UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STATE OF NEW YORK *ex. rel.,*

Plaintiffs,

- against –

MICROSOFT CORPORATION,

Defendant.

Civil Action 98-1233 (CKK)
Next Court Deadline:
September 11, 2007
Status Conference

CALIFORNIA GROUP'S REPORT ON REMEDIAL EFFECTIVENESS

Plaintiff States California, Connecticut, Iowa, Kansas, Minnesota, the Commonwealth of Massachusetts and the District of Columbia ("California Group")[1] respectfully submit this Report on Remedial Effectiveness. It contains the California Group's conclusions regarding the effectiveness of the Final Judgment in remedying the violations of antitrust law found by this Court and upheld by the Court of Appeals. The report is based on the California Group's observations of the relevant markets since the complaint was filed in 1998, its interactions with Microsoft and other market participants during that time period, and its recent MCPP licensee survey. The report is intended to be descriptive, rather than prescriptive.

INTRODUCTION

In his recent book *The Antitrust Enterprise, Principle and Execution*, Professor Herbert Hovenkamp, one of the country's leading antitrust scholars and the senior surviving author of *Antitrust Law* (formerly with Phillip Areeda and Donald Turner), writes:

[1] For purposes of this Report, the California Group does not include Florida or Utah.

> The D.C. Circuit stated the goals for an antitrust remedy in *Microsoft.* It must "seek to 'unfetter a market from anticompetitive conduct,' to '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…'"
>
> At this writing, there is little reason to believe that the consent decree that the government negotiated with Microsoft will achieve any of these goals. If so, the *Microsoft* case may prove to be one of the great debacles in the history of public antitrust enforcement, snatching defeat from the jaws of victory.[2]

Similarly, two other prominent antitrust scholars, Professor Harry First of New York University School of Law and Professor Andrew I. Gavil of Howard University School of Law, have described the remedy in *Microsoft* as "plainly ineffectual" because it "left competition hobbled and significant violations of antitrust law largely uncorrected."[3]

Whether or not one agrees with these stark conclusions, the Final Judgment clearly has had little or no discernible impact in the marketplace as measured by the most commonly used metric – market shares. In the market at the heart of the case – Intel-compatible PC operating systems – Microsoft's share has remained persistently high at supra-monopoly levels.[4] Microsoft's share of this market has stayed within a narrow range, from 93% in 1991 to 92% in 2006.[5] The other product of principal focus at the liability trial was web browsers. Largely due to the success of Mozilla's Firefox web browser, Microsoft's usage share has slipped from 95%

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[2] Herbert Hovenkamp, *The Antitrust Enterprise, Principle and Execution* 298 (2005) (citations omitted).

[3] Harry First & Andrew I. Gavil, *Re-Framing Windows: The Durable Meaning of the Microsoft Antitrust Litigation,* 2006 Utah L. Rev. 641, 644 (2006).

[4] Market shares in excess of 70% are generally deemed sufficient to support an inference of monopoly power. *See, e.g., United States v. Dentsply International, Inc.* 399 F.3d 181, 184-88 (3d Cir. 2005), *cert. denied* 126 S. Ct. 1023 (2006).

[5] *See* Exhibits 1 and 2, attached hereto. Exhibit 2 is a copy of trial exhibit GX 1. Both Exhibits 1 and 2 report International Data Corporation (IDC) market data. Microsoft's market share in 2005 was 96%. The 2006 data reflect Apple's recent transition to Intel architecture and show a decline in Microsoft's market share of 4% and a concomitant increase in Apple's market share from 0% to 4%.

in 2002 to 85% in 2006 – still well above monopoly levels.[6]

The server market was the focus of the important "forward-looking" aspects of the Final Judgments requiring Microsoft to disclose information necessary to enable other software products to interoperate with Windows. As the Court said regarding § III. E.:

> This aspect of the proposed consent decree, like § III.D., is forward-looking and seeks to address the "rapidly growing server segment of the market." United States Mem. at 59. A "growing number of applications…run on servers rather than on the desktop." Sibley Decl. ¶ 56. The technologies "represent[] a strong source of competition to Microsoft in the business computing segment and may yet make a serious attack on the applications barrier to entry in the desktop PC market." *Id.* Hence, the goal of this disclosure is to ensure that rival middleware can interoperate with servers running Microsoft's server operating system and thereby compete vigorously with Microsoft middleware.[7]

In fact, the server market has not proved to be a "strong source of competition to Microsoft," as the Court had anticipated based on the information provided to it. On the contrary, IDC data show that Windows' share of server operating system shipments has increased from 55% in 2002 to 72% in 2006.[8] Moreover, because of its royalty requirements and other license provisions, the MCPP is not a viable option for providers of open source Linux-based products - Microsoft's principal remaining source of competition in that market.[9]

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[6] *See* Exhibit 3, attached hereto. There are two recent noteworthy events that may affect future web browser market shares – with potentially opposite effects on IE's usage share: Microsoft's introduction of IE7, the first major overhaul of its web browser since 2002, and Apple's announcement of a Windows-compatible version of its Safari web browser.

[7] *United States v. Microsoft Corp.*, 231 F. Supp.2d 144, 189 (D.D.C. 2002), *aff'd* 373 F. 3d 1199 (D.C. Cir. 2004).

[8] *See* Exhibit 4, attached hereto. According to Microsoft CEO Steve Ballmer, more than 85% of large enterprises now use Microsoft's proprietary Active Directory technology. *See* Steve Ballmer, Remarks at the Microsoft Tech-Ed 2005 (June 5, 2005), *available at* http://www.microsoft.com/presspass/exec/steve/2005/06-06TechEd.mspx. It seems unlikely, therefore, that challengers will make substantial inroads on Microsoft's growing share of the server market.

[9] Less than three days before the agreed date for the filing of the parties' respective reports on remedial effectiveness, Microsoft provided the California Group with drafts of two "expert reports" totaling more than 80 pages (excluding appendices) that are annexed as Exhibits A and

The purpose of the remedy in this case was not to favor any particular competitor or to pre-determine competitive outcomes.[10] A fundamental purpose of an antitrust decree, however, is "to ensure competition."[11] It is noteworthy, then, that Microsoft's market dominance, which its anticompetitive conduct was intended to protect, has endured. When the remedial regime imposed by the Court expires in large part in November, 2007, the principal constraint on Microsoft's ability to abuse its market power will be gone. It is important, therefore, to assess what the Final Judgment has accomplished. Pertinent in that regard is Professor Hovenkamp's observation:

> By the time each round of the *Microsoft* litigation had produced a "cure," the victim was already dead. This makes it vitally important that settlements such as the one in *Microsoft* contain a clause that permits a court to retain its jurisdiction and assess future developments. Furthermore, the point of assessment down the road is *not* to insure that Microsoft has complied with the decree, but that the market is moving toward the competition that the court insisted should be the goals of an antitrust remedy in the first place. Unfortunately, compliance with the decree has come to define success. The government can subsequently proclaim

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B to its Report Concerning the Final Judgments. These reports are noteworthy in that they say virtually nothing about the PC operating system market, which was the focus of the liability phase of this case, or the server operating system market, which was an important aspect of the remedy. Nor do these reports take issue with any of the key facts noted in the California Group's Report on Remedial Effectiveness: 1) Microsoft's market power remains enormously high and virtually undiminished in the PC operating system market; 2) Microsoft has substantially increased its share of the server operating system market; 3) with respect to web browsers, the other product of principal focus at trial, Microsoft's market share has remained well above monopoly threshold levels and no significant OEM has made a web browser other than IE the default on its new PC systems; and 4) the MCPP has failed to yield any products that challenge, rather than enhance, Microsoft's market dominance. Instead, the two reports obfuscate these crucial facts by describing in great detail the various other types of applications and services often found on PCs – most of which are not middleware as defined by the Final Judgment or represent a significant platform threat to Windows.

[10] Microsoft states in its Report Concerning the Final Judgments (at 3) that the Final Judgment was not "designed to reduce Microsoft's market share." The California Group does not contend otherwise. Rather, the market data cited by the California Group – which Microsoft does not dispute – indicate that the Final Judgment within its limited five year term has had no impact on Microsoft's enormous entrenched market power, which endures and remains subject to abuse once the Final Judgment expires.

[11] *See New York v. Microsoft Corp.*, 224 F.Supp.2d 76, 184 (D.D.C. 2002).

> victory by citing compliance with the decree, without ever asking whether the decree is doing anything to make the market more competitive.[12]

I. PROSCRIPTIVE PROVISIONS

Various provisions of the Final Judgment (§§ III. A., B., F. and G.) prohibit Microsoft from engaging in specific types of conduct that the Court found to be anticompetitive – including exclusive dealing, retaliation and discriminatory pricing. As far as the California Group is aware, Microsoft has not directly contravened these provisions.[13] Plaintiffs' scrutiny of Microsoft's conduct during the past five years may well have been a factor in constraining Microsoft's conduct. Microsoft did not, however, cease the prohibited practices because of the Final Judgment. Most, if not all, of the specific practices proscribed by the Final Judgment were abandoned by Microsoft after they were called into question during the liability phase of the case. The Final Judgment has demanded relatively little of Microsoft other than to fulfill its disclosure obligations under § III.E. – which it still has not discharged in full.

There is no way of knowing whether Microsoft will continue to refrain from engaging in the anticompetitive conduct enjoined by the Final Judgment once it has expired and plaintiffs are no longer able to enforce it. During the past five years, plaintiffs have scrutinized Microsoft's compliance with the various obligations imposed by the Final Judgments. Termination of Microsoft's obligations and of plaintiffs' oversight, including plaintiffs' ability to investigate complaints and review Microsoft's internal records, will remove a significant constraint on Microsoft's behavior. Given Microsoft's continued dominance of the PC operating system and adjacent markets, its future conduct will turn largely on what, if anything, it has learned from this litigation and the extent to which that learning has changed its corporate culture.

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[12] Hovenkamp, *supra* n.2, at 299-300.
[13] *See* Final Judgment, § V.

As the Court has observed, Microsoft announced a set of so-called Twelve Tenets to Promote Competition in July, 2006.[14] According to Microsoft, these tenets are intended to foster, inter alia, "user choice, opportunities for developers and interoperability for users" in recognition of "the important role its Windows desktop operating system products play in the information economy and the responsibilities that come with that role." [15] These "Windows Principles" are, of course, completely voluntary, and it is unclear whether they are simply a public relations gesture or something more substantive. For example, Microsoft's original treatment of desktop search in Vista did not seem to accord entirely with Principle #3 in which Microsoft pledged "to design Windows so as to enable computer manufacturers and users to set non-Microsoft programs to operate by default in key categories…" [16] Only time will tell whether Microsoft honors its commitment if and when it is confronted by other competitive threats in the future.

II. MIDDLEWARE-RELATED PROVISIONS

The provisions of the Final Judgment most crucial to effecting change in the marketplace are those intended to insure that consumer and OEM middleware choices are based on the relative merits of the products – not on advantages accruing to Microsoft through misuse of its desktop monopoly. The relevant provisions of the Final Judgment are §§ III. C. and H, intended to encourage OEM flexibility, and §§ III. D. and E., intended to promote third party interoperability. They reflect the Court's recognition that simply prohibiting a monopolist from engaging in specific anticompetitive practices, especially those long since abandoned, is

[14] Tr., No. 98-1233 (CKK), September 7, 2006, at 5.
[15] Microsoft Corp, *Windows Principles: Twelve Tenets to Promote Competition* (July 2006), *available at* http://www.microsoft.com/presspass/newsroom/winxp/windowsprinciples.mspx.
[16] *Id.*

insufficient to achieve the requisite remedial objectives.[17] Unfortunately, these provisions have yielded little, if any, tangible pro-competitive results. The significance of this failure cannot be overstated.

In its Tunney Act decision, the Court stressed the centrality of the middleware threat to plaintiffs' theory of the case, noting in particular that plaintiffs had "focused their attention primarily upon two such middleware threats to Microsoft's operating system dominance – Netscape Navigator and the Java technologies."[18] In crafting its remedy, the Court relied upon the prediction in the United States' Competitive Impact Statement that §§ III. C. and H. of the Final Judgment "will enhance competition between Microsoft middleware and non-Microsoft middleware" and "will effectively remedy commingling."[19] Moreover, as noted above, the Court stressed that the "goal" of the disclosures mandated by §§ III.D. and E. was to "ensure that rival middleware can interoperate with servers running Microsoft's server operating system software *and thereby compete vigorously with Microsoft middleware*."[20] These middleware-related provisions of the Final Judgment also had the critical remedial objective, as the Court of Appeals recognized, of "deny[ing] the defendant the fruits of its statutory violation":

> the fruit of its violation was Microsoft's freedom from the possibility that rival middleware vendors would pose a threat to its monopoly of the market for Intelcompatible (sic) PC operating systems. The district court therefore reasonably identified opening the channels of distribution for rival middleware as an appropriate goal for its remedy. By "pry[ing] open these channels, *International Salt*, 332 U.S. at 401, 68 S.Ct. at 17, the district court denied Microsoft the ability again to limit a nascent threat to its operating system

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[17] *See, e.g., New York v. Microsoft Corp.*, 224 F.Supp.2d at 171 ("facilitating interoperation between Microsoft's PC operating system and third-party middleware…is consistent with the goal of 'ensur[ing] that there remain no practices likely to result in monopolization in the future.' *United Shoe*, 391 U.S. at 250, 88 S.Ct. 1496.").

[18] *United States v. Microsoft Corp.*, 231 F. Supp. 2d at 156 (footnote omitted).

[19] *Id.* at 181.

[20] *Id.* at 189 (emphasis added).

monopoly.[21]

A. The Disclosure Provisions

The disclosure provisions of the Final Judgment have failed to achieve any competitively meaningful results. Based on the information available to the California Group, including the responses to its MCPP licensee survey, there are 29 MCPP licensees of whom 13 actually have shipped product. Nine of these 13 licensees have self-described these MCPP products as being complements to Windows servers.[22] Accordingly it would appear that the principal competitive effect of MCPP products has been to promote the diffusion of Microsoft technology into mixed networks rather than to provide alternative platforms that the Court identified as the remedial purpose of § III.E.

In the January 16, 2004, Joint Status Report (at pages 5-7), all plaintiffs told the Court:

> The fact remains, however, that a majority of the licensees appear to be developing a relatively narrow set of products. Plaintiffs do not by any means intend to suggest that the development work and products that the current licensees make or intend to make using the CPs are of no or little value in the marketplace. Rather, bearing in mind the Court's articulated remedial goals for Section III.E., Plaintiffs are concerned that the development efforts of the current licensees are not likely to spur the emergence in the marketplace of broad competitors to the Windows desktop. To date, the MCPP appears unattractive to potential licensees with well-defined plans to build products that could enable software on servers to fully utilize the connectivity to the Windows desktop afforded by the CPs available through Microsoft's program….
>
> At the same time, a small number of licensees apparently are planning to use the CPs in ways that appear more closely connected to furthering the remedial goals of Section III.E. In general, these companies do not fall into any of the categories discussed above. While it is possible that all of the MCPP licensees may develop products that could create or support platform threats, Plaintiffs remain concerned that the prospects for the current group of licensees necessarily developing new products of this type are uncertain.

More recently, at the February 9, 2005 Status Conference, counsel for the United

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[21] *Massachusetts v. Microsoft Corp.*, 373 F.3d 1199, 1232-33 (D.C. Cir. 2004).

[22] A table showing MCPP licensing by task is attached hereto as Exhibit 5.

States responded to the Court's question about "[w]hat effect, if any, this [decree] has had on the marketplace generally," as follows:

> It is a question we ask ourselves frequently, but don't have a particularly good answer for. I think part of the reason for that, 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 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.[23]

The California Group sees no reason to revise the assessments they and other plaintiffs previously have provided to the Court.

B. The OEM Flexibility Provisions

As the Court is aware, web browsers are the most significant category of middleware, having been the nascent platform threat at which most of Microsoft's anticompetitive conduct established at the trial was directed. To the best of the California Group's knowledge, no major OEM has taken advantage of the OEM flexibility provisions of the Final Judgment to designate a web browser other than Microsoft's IE as the default on the Start Menu of its new PC systems. Moreover, there is no reason to believe that any decline in IE's usage share is attributable to the Final Judgment, as counsel for the United States noted at the February 9, 2005 Status Conference:

> There has been some discussion recently in the press about a slight reduction in Microsoft's share in the Internet Explorer browser market. It's hard to know what that's attributable to, and I wouldn't want to credit the final judgment….[24]

It would appear, then, that, as a practical matter, the Final Judgment has not succeeded in "prying open" what is perhaps the most critical distribution channel – sales of new PC systems.

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[23] Tr., No. 98-1233 (CKK), February 9, 2005, at 16-17.
[24] Tr., No. 98-1233 (CKK), February 9, 2005, at 17.

C. Reasons for Ineffectiveness of Middleware-Related Provisions

There are several reasons why the Final Judgment has not produced greater results with respect to middleware. One overarching reason is that no middleware product has emerged in the last 15 years that poses the same level of platform threat to Microsoft's operating system dominance that Netscape/Java posed in the mid-1990's.[25] Although it is often said that high tech markets are subject to rapid change, that is not true in the PC operating system market which is subject to strong network effects and is protected by the applications barrier to entry. Microsoft's share of that market has remained extraordinarily high and virtually unaltered for at least the past 15 years – from 93% in 1991 to 92% in 2006.[26] Moreover, Microsoft only recently introduced its Vista operating system as the successor to its Windows XP operating system that was prevalent when the Final Judgment was entered five years ago.

The confluence of the introduction of Netscape Navigator and the Java technologies appears to have been a rare challenge, not duplicated since, to Microsoft's entrenched market power. The middleware-related provisions of the Final Judgment were premised on the notion that any harm done by Microsoft to Netscape/Java could be remedied by nourishing similar middleware threats in the future.[27] The Final Judgment could not attain its intended remedial objectives, however, if no middleware product emerged during its limited five-year term that had a similar potential to threaten Microsoft's platform dominance – and none has.

There are several additional reasons why the MCPP has not been more successful. First,

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[25] Non-Microsoft desktop search products could develop into a potentially significant cross-platform middleware threat to Windows, which is why the California Group supported the changes to Vista described at the Compliance Hearing on June 26, 2007.

[26] *See* Exhibit 1 and 2, attached hereto.

[27] For example, the United States advised, in its Competitive Impact Statement (at p. 18), that the Final Judgment was intended to "restore the competitive threat that middleware products posed prior to Microsoft's unlawful conduct."

it is of no utility to companies that constitute a significant segment of the server market. MCPP licenses are simply not a viable option for suppliers of open source products - now the principal alternative to Microsoft in the server market. These companies cannot utilize MCPP licenses because of their royalty provisions and other restrictions on the use of intellectual property.[28]

Second, the MCPP has not proved attractive to manufacturers of general server systems because it does not provide the server-to-server disclosures necessary to allow their products to operate in a mixed environment with both Microsoft servers and clients.[29] That capability is necessary because many business/enterprise networks that utilize Windows clients also utilize Windows servers. MCPP licenses are of little use to manufacturers of general servers unless their servers can communicate with Windows servers. Consequently, the MCPP has failed to yield even one product that has enhanced in any meaningful way the ability of general servers to become a middleware platform threat to Windows, as envisioned by the Final Judgment.[30]

A third factor that has inhibited broader utilization of the MCPP, particularly by general server licensees, is Microsoft's failure to document its server-to-client communications protocols

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[28] Certain aspects of the MCPP directly conflict with the terms of a commonly-used open-source license, the General Public License (GPL). *See generally* http://www.gnu.org/licenses/gpl-faq.html (last visited July 25, 2007). For example, the MCPP prohibits licensees from distributing source code, does not allow end users to modify products, and imposes royalty terms inconsistent with the GPL Terms & Conditions. Thus, prominent open-source software released under the GPL, such as the Linux operating system and the Samba file and print services program, are ineligible to participate in the MCPP.

[29] It is possible that, if the Work Group Server Protocol Program (WSPP) in the European Union provides sufficient disclosure to enable server-to-server interoperability, some companies may be interested in taking both MCPP and WSPP licenses. *See* http://www.microsoft.com/about/legal/intellectualproperty/protocols/wspp/wspp.mspx (last visited July 17, 2007).

[30] Six companies have signed a general server license under the MCPP program. According to information obtained from both Microsoft and the licensees, three of the companies (one of which has gone out of business) never even accessed the technical documentation, and the other three have developed products which utilize only a narrow range of general server tasks and which the licensees themselves describe as being primarily complements to Windows servers.

on a timely basis. Section III.E. required Microsoft to provide that disclosure starting three months after entry of the Final Judgment. At the May 17, 2006 Status Conference, when the Court approved Microsoft's proposed "reset" and extended § III.E. for two additional years, Microsoft acknowledged that its prior technical documentation "wasn't really meeting anyone's needs."[31] Microsoft's delay in satisfying its § III.E. disclosure obligations has undermined any reasonable expectations for this "forward-looking" aspect of the Court's remedy.[32] Given the lead time necessary to make a business decision whether to commit the considerable resources necessary to develop the full range of functionality conveyed by a general server license, it is not surprising that no company has opted to develop a general server product in the absence of complete and accurate technical documentation.

The OEM flexibility provisions of the Final Judgment have not produced competitively significant results because they do not adequately address the persistent disincentives (including Microsoft's advantage of free universal distribution, additional support costs, potential consumer confusion and PC resource constraints) that discourage OEMs from preloading rival middleware products on a Windows PC that already comes bundled with similar Microsoft products. Particularly telling is the fact that, despite widespread consumer acceptance of the Firefox web browser, no major OEM has preloaded it onto new PC systems.[33] In other words, these

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[31] Tr., No. 98-1233 (CKK), May 17, 2006, at 39. Moreover, Microsoft ascribed it problems in producing better technical documentation to the fact that it hadn't had "the exact right resources…[or] the right process in place." *Id.,* at 56.

[32] "Initial availability" to licensees of the final group of Milestone 5 documents (46 documents) of the revised technical documentation was not made until just a couple of weeks ago. Supp. Status Report on Microsoft's Compliance with the Final Judgment (filed July 16, 2007), at 2.

[33] Firefox has attained a web browser usage share in the United States of approximately 13%. *See* Exhibit 3, attached hereto. Moreover, it has garnered numerous critical reviews comparing it favorably to IE. *See, e.g,* CNET, *Internet Explorer 7 vs. Firefox 2* (last visited July 17, 2007), *available at* http://reviews.cnet.com/4520-10442_7-6656808-7.html?tag=btn ("Firefox 2 still rules the browser roost for now, despite a much improved version of Internet Explorer"); PC

provisions have not proved sufficiently powerful to overcome the very strong effects exerted on OEMs by Microsoft's commingling and bundling of its own middleware products with Windows.[34]

It should not be surprising perhaps that the middleware-related provisions of the Final Judgment have been so ineffectual, especially given Microsoft's entrenched market power. It has long been recognized that conduct remedies in Sherman Act § 2 cases are notoriously difficult to calibrate correctly because their consequences are often "unpredictable" and the monopolist "can adopt alternative patterns of behavior to effectuate its market power." [35] Recently, the California Group expressed concern that the original presentation of desktop search in Vista undermined the potential of rival desktop search products to develop into platform threats through the APIs they expose to third party developers. As a result, and despite some ambiguity in the language of the Final Judgment written five years earlier in the context of a different operating system, plaintiffs were able to secure potentially procompetitive changes in the way desktop search is presented in Vista.

World, *Radically New IE 7 or Updated Mozilla Firefox 2--Which Browser Is Better?* (October 24, 2006), *available at* http://www.pcworld.com/article/id,127309-page,6-c,browsers/article.html ("Of the two rivals, Firefox remains the better application").

[34] The "market test" provided by Firefox demonstrates that the Court of Appeals was unduly optimistic when it predicted that simply allowing OEMs to disable end user access would make them "more likely to install a rival web browser based upon market determinants, such as consumer demand." *Massachusetts v. Microsoft Corp.*, 373 F.3d 1199, 1238-39 (D.C.Cir. 2004).

[35] Kevin J. O'Connor, *The Divestiture Remedy in Sherman Act §2 Cases*, 13 Harv. J. On Legis. 687, 731-33 (1976). *See also* R. Craig Romaine & Steven C. Salop, *Alternative Remedies for Monopolization in the Microsoft Case*, 13 Antitrust ABA 3, 15-18 (1999) (predicting that conduct remedies in *Microsoft* would be of limited effectiveness because of, inter alia, their insufficiency to "kick start" competition in view of network effects and the possibility that Microsoft could design strategies that steer clear of prohibited conduct but nevertheless have an exclusionary effect). Indeed, the Court itself has acknowledged the difficulty in predicting "future demands of the software industry." *New York v. Microsoft Corp.*, 224 F.Supp.2d at 183.

III. OTHER PROVISIONS

The California Group also wishes to make some observations about two additional important provisions of the Final Judgment: those relating to the Technical Committee (§ IV.A. in the *United States* case) and to Termination (§ V.).

A. The Technical Committee

The Court has noted that the Technical Committee has played an important role on enforcement matters beyond what it had envisioned, and the California Group has acknowledged that the Technical Committee exceeded its expectations as well.[36] The Technical Committee has seized the initiative on numerous projects on which Microsoft should have taken the lead, from assessing the accuracy and completeness of the technical documentation to making sure that important ISVs were aware of changes in Vista that might affect their products. Its members have cooperated with the California Group and have interacted seamlessly with the California Group's technical consultant Craig Hunt. The California Group believes the Technical Committee has been instrumental in extracting the maximum remedial benefit from the Final Judgment. This result is no doubt attributable to the professionalism, competence and diligence of the Technical Committee's members and staff, as well as to its independence from Microsoft

B. Termination

As the Court is aware, the Final Judgment's five-year term is a substantial deviation from the Antitrust Division's policy not to negotiate consent decrees of less than 10 years' duration.[37] The justification given for the departure from the standard 10-year term was the pace of technological change in the computer industry. But whatever merit this observation might have

[36] Tr., No. 98-1233 (CKK), February 14, 2006, at 11, 16-17, 36-37; Tr., No. 98-1233 (CKK), May 17, 2006, at 4.
[37] *New York v. Microsoft Corp.*, 224 F. Supp.2d at 184.

generally to the computer industry, it is singularly inapplicable to the market for PC operating systems which is the focus of this case. Not only has Microsoft just recently introduced Vista as the successor to Windows XP, but its market power has remained undiluted as evidenced by a market share in excess of 90% for at least the past 15 years. As a practical matter, termination of the Final Judgment means, inter alia, that plaintiffs will not be able fully to assess the impact in the marketplace of Microsoft's recent introduction of Vista.

CONCLUSION

The California Group has worked diligently and cooperatively with the other plaintiffs during the past five years to enforce the Final Judgment. As Professor Hovenkamp has noted, though, the success of the Final Judgment should not be measured by the extent of plaintiffs' diligence or Microsoft's compliance. Rather, the critical question is what, if any, impact the Final Judgment has had on competitive conditions. There can be little doubt that Microsoft's market power remains undiminished and that key provisions of the Final Judgment– those relating to middleware – have had little or no competitively significant impact. One can fairly ask what impact the Final Judgment has had on Microsoft – apart from the cost of developing the still delayed Technical Documentation – that would cause it to refrain from engaging in similar conduct with respect to whatever competitive threat might arise in the future. Consequently, the California Group respectfully submits, Microsoft's commingling violation has not been effectively addressed, Microsoft remains in possession of the fruits of its violation, and the competitive conditions antedating Microsoft's anticompetitive conduct have not been restored. The California Group will be prepared to discuss at the next Joint Status Conference what, if any, changes the Court might consider with respect to the remedy in this case.

Dated: August 30, 2007

Respectfully submitted,

FOR THE STATES OF CALIFORNIA. CONNECTICUT, IOWA, KANSAS, MASSACHUSETTS, MINNESOTA, AND THE DISTRICT OF COLUMBIA

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Exhibit 1. Actual Shares, Worldwide Intel-Compatible PC Operating System Market, 2000-2006

Client Operating System	2000	2001	2002	2003	2004	2005	2006
Windows (all versions)	96%	96%	97%	97%	97%	96%	92%
Apple Mac OS*	0%	0%	0%	0%	0%	0%	4%
Linux (paid)	2%	2%	3%	3%	3%	4%	4%
Other single-user	2%	1%	<1%	<1%	<1%	<1%	<1%

<1%=less than 1% All figures rounded to nearest percentage

* Apple released Macintoshes based on Intel microprocessors in January 2006[1] and completed the transition to Intel processors in August 2006.[2]

The table presents all of Apple's 2006 units shipped that year as if they were in the Intel-compatible market, although some units shipped that year were still based on non-Intel compatible processors and would properly be classified as outside the relevant market.

Sources

For 2000-2002: IDC Report #30159, September 2003 *Worldwide Client and Server Operating Environments Forecast, 2002-2007: Microsoft Growth Sets Stage for SOE [Server Operating Environment] Dominance*, by Al Gillen and Dan Kusnetzky – Table 2, Worldwide Client and Server Operating Environment New License Shipments, 2000-2002

For 2003-2006: IDC Report #205411, February 2007, *Worldwide Client and Server Operating Environments 2007-2010 Forecast and Analysis: Don't Count Anybody Out Yet*, by Al Gillen and Brett Waldman – Table 2, Worldwide Client and Server Operating Environments Paid New License Shipments, 2003-2006 (000)

[1] Press Release, Apple Inc., Apple Unveils New iMac with Intel Core Duo Processor (January 10, 2006), *at* http://www.apple.com/pr/library/2006/jan/10imac.html.

[2] Press Release, Apple Inc., Apple Unveils New Mac Pro Featuring Quad 64-bit Xeon Processors – New Mac Pro Completes Apple's Intel Transition (August 7, 2006), *at* http://www.apple.com/pr/library/2006/aug/07macpro.html.

Report Exhibit 2. GX 1

Exhibit 1

Microsoft's Actual and Projected Share of the (Intel-Based) PC Operating System Market (According to IDC)

	Year[4,5,6]										
Operating System[1]	1991	1992	1993	1994	1995	1996	1997	1998	1999	2000	2001
Microsoft[2]	93	92	93	93	90	94	95	95	95	95	96
IBM OS/2	0	3	3	4	7	3	3	3	3	3	3
UNIX[3]	0.2	0.2	0.2	0.1	0.1	0.1	0.1	0.1	0.1	0.1	0.1
Other Intel	7	4	4	3	3	2	2	2	2	2	2

Notes:

[1] Operating systems used in single-user client and PC operating environment.
[2] Includes Microsoft 16-bit and 32-bit Windows and MS-DOS.
[3] Intel-based UNIX operating systems.
[4] Market shares may not total 100% due to rounding.
[5] The market shares for the years 1997-2001 are forecasts.
[6] Worldwide

Sources:

International Data Corporation (1997), OPERATING ENVIRONMENTS, REVIEW AND FORECAST 1996-2001.
International Data Corporation (1997), CLIENT OPERATING ENVIRONMENTS, REVIEW AND FORECAST 1996-2001.

Exhibit 3. Major Browser Worldwide Usage Shares, 2002-2007, Three Commercial Services

StatMarket® by Visual Sciences, Inc. (formerly WebSideStory, Inc.) tracks Web site statistics at over 1,500 global enterprises visited by tens of millions of users daily.
Data Source: http://www.statmarket.com

StatMarket Global Data, 2002-2007

	Nov 2002	Nov 2004	Nov 2005	Nov 2006	June 2007
Internet Explorer	96%	93%	88%	85%	80%
Mozilla/Firefox	n/a	4%	9%	12%	15%
Netscape	4%	2%	<1%	<1%	<1%
Apple Safari	n/a	<1%	2%	2%	3%
Opera	<1%	<1%	<1%	<1%	<1%

n/a= not available <1%=less than 1% All figures rounded to nearest percentage

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HitsLink by Net Applications tracks browser usage at small and medium enterprises.
Data Source: http://marketshare.hitslink.com/report.aspx?qprid=0.

HitsLink, 2004-2007

	Nov 2002	Nov 2004	Nov 2005	Nov 2006	June 2007
Internet Explorer	n/a	92%	86%	81%	79%
Mozilla/Firefox	n/a	4%	9%	14%	15%
Netscape	n/a	2%	1%	<1%	<1%
Apple Safari	n/a	1%	3%	4%	4%
Opera	n/a	<1%	<1%	<1%	1%

n/a= not available <1%=less than 1% All figures rounded to nearest percentage

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OneStat reports browser usage for over 75,000 subscribers worldwide.
Data Source: http://www.onestat.com/html/aboutus_pressbox.html.

OneStat, 2002-2007

	Sept 2002	Nov 2004	Nov 2005	Nov 2006	June 2007
Internet Explorer	94%	89%	85%	85%	85%
Mozilla/Firefox	<1%	7%	12%	12%	13%
Netscape	1%	n/a	<1%	<1%	<1%
Apple Safari	n/a	n/a	2%	2%	2%
Opera	<1%	1%	<1%	<1%	<1%

n/a= not available <1%=less than 1% All figures rounded to nearest percentage

Exhibit 4. Actual Shares, Worldwide Server Operating System Shipments, 2000-2006

Server Operating System	2000	2001	2002	2003	2004	2005	2006
Windows (all versions)	44%	50%	55%	61%	70%	72%	73%
Linux (paid)	21%	22%	23%	18%	12%	13%	15%
Unix (all versions)	16%	12%	11%	8%	6%	5%	4%
Novell NetWare	16%	12%	10%	12%	11%	10%	8%
Mainframe, IBM OS/400, Other host/server/multiuser	4%	2%	<1%	<1%	<1%	<1%	<1%

<1%=less than 1% All figures rounded to nearest percentage

Sources

For 2000-2002: IDC Report #30159, September 2003, *Worldwide Client and Server Operating Environments Forecast, 2002-2007: Microsoft Growth Sets Stage for SOE Dominance*, by Al Gillen and Dan Kusnetzky – Table 2, Worldwide Client and Server Operating Environment New License Shipments, 2000-2002

For 2003-2006: IDC Report #205411, February 2007, *Worldwide Client and Server Operating Environments 2007-2010 Forecast and Analysis: Don't Count Anybody Out Yet*, by Al Gillen and Brett Waldman – Table 2, Worldwide Client and Server Operating Environments Paid New License Shipments, 2003-2006 (000)

Exhibit 5. MCPP Licensing, by Task

	January 16, 2004	*June 19, 2007*
General-purpose Task		
General Server	1 license	6 licenses
Limited-purpose Tasks		
Certificate Services	1 license	3 licenses
File Server	2 licenses	3 licenses
Health Certificate Services	*Task did not exist*	1 license
Media Streaming Server	6 licenses	9 licenses
Proxy/Firewall/NAT	0 licenses	7 licenses
Terminal Services	2 licenses	2 licenses