ORAL ARGUMENT SCHEDULED FOR APRIL 24, 1995

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 95-5037, 95-5039
Consolidated Cases

UNITED STATES OF AMERICA,

Plaintiff-Appellant (No. 95-5037),

v.

MICROSOFT CORPORATION,

Defendant-Appellant (No. 95-5039).

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF FOR APPELLANT UNITED STATES OF AMERICA

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Authorities upon which we chiefly rely are marked with asterisks.

STATUTE

MISCELLANEOUS

GLOSSARY

Amici Br.	Revised Joint Brief of Amici Curiae on Common Issues
AT&T	American Telephone and Telegraph Company
CCIA	Computer & Communications Industry Association
IBM	International Business Machines Corporation
IDEA	I.D.E. Corporation
J.A.	Joint Appendix
OEM	Original Equipment Manufacturer
Op.	District Court opinion issued Feb. 14, 1995.
Supp. Br.	Supplemental Brief for Amicus Curiae I.D.E. Corporation and Computer & Communications Industry Association

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ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF FOR APPELLANT UNITED STATES OF AMERICA

The complaint in this case alleged that particular practices of Microsoft violated the Sherman Act. The government negotiated a consent decree that would terminate those practices and prevent their reinstitution. The only question before the district court was whether the government reasonably determined that this settlement is within the reaches of the public interest as a remedy for the challenged practices. Amici have offered no reason to conclude that it is not.

SUMMARY OF ARGUMENT

Congress has provided for interlocutory appeal as of right from orders "refusing . . . injunctions," 28 U.S.C. 1292(a)(1), and an order refusing entry of a consent decree comes within the statute as long as denying an immediate appeal "might have a serious, perhaps irreparable, consequence," Carson v. American Brands, Inc., 450 U.S. 79, 84 (1981) (internal quotations

omitted). The district court's rejection of the decree in this case readily meets the Carson standard. By insisting on deal-breaking revisions of the proposed injunction and on improperly intrusive scrutiny and disruptive disclosure of details of the government's investigation, the district court has forced the parties to litigate the case, with all the irretrievable costs and uncertainty of result that such a course would entail. Without immediate appeal, the parties would return to their adversarial roles, and the government would thereby be subjected to the serious risk that it might not secure the injunction it seeks at the earliest opportunity. Meanwhile, public enforcement resources would be needlessly diverted from other matters, and the government's ability to obtain consent decrees would be seriously compromised. Nothing in amici's challenge undermines the clear presence of jurisdiction under section 1292 in these circumstances.

On the merits, amici's defense of the district court's ruling is fundamentally flawed at each turn. Notably, amici accept our showing that the district court could not, under the Tunney Act, scrutinize the government's determinations as to practices not challenged in the complaint unless there had been some evidence that the proposed decree was part of a "side deal" limiting future government challenges to such other practices. Because there is not a shred of evidence of any such undisclosed agreements, and the Assistant Attorney General in charge of the Antitrust Division assured the district court that none exist, no further inquiry was authorized by the Tunney Act into practices outside the scope of this case. Rather, the sole question was the propriety of the proposed Final Judgment as a remedy for the violations alleged in the complaint.

In seeking to contest the reasonableness of the government's judgment that the decree effectively redresses the challenged conduct, amici pervasively rely on an erroneous legal theory, one that ignores the fundamental remedial principle that the remedy be tailored to the violation. On the narrow issues raised under this proper legal standard, amici have very little to say, much less

sufficient reason to undermine the government's judgment -- itself supported by expert testimony -- that the particular licensing practices at issue had immaterial, unmeasurable past effects in the market. Indeed, amici's sole argument addressed to this issue, focusing on the increase in the installed base of Windows, rests on a plain misuse of the record evidence. The government was therefore well within the bounds of reasonable judgment in determining that complete and immediate prospective relief was an effective antitrust remedy for the violations alleged. It was likewise reasonable in not insisting upon additional prophylactic relief, in limiting the decree to products in which Microsoft has market power, and in omitting an individual firm's damages claim from the decree. The district court's refusal to enter the decree should be reversed.

ARGUMENTA. THE COURT HAS JURISDICTION OVER THIS APPEAL

Section 1292(a)(1) grants the courts of appeals jurisdiction over interlocutory appeals from orders "refusing . . . injunctions." 28 U.S.C. 1292(a)(1). The district court's order denying the government's motion to enter the proposed Final Judgment, which provides for injunctive relief, has the "practical effect" of denying injunctive relief and thus falls squarely within the language and purpose of the statute. See Carson v. American Brands, Inc., 450 U.S. 79, 83-84 (1981); United States v. Western Elec. Co., 777 F.2d 23, 28-29 n.12 (D.C. Cir. 1985). The only question for this Court is whether the district court's order "might have a serious, perhaps irreparable, consequence [that] can be effectually challenged only by immediate appeal," Carson, 450 U.S. at 84 (internal quotations omitted), an additional requirement that Carson established in recognition of "the general congressional policy against piecemeal review," id.

This requirement of irreparable consequences is readily satisfied in this case. Here, as in Carson, the district court has insisted on additional terms that "radically affect[]" the settlement,

Carson, 450 U.S. at 87 & n.12, such as the prohibition of certain product preannouncements, see Op. at 29, 35-40 (J.A. 1222, 1228-33), and an extension of the decree to cover "operating systems developed for new microprocessors," id. at 31-32 (J.A. 1224-25). See generally id. at 15-16 n.15 (J.A. 1208-09). Neither the government nor Microsoft is willing to accept those terms. Compare id. at 15-16 n.15, 28-29, 31-32, 34, 40-42 (J.A. 1208-09, 1221-22, 1224-25, 1227, 1233-35) with J.A. 850-54, 857, 913, 919-20, 935-37, 958-59. Thus, the district court has caused the parties irreparable harm by effectively eliminating "their opportunity to settle their case on the negotiated terms," Carson, 450 U.S. at 86, 88, and forcing them back into the posture of adversaries, see id. at 87-88 & nn.12, 14. As a direct result, here, as in Carson, the party seeking the injunction will suffer the irreparable harm of denial of the uncontested injunctive relief "at the earliest opportunity." Id. at 89. Indeed, the government might not be able to obtain the relief set forth in the proposed Final Judgment, at least not without substantial costs, even as a preliminary injunction, for it is hard to imagine that Microsoft would refrain from contesting the factual and legal predicates the government would have to establish to secure such relief.[1/] These results -- the breaking of the deal, the prospect of costly and uncertain litigation, the loss of the guaranteed injunction "at the earliest opportunity" -- are precisely what the Carson Court held sufficient for an appeal under 28 U.S.C. 1292.[2/]

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[1] Microsoft consented to entry of the decree and agreed to abide by its terms pending its entry as a condition of settlement. As the Court emphasized in Carson, settlement agreements often are "predicated on an express or implied condition that the parties would, by their agreement, be able to avoid the costs and uncertainties of litigation." Carson, 450 U.S. at 87. By requiring the parties to go to trial, moreover, the district court has "radically affected" that condition of settlement, id., and there is no good reason to assume that Microsoft would continue to consent to the relief provided by the decree, on a permanent or temporary basis, if required to litigate, see id. at 87-88 & n.13.

[2] Amici offer no support for limiting Carson to situations in which a district court order "resolve[s] a legal issue restricting the scope of injunctive relief available even after a full trial." Amici Br. at 22. Instead, the courts of appeals consistently have interpreted Carson to allow immediate appeal of a refusal to enter a consent decree whenever the district court insists on terms that, as a practical matter, would so alter the character of the settlement as to preclude any agreement

In fact, in this case there is more. The district court required the government to disclose details of its investigation, including details of its investigation of practices that it did not challenge, as a condition to entry of the decree. See Op. at 29-31 (J.A. 1222-24). But the government could not make such disclosure, which the district court lacked authority to demand, without seriously undermining its enforcement responsibilities. See infra p.8. Moreover, requiring the government and defendant to litigate when they have already negotiated effective relief would needlessly divert enforcement resources from other matters and seriously deter settlements, thus impairing the consent decree as a frequently used and congressionally approved enforcement tool in the antitrust context. See United States v. American Tel. & Tel. Co. (AT&T), 552 F. Supp. 131, 151 (D.D.C. 1982), aff'd sub nom. Maryland v. United States, 460 U.S. 1001 (1983).[3/] These irreparable harms to the public interest in effective antitrust enforcement further justify an immediate appeal. Cf. Digital Equip. Corp. v. Desktop Direct, Inc., 114 S. Ct. 1992, 2004 (1994) (explaining that "decisions involving

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by the parties. See, e.g., Sierra Club, Inc. v. Electronics Controls Design, Inc., 909 F.2d 1350, 1354 n.3 (9th Cir. 1990) (finding irreparable harm when the district court "attack[ed] the underlying premise of the settlement"); United States v. Colorado, 937 F.2d 505, 508-09 & n.1 (10th Cir. 1991) (finding irreparable harm when the district court insisted on changing a "material term of the agreement"); see also EEOC v. Pan American World Airways, Inc., 796 F.2d 314, 317 (9th Cir. 1986) (denying appeal when the district court's refusal to enter consent decree was based on inadequacy of monetary settlement, rather than the agreed-upon injunctive relief, and when the district court's rejection "in no way inhibit[ed] further negotiations . . . to meet the concerns raised"), cert. denied, 479 U.S. 1030 (1987).

Amici are likewise wrong in relying on New York v. Dairylea Coop. Inc., 698 F.2d 567 (2d Cir. 1983), in which the Second Circuit merely objected to smuggling an essentially non-injunctive action under Section 1292, see id. at 570 & n.11. Dairylea in fact supports the government's contention that a section 1292 appeal may be had if the district court, in rejecting a proposed settlement that contains proper injunctive relief, insists on terms that leave the parties realistically unable "to devise a settlement which would respond to [its] objections." Id. at 570; see also Donovan v. Robbins, 752 F.2d 1170, 1174 (7th Cir. 1984) (Dairylea requires litigants to show that "they are at an impasse with the district judge").

[3] See also United States' Motion For Expedited Consideration And For Briefing Schedule at 1-7 (Feb. 16, 1995).

rights more deeply rooted in public policy" than mere private rights warrant broader departures from the final judgment rule).

I. THE DISTRICT COURT INCORRECTLY REJECTED THE DECREE

Amici cannot defend the district court's rationale for its order -- that the decree could be rejected for failure to remedy violations that the government did not allege. Rather, amici accept the contours of the Tunney Act public interest inquiry as set forth in our opening brief: (1) does the judgment affect practices outside the complaint because it is part of a "side deal" limiting the government's future ability to challenge any such practices?; and, if not, (2) is the judgment a reasonable and effective remedy for the practices within the complaint brought by the government?[4/] Amici also agree that, on the question of effective remedy, the court must give the government's judgments substantial deference, respecting those judgments as long as they are "reasonable" and, hence, "within the zone of settlements consonant with the public interest." United States v. Western Elec. Co. (Triennial Review Remand), 993 F.2d 1572, 1576 (D.C. Cir.) (emphasis and internal quotations omitted), cert. denied, 114 S. Ct. 487 (1993); United States v. Western Elec. Co., 900 F.2d 283, 307 (D.C. Cir.), cert. denied, 498 U.S. 911 (1990). See Amici Br. at 23-26, 30.

Amici nevertheless seek to defend the district court's holding by trying to refit it into the proper legal framework. But this attempt plainly fails, for the end result is the same: amici's argument, much like that of the court below, leads to a congressionally unauthorized and constitutionally suspect inquiry into prosecutorial decisions on matters outside the case brought, as well as an unwarranted substitution of the court's judgments for the government's.

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[4] This case does not involve any contention that the judgment is not in the public interest because particular provisions themselves adversely affect competition or public policies other than competition. Compare AT&T, 552 F. Supp. at 184-86 (conditioning approval of proposed decree on precluding AT&T's entry into the electronic publishing market because of First Amendment concerns).

A. The Decree Leaves Fully Intact The Government's Ability To Challenge And To Seek To Remedy Practices Outside The Complaint

Amici first seek to prop up the district court's wide-ranging demand for scrutiny of matters outside the complaint as a legitimate effort to uncover what the government "might have given up" in exchange for Microsoft's consent to the proposed decree. Amici Br. at 27. See generally id. at 26-29.[5/] But there is not one iota of evidence that the government entered into any side deal limiting its ability to challenge any practices outside the complaint as consideration for Microsoft's agreement to the decree here. To the contrary, the government told the district court, see J.A. 174-77, 707, 716, 831, 836-37, 846, 944, 956, 998, told this Court in its opening brief, see Brief for Appellant United States of America at 28-29, and now repeats that there are no "undisclosed agreements" affecting practices outside the complaint. Those official representations end this issue in the absence, as here, of any contrary evidence.

Amici nevertheless argue that the Department's representations may be questioned because the Department, having conducted a sweeping probe of a powerful defendant, brought a narrow case. See Amici Br. at 27-29. This argument makes no sense: the Department's decision to focus a complaint on particular conduct raises no inference that the Department has traded off its ability to challenge, and to seek remedies for, other conduct. The government's decision to bring a narrow case at a particular time might, for example, only mean that it found insufficient evidence to challenge other conduct, that it needed further time to investigate such conduct while bringing the case stated in the complaint, or that it wanted to assess the market impact of the consent judgment

[5] Amici frame their discussion of this point as an inquiry into the government's "good faith," but their discussion is properly focused on the question of side deals covering practices outside the complaint. Amici Br. at 26-29. In any event, the district court unmistakably rejected any suggestion of bad faith in some looser sense. See J.A. 863 ("I don't want [it] to be part of the record . . . without going unanswered that [the Department is] not acting in the public interest. They sure are."); id. at 176-77 ("I have no concern of any political [considerations], and I am not raising that.").

before deciding whether to pursue potential additional claims. Indeed, amici's argument would penalize the Department for investigating thoroughly and then acting promptly on one part of its investigation. At the same time, adopting the amici's position would gravely harm antitrust enforcement by making mere prosecutorial restraint in filing antitrust charges the trigger for a public fishing expedition into the Department's investigatory files. Congress, concerned that the disclosures mandated by the Tunney Act already were quite intrusive, see S. Rep. No. 280, 93d Cong., 1st Sess. 3 (1973), intended nothing of the sort.[6/]

Amici express concern that entry of the proposed Final Judgment will "mak[e] it more difficult [for the government] to bring a[later] action" challenging practices outside the present complaint. Amici Br. at 30-31. This concern is misplaced. Settling this case, which challenged only specific licensing practices having anticompetitive effects in certain operating-systems markets, does not preclude the government from challenging any other conduct that Microsoft engaged in prior to the filing of the present complaint,[7/] including conduct alleged to have had an anticompetitive effect

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[6] See 119 Cong. Rec. 24,605 (1973) (statement of Sen. Tunney) (emphasizing that the disclosures required by the Act should not "have an inhibiting effect by requiring the publication of virtually all internal staff memoranda by division attorneys"); The Antitrust Procedures and Penalties Act: Hearings on S. 782 and S. 1088 Before the Subcomm. on Antitrust and Monopolies of the Senate Comm. on the Judiciary, 93d Cong., 1st Sess. 107 (1973) (remark of Sen. Tunney) ("We don't want the judge to run a broad-ranging inquiry. That is not the [Act's] purpose."); cf. 120 Cong. Rec. 36,343 (1974) (remarks of Rep. Holtzman) (stating that the disclosures specifically required by the Act "should deter any improprieties in settlement procedures"); United States v. Central Contracting Co., 537 F. Supp. 571, 577 (E.D. Va. 1982) (explaining that the limited document production ordered "[did] not require full disclosure of Justice Department files" or upset the "sensitive balance that must be struck in [a court's] review of proposed consent decrees").

[7] See, e.g., Columbia Steamship Co. v. American Mail Line, Ltd., 510 F.2d 29, 35 (9th Cir. 1974), cert. denied, 424 U.S. 969 (1976); United States v. American Tel. & Tel. Co., 524 F. Supp. 1336, 1353 n.70 (D.D.C. 1981); cf. FTC v. Motion Pictures Advertising Serv. Co., 344 U.S. 392, 397-98 (1953); I.A.M. Nat'l Pension Fund Benefit Plan A v. Industrial Gear Mfg. Co., 723 F.2d 944, 947-49 (D.C. Cir. 1983).

in the operating systems market.[8] Nor, of course, does the proposed settlement preclude subsequent challenge to any anticompetitive conduct in which Microsoft might engage in the future, including a repetition of the challenged conduct.[9] In short, the district court's demand to scrutinize practices outside the complaint cannot be defended as necessary to examine the effects of the proposed decree on such practices, for entry of the judgment in this case does not diminish the ability -- or commitment -- of the United States to bring any other appropriate case.

B. The Proposed Decree Is A Proper Antitrust Remedy For The Violations Alleged In The Complaint

Amici next seek to justify the district court's scrutiny of practices outside the complaint as necessary to assure the adequacy of the decree as a remedy for the charged violations. But this argument pervasively rests on a fundamentally erroneous view of the legal standards governing relief, one that ignores the requirement that the relief should be tailored to the particular violations. And once amici turn to the proper legal question -- the relationship between the remedy and the effects of the charged violations -- the little they say on the subject does not remotely undermine the reasonableness of the government's determination that the proposed decree is well within the range of proper remedies.

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[8] See MCI Communications Corp. v. American Tel. & Tel. Co., 1982-1 Trade Cas. (CCH) ¶ 64,544, at 72,988 (D.D.C. Feb. 18, 1982); cf. United States v. Aluminum Co. of Am., 20 F. Supp. 608, 611 (W.D. Pa.) (prior suit challenging particular practices used to "maintain the monopoly" did not bar subsequent suit challenging broader conduct that asked not "whether any specific device was lawful, but whether the monopoly which existed in 1937 was lawful"), aff'd, 302 U.S. 230 (1937).

[9] See, e.g., Lawlor v. National Screen Serv. Corp., 349 U.S. 322, 327-29 (1955); Cellar Door Productions, Inc. v. Key, 897 F.2d 1375, 1376-78 (6th Cir.), cert. denied, 498 U.S. 819 (1990); American Tel. & Tel. Co., 524 F. Supp. at 1374. See generally 2 Phillip Areeda & Donald F. Turner, Antitrust Law § 323c, at 110 (1978) ("It cannot be emphasized too strongly that the continuation of conduct under attack in a prior antitrust suit is generally held to give rise to a new cause of action.").

1. The bulk of amici's argument rests on a patently incorrect view of the standards for antitrust relief (even after trial, much less in the context of a negotiated settlement[10]). Amici Br. at 30-32, 36-39. Their basic submission is to contend that the market involved must be "`pried open to competition,'" Amici Br. at 31 (quoting International Salt Co. v. United States, 332 U.S. 392, 401 (1947)), apparently regardless of whether the particular violations themselves had any material effect on the (noncompetitive) structure of the market. With that benchmark presumably in mind, amici proceed to argue that the decree here must reach Microsoft's practices outside the complaint in order to ensure that the remedy for the charged violations is "effective." Amici Br. at 36-37. But this entire argument is flawed because the asserted goal of the remedy in question is wrong.

The adequacy of a remedy is measured by the effects of a violation: the decree should "both . . . avoid a recurrence of the violation and . . . eliminate its consequences." National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679, 697 (1978) (emphasis added). See generally AT&T, 552 F. Supp. at 150-51 & nn.79-80, 82. The remedy need not be limited to "deal[ing] with the exact type of acts found to have been committed," Hartford-Empire Co. v. United States, 323 U.S. 386, 409 (1945), modified, 324 U.S. 570 (1945), if more is needed to accomplish either objective, see, e.g., International Salt Co. v. United States, 332 U.S. 392, 400-01 (1947) . But a decree must "represent a reasonable method of eliminating the consequences of the illegal conduct," National Soc'y, 425 U.S. at 698 (emphasis added); United States v. National City Lines, Inc., 134 F. Supp. 350, 355 (N.D. Ill. 1955), and appropriate prophylactic relief, to be deemed "effective" or reasonable, need only reach "practices connected with acts actually found to be

[10] See AT&T, 552 F. Supp. at 151 ("If courts acting under the Tunney Act disapproved proposed consent decrees merely because they did not contain the exact relief which the court would have imposed after a finding of liability, defendants would have no incentive to consent to judgment and this element of compromise would be destroyed.").

illegal," United States v. Gypsum Co., 340 U.S. 76, 89 (1959) (emphasis added); see also Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 132 (1969) (explaining that a court may "restrain acts which are of the same type or class" as those charged as violations (internal quotations omitted)). This standard, of course, implements in the antitrust context the fundamental equitable principle that a remedy should be reasonably related to the effects of the violation. See, e.g., Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 15-16 (1971); see also United States v. Morrison, 449 U.S. 361, 365 (1981); Epstein Family Partnership v. KMart Corp., 13 F.3d 762, 771 (3d Cir. 1994) (citing Hartford-Empire, 323 U.S. at 410).

In other words, while "[a]ntitrust remedies, it is usually said, must `effectively pry open to competition a market that has been closed by defendants' illegal restraints,'" AT&T, 552 F. Supp. at 150 (quoting International Salt, 332 U.S. at 401), this principle does not mandate the use of wide-ranging remedies that are unrelated to, and out of proportion with, the challenged practices. Rather, a reasonable remedy will pry open the market to the extent that it has "been closed by defendants' illegal restraints." International Salt, 332 U.S. at 401 (emphasis added). Indeed, amici's contrary rule would impose an irrational constraint on antitrust enforcement, precluding challenges to specific unlawful practices in a market that could not be pried open to competition because the market was noncompetitive as a result of natural economic forces and lawful competitive practices -- unless the courts were prepared, under the guise of the antitrust laws, to risk inefficient judicial regulation of lawful economic conduct. The proper question in this case, therefore, is whether the government -- whose decree fully stops the violations prospectively -- made a reasonable determination as to the

past market effects of the practices challenged in the complaint and the appropriate scope of prophylactic relief.[11/]

2. Given the deference owed the government, the evidentiary basis for the government's determination, and amici's own recognition of the economics of the relevant operating-system markets, amici have a very onerous burden to carry in attacking the reasonableness of the government's judgment that the past effects of the challenged practices were immaterial and unmeasurable and, hence, that the decree should be prospective only. Thus, the government concluded, with support from Professor Arrow, that Microsoft achieved its dominant position in operating systems for IBM-compatible personal computers through the exploitation of good fortune, natural advantages, and the economics of increasing returns. See Brief for Appellant United States of America at 4, 7-8, 25. The government further determined, with support from Professor Arrow, that the unlawful Microsoft practices alleged in the complaint, while threatening the legitimate competitive opportunities of future challengers to Microsoft's dominance in operating systems, had in the past made only a nonmaterial and unquantifiable contribution to Microsoft's current position. See Arrow Dec'l 11-12 (J.A. 728-29).[12/] Based on those determinations, a decree terminating the

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[11] To the extent that amici mean to suggest that, once any violation is found, a decree should enjoin any and all other means by which the defendant might in the future violate the antitrust laws, the suggestion plainly is incorrect. See Zenith Radio Corp., 395 U.S. at 133 (explaining that a court may not enjoin "all future violations of the antitrust laws, however unrelated to the violation found by the court"); Hartford-Empire, 323 U.S. at 409-10 & n.7 (citing NLRB v. Express Publishing Co., 312 U.S. 426, 433, 435-36 (1941)). "The court is constrained . . . to steer the narrow course between the hazards of a failure to cure the evil on one side and unwarranted and oppressive control on the other. In its essence, the principle involved is simply that we should not attempt to accomplish in a single suit what should fairly be left to a later action when and if it proves necessary." National City Lines, 134 F. Supp. at 355.

[12] The economics of increasing returns -- the very theory trumpeted by amici -- explains why even a marginal increase in Microsoft's installed base resulting from these practices would not have a material impact on present competition. See J.A. 699, 702-03; Arrow Dec'l at 12-13 (J.A. 729-30). Consequently, this is not a case in which, despite the remedy, "those who had unlawfully built their

challenged practices and preventing both their reimposition and the use of closely connected practices to achieve the same end (J.A. 67-70), was a reasonable means of eliminating their anticompetitive effects and preventing their recurrence.

Amici would have a difficult time sustaining their attack on these determinations even if the district court were not required to defer to the government's assessment of likely competitive consequences, see Triennial Review Remand, 993 F.2d at 1577. Amici's task is made still more difficult because they agree with Professor Arrow that the industry is characterized by increasing returns -- a circumstance that tends to promote a market leader's dominance wholly independent of the challenged licensing practices. To carry their burden, therefore, amici have to show that the only reasonable judgment the government could have made was that the particular practices challenged in the complaint were substantially responsible for Microsoft's dominance in the market. Amici cannot carry that burden.

The only evidence amici offer in support of their argument that the government could not reasonably conclude that the challenged licensing agreements had only a minor and nonmaterial effect on Microsoft's current position is the success of Microsoft Windows starting in mid-1991. See Amici Br. at 34-35. Preliminarily, we note that amici did not even advance this argument in the district court. The omission reflects the argument's utter lack of merit. To begin with, amici's argument rests on a serious misreading of both the details of Professor Arrow's analysis and the record. And, in any event, it is surely implausible for amici to assert that the Windows success -- coincident with the release of Microsoft's breakthrough product, Windows 3.0 -- can only reasonably be attributed to the licensing practices.

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empires could preserve them intact" and "profit from the unlawful restraints of trade which they had inflicted on competitors." Schine Chain Theatres, Inc. v. United States, 334 U.S. 110, 128 (1948) (discussed in Amici Br. at 31-32).

Amici would have the Court believe that Professor Arrow stated that, beginning in mid-1991, Microsoft's use of per processor licenses "reached such a level" as to "close off the operating systems market to competitors for three years," Amici Br. at 34, the years in which the Windows installed base rose sharply. But Professor Arrow did not say that. He said instead that per processor licensing "did not affect enough of the OEM channel to foreclose competition until FY 1992, when 50% of all OEM sales of MS-DOS were sold pursuant to per-processor licenses." Arrow Dec'l at 12 (J.A. 729). This statement addresses only the OEM channel, not retail sales, and only MS-DOS, not Windows. And the statement says only that there is no foreclosure until the 50% level is reached, not that there is total foreclosure when 50% is reached.

The difference between what Professor Arrow said and amici's rendition of it matters considerably. MS-DOS and Windows are two quite separate products. There is no indication in the record that sales of Windows to OEMs that were subject to per processor licenses ever reached Professor Arrow's 50% threshold. As late as fiscal year 1993, when "per processor licenses accounted for an estimated 60% of MS-DOS sales to OEMs," they accounted for only "43% of Windows sales to OEMs" (J.A. 62), leaving over half the OEM market wholly unaffected. Moreover, the OEM channel is less important for Windows than for MS-DOS, which (except for retail upgrades) is sold only to OEMs (J.A. 14). Windows, in contrast, is widely sold at retail. Indeed, recent versions of Windows have been best-selling products at retail,[13] and there is no suggestion of foreclosure of the retail market.

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[13] For example, a ranking of "PC business programs according to the total number of copies shipped to stores and resellers in the week ending July 11, 1992," placed Microsoft Windows 3.1 third, and Microsoft Windows 3.1 Upgrade first. Top Retail Software, PC Magazine, Sept. 15, 1992, at 31.

The scope of the restrictive licenses for Windows was, in short, vastly less significant than amici contend. At the same time, there are more plausible explanations for the increased Windows sales on which amici rely. Windows 3.0, which significantly improved on relatively unsuccessful prior versions, was announced as available for sale in mid-1990, and the best-selling Windows 3.1, another major improvement, was shipped in mid-1992. As one court has observed, "[b]ecause each version of Windows seemed increasingly to offer that which Apple had touted as the special advantage of the Macintosh, Windows proved a hugely formidable force in the software market." Apple Computer, Inc. v. Microsoft Corp., 799 F. Supp. 1006, 1019-20 (N.D. Cal. 1992), aff'd, 35 F.3d 1435 (9th Cir. 1994), cert. denied, 115 S. Ct. 1176 (1995). In these circumstances, the success of Windows in no way undermines the government's finding of immaterial past effects from the licensing practices challenged in this case.

The government was therefore entirely reasonable in concluding that the proposed decree, by terminating the unlawful practices and prohibiting related ones that could also be used to create a wall of contracts capable of blocking operating system competitors from reaching the important OEM channel, accomplishes all it should to satisfy the proper remedial standards. There is no reason to address what the district court called "a number of other anticompetitive practices that from time to time Microsoft has been accused of engaging in by others in the industry," Op. at 34 (J.A. 1227), and what those others in the industry now suggest are possible ways that Microsoft could monopolize in the future, see Amici Br. at 37-39; Supp. Br. at 17-19. None of those practices are so "connected with," Gypsum, 340 U.S. at 89, or "of the same type or class as," Zenith Radio Corp., 395 U.S. at 132 (internal quotations omitted), the practices challenged here that they must be included in the remedy for these practices. "[A] finding of an offense under the antitrust laws does not invest a court

with a license to embark on a general program of comprehensive control of the defendants' business." National City Lines, 134 F. Supp. at 355.

3. In addition to attacking the decree for failure to provide backward-looking relief, amici criticize the decree for excluding Windows NT Workstation and its successors from the "Covered Products" within the decree. Amici Br. at 40-41. Windows NT Workstation, however, is a specialized, high-end product (J.A. 315-16, 564), and amici do not dispute the simple premise for the exclusion set forth in the Competitive Impact Statement: that Windows NT Workstation does not have "a significant share of a relevant market at this time" (J.A. 65). The decree reasonably addresses itself to "all Microsoft's PC operating system products in which the defendant currently possesses a substantial degree of market power" (J.A. 65). This principle is a patently reasonable basis for the present NT exclusion. And in any event, if Microsoft some day markets Windows NT Workstation, or its successors, as successors to MS-DOS or Windows, see Amici Br. at 40, the proposed decree will then apply (J.A. 27, 65-66).[14/]

C. The Absence Of Any Provision Providing Private Relief To IDEA Casts No Doubt On The Efficacy Of The Remedy

Amicus IDEA's separate objection to the decree -- that it omits private monetary relief for IDEA -- is insubstantial. The district court, of course, made no reference to IDEA in explaining why it refused to enter the proposed decree. And the decree's omission of such relief plainly was reasonable. Injunctions in government antitrust cases do not ordinarily function as collection services for private claims, as Congress recognized in enacting the Tunney Act. See S. Rep. No.

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[14] Amici's objection, see Amici Br. at 40 n.28, to the proposed decree's reference to unbundled products, see Decree ¶ II(A) (J.A. 27), is even more farfetched. The provision is worded to prevent Microsoft from achieving the result of the challenged practices by splitting off key functions of covered products and selling them separately subject to such restrictions. Amici's hypothetical example would produce a covered product under, depending on its precise facts, ¶ II(A)(6)(a) or (6)(b).

280, supra, at 6-7; H.R. Rep. No. 1463, 93d Cong. 1st Sess. 8 (1973). Moreover, nothing in the decree precludes IDEA from bringing its own antitrust or contract actions on its claim, as IDEA recognizes. See Supp. Br. at 12 nn.6, 8. It was obviously reasonable for the decree to leave for separate private litigation IDEA's distinct claims as an OEM -- claims involving an injury that has no apparent relation to the harm to Microsoft's operating-system rivals that is the source of antitrust concern here.

CONCLUSION

The record before the district court amply established that the proposed Final Judgment is "within the reaches of the public interest," Triennial Review Remand, 993 F.2d at 1576 (internal quotations omitted) (emphasis in original), and the district court's justifications for holding to the contrary are legally insufficient. Accordingly, the Court should vacate the district court's Order Re Motion to Approve the Consent Decree and remand with instructions to enter the proposed decree. See id. at 1577-78; cf. Apache Survival Coalition v. United States, 21 F.3d 895, 906-07 (9th Cir. 1994).

Respectfully submitted.

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CERTIFICATE OF COMPLIANCE WITH CIRCUIT RULE 28(d)

I hereby certify that the foregoing REPLY BRIEF FOR APPELLANT UNITED STATES OF AMERICA contains no more than 6,250 words and fully complies with Circuit Rule 28(d).

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