination in Violation of Section 7 of the Clayton Act, United States v. Microsoft Corp. (N.D. Cal.filed Apr. 27, 1995).

91. Complaint for United States at 10, United States v. Microsoft Corp., 1998 U.S. Dist. LEXIS 14231 (D.D.C. Sept. 14, 1998) (Nos. 98-1232, 98-1233). *See infra* note

103 and accompanying text. Netscape Navigator, the first Internet browser widely used by the general public, was introduced in 1994; Internet Explorer was released in mid-1995. According to the DOJ, Microsoft's share of the browser market has grown from less than 5% in early 1996 to 50% or more in 1998.

92. *Id*. at 25.

93. Petition by The United States to Show Cause Why Respondent Microsoft Should Not Be Found in Civil Contempt, United States v. Microsoft Corp., 980 F. Supp. 537 (D.D.C. 1997) (No. 94-1564).

94. United States v. Microsoft Corp. 980 F. Supp. 537, 538 (D.D.C. 1997). The licensing agreements also prohibited OEMs from disassembling the package; Internet Explorer had to remain as a part of the operating system software whether or not the OEMs or their customers would prefer another brand of Internet browser, or none at all. *Id*. at 539.

95. *See supra* note 49 and accompanying text. The first three versions of IE were included on the Windows 95 master disk supplied to OEMs. IE 4.0 was supplied on a separate CD ROM and OEMs were not required to install it, but Microsoft intended to start requiring OEMs to reinstall IE 4.0 in February 1998, and that led to the DOJ complaint. United States v. Microsoft Corp., 147 F.3d 935 (D.C. Cir., June 23, 1998) (Nos. 97-5343, 98-5012).

96. United States v. Microsoft Corp., 980 F. Supp. 537, 544 (D.C. Cir. 1997). The court also stated that the preliminary injunction placed no undue hardship on

Microsoft, and they did not have to rip out IE code already installed. *Id.* at note 8. The DOJ's request that certain contract language in nondisclosure agreements with OEMs be struck as it might inhibit OEMs from communicating with the DOJ was denied without prejudice. *Id.* at 545.

97. *Id.* at 541. The court had to resolve any ambiguities in favor of Microsoft, the party charged with contempt. Microsoft's interpretation that IE was an integrated product was plausible, although not necessarily correct, according to the district court. *Id.*

98. United States v. Microsoft Corp., 980 F. Supp. 537, 545-46 (D.D.C. Dec. 11, 1997) (No. 95-1564).

99. United States v. Microsoft Corp., 147 F.3d 935, 940-41 (D.C. Cir., June 23, 1998) (Nos. 97-5343, 98-5012). These alternate modes of compliance do not remove the IE software code.

100. Amended Complaint Alleging Violations of the Sherman Act by Microsoft Corporation, Caldera v. Microsoft Corp., 181 F.R.D. 506 (D. Utah 1998). The original complaint stated that Microsoft spread the false perception that Windows was incompatible with DR-DOS, deliberately attempting to damage sales of DR-DOS.

101. United States v. Microsoft Corp., 147 F.3d 935, 956 (D.C. Cir. May 12, 1998). The DOJ objected that Microsoft should have requested the stay from the district court. The appeals court stated that while that is the preferred procedure, going to the

appeals court is permissible in instances such as this where seeking relief from the district court is not practical. *Id.*

1 102. *See supra* note 6 and accompanying text.

103. *See supra* note 8 and accompanying text.

104. United States v. Microsoft Corp., Nos. 98-1232, 98-1233, 1998 U.S. Dist. LEXIS 14231, at *4-5 (D.D.C. May 18, 1998).

105. *Id*. at *5.

106. The parties filing the complaint include: New York, California, Connecticut, Florida, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, New Mexico, North Carolina, Ohio, South Carolina, Utah, West Virginia, Wisconsin and the District of Columbia.

107. United States v. Microsoft Corp., No. 98-1232, 1998 U.S. Dist. LEXIS 14321, at *3-4 (D.D.C. May 22, 1998).

108. United States v. Microsoft Corp., 147 F.3d 935, 956 (D.C. Cir. June 23, 1998)

109. Federal Rule of Civil Procedure 65(a)(1) states, "No preliminary injunction shall be issued without notice to the adverse party." Concerning this rule, the court of appeals stated, "We agree." United States v. Microsoft Corp., 147 F.3d 935, 943 (D.C. Cir. June 23, 1998). The purpose of the federal rule is to allow the opposing party to have a fair opportunity to oppose the preliminary injunction.

110. *See supra* note 49 and accompanying text. The court of appeals' task was to determine the intent of the parties to discern the bargain the parties struck, just as they

would with a contract. While both sides' arguments had flaws, the court of appeals found a construction of the consent decree that is consistent with antitrust laws and accomplishes the parties' intent. The court of appeals looked at the anti-competitive effect of tie-ins, and read the clause as permitting any technological integration, regardless of whether elements of the integrated package are marketed separately. United States v. Microsoft Corp., 147 F.3d 935, 948 (D.C. Cir. June 23, 1998). Integration is considered genuine if it is beneficial when compared to a purchaser combination.

111. The district court needed to find irreparable injury before granting the preliminary injunction. *Id.* at 944.

112. *Id*. at 956. The order for the special master stated that "the Special Master shall receive evidence and legal authority presented by the parties at such times and places, and in such manner as he shall prescribe, and shall propose findings of fact and conclusions of law for consideration by the Court on the issues raised by this case." While special masters are allowed to oversee compliance, the appeals court stated that the issue here was interpretation, not compliance. The DOJ argued that this case was of such technological complexity as to be "exceptional." The court of appeals disagreed. It stated the consent decree was in plain English, and any ambiguities were due to uncertainty of the purposes of the parties, not technological issues. The court of appeals did not find the case especially complex, and interpreted the consent decree itself. *Id.* at 955.

113. *Id.* at 959-60.

114. United States v. Microsoft Corp., Nos. 98-1232, 98-1233, 1998 U.S. Dist. LEXIS 13098, at *3 (D.D.C. Aug. 11, 1998).

115. United States v. Microsoft Corp., Nos. 98-1232, 98-1233, 1998 U.S. Dist. LEXIS 13097, at *1 (D.D.C. Aug. 11, 1998).

116. United States v. Microsoft Corp., Nos. 98-1232, 98-1233, 1998 U.S. Dist. LEXIS 14231, at *6 (D.D.C. Aug. 11, 1998).

117. United States v. Microsoft Corp., 147 F.3d 935, 953-54 (D.C. Cir. June 23, 1998).

118. *Id*. at 948.

119. *Id*. at 952. This is because OEMs cannot combine the two products in the way that Microsoft has integrated IE into Windows 95.

120. *See supra* note 91 and accompanying text. Microsoft representatives met with Netscape executives in June 1995, but the parties disagree concerning the purpose and substance of that meeting. The plaintiffs allege that Microsoft proposed an illegal market allocation, but Microsoft denies this allegation. United States v. Microsoft Corp., Nos. 98-1232, 98-1233, 1998 U.S. Dist. LEXIS 14231 at *9 (D.D.C. Sept. 14, 1998).

121. Clayton Act, 15 U.S.C. § 16 (1994).

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