

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,
Plaintiff,

v.

MICROSOFT CORPORATION,
Defendant.

Civil Action No. 98-1232 (TPJ)

REDACTED PUBLIC VERSION

STATE OF NEW YORK *ex rel.*
Attorney General ELIOT SPITZER, *et al.*,
Plaintiffs,

v.

MICROSOFT CORPORATION,
Defendant.

Civil Action No. 98-1233 (TPJ)

PLAINTIFFS' JOINT PROPOSED FINDINGS OF FACT

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OVERVIEW

Plaintiffs' Joint Proposed Findings of Fact, and the evidence on which they are based, demonstrate that Microsoft has engaged in a broad pattern of unlawful conduct with the purpose and effect of thwarting emerging threats to its powerful and well-entrenched operating system monopoly. Most prominent among these was the threat posed by competing Internet browsers, particularly Netscape's Navigator. Non-Microsoft browsers, if widely used, promised to form the center of an emerging middleware platform that could have helped to erode the high applications barrier to entry that protects Microsoft's monopoly.

Microsoft acted quickly to squelch this evolving middleware threat to what it sometimes called its "desktop paradise," first by proposing an illegal division of markets, and then by embarking on a predatory campaign to restrict the distribution and usage of Netscape's browser and, in Microsoft's words, to "cut off Netscape's air supply." But Microsoft's broad anticompetitive campaign has not been limited to preempting the browser threat; Microsoft sought to curtail other actual or potential middleware threats to its operating system monopoly, including Sun's Java, Intel's Native Signal Processing, and Apple's QuickTime. Microsoft's actions demonstrate that it believed it could not win simply by competing on the merits. As one of Microsoft's top executives candidly acknowledged: "we were very concerned that if the user saw Netscape Navigator side by side with Internet Explorer . . . we would lose."

Microsoft's predatory campaign worked. It succeeded in preserving Microsoft's monopoly power by preventing the successful development of alternative platforms that could have eroded its Windows monopoly and given consumers greater choice. In other words, Microsoft prevented consumers from getting what they wanted so that Microsoft could keep what it had -- a monopoly in operating systems.

For a long time now -- and, if Microsoft's actions to maintain its monopoly are not halted, for well into the future -- personal computer consumers are locked into a Microsoft world, one in which a single company essentially controls the configuration of desktop computing. The evidence detailed in these Proposed Findings establishes both the anticompetitive tactics Microsoft employed and the harm to competition and consumers those tactics caused. What can never be fully known, of course, are (i) the innovative products that would have come to market had developers not been deterred by Microsoft's illegal assault on potential competitors; and (ii) the benefits that consumers would have realized if Microsoft's operating systems monopoly had been eroded. Such products and consumer benefits are inevitable wherever market competition flourishes.

Monopoly Power

Microsoft has monopoly power in the market for operating systems for Intel-compatible personal computers ("PCs"). Microsoft's operating systems account for an overwhelming share - - well over 90% -- of that market and, indeed, of all operating systems for PCs. Microsoft's customers -- computer manufacturers ("OEMs") and the vast majority of PC users -- have no commercially viable alternative to the Windows operating systems. Microsoft is able to, and does, exercise its monopoly power over OEMs and PC consumers in a variety of ways.

Microsoft's monopoly power is protected, and has been protected for years, by high barriers to entry into the operating systems market, the most important of which is the applications barrier. The applications barrier to entry exists because applications written to Windows will not run on other operating systems and other operating systems cannot effectively

compete against Microsoft unless they can offer PC users a wide array of applications similar, in depth and breadth, to the vast set of applications that exists for Windows.

The Middleware Threat

In the mid-1990's, Microsoft identified a potential threat to its monopoly: platform level middleware such as Netscape's Navigator browser. Internet browsers run "on top" of operating systems and contain interfaces ("APIs") to which other application programs can be written. Because Internet browsers and other middleware can run on multiple operating systems, they can enable application developers, by writing programs to the APIs on the middleware, to develop programs that are platform neutral -- that is, that can run across a variety of operating systems. By potentially "commoditizing" the underlying operating system, browsers thus offer the potential to erode the applications barrier to entry and, ultimately, Microsoft's operating system monopoly. Netscape's browser posed a particularly serious threat to Microsoft: it was widely adopted by PC users to browse the rapidly emerging World Wide Web, it was cross platform, and it therefore had the potential to become a ubiquitous platform to which other application programs could be written.

Another serious threat to Microsoft was the development of Java by Sun Microsystems. Java too can serve as an alternative platform to which developers can write applications that run across different operating systems. The Java and Netscape threats were mutually reinforcing because the Netscape browser was a primary distribution mechanism for Java and because Java applications are especially well-suited to the Internet and to other network-based computing needs and, therefore, complement the browser.

Microsoft Quickly Acted to Thwart Potential Middleware Threats to Its Monopoly

Microsoft has engaged in a broad pattern of conduct to exclude or eliminate products that Microsoft believed could help erode the applications barrier to entry and thereby threaten its Windows monopoly. Microsoft began its attack on the middleware threat by proposing to Netscape that it agree not to compete and to divide the browser market. Microsoft wanted Netscape to agree not to offer its browser and APIs for use on Windows 95; in return Microsoft would agree not to compete with Netscape on browsers developed for other, niche operating systems. Netscape rejected Microsoft's proposal. Over time, Microsoft made similar efforts to enter into illegal market-division agreements, or took other anticompetitive action, with Intel, Apple, and IBM.

Unable to protect its monopoly through illegal agreements not to compete with its rivals, Microsoft engaged in a predatory and anticompetitive campaign effectively to exclude those rivals from the market or, at the least, to impede and weaken them so that they would no longer present serious threats. As part of its campaign, firms such as Compaq that assisted Microsoft in excluding its rivals were rewarded with lower prices and better technical and marketing support for Windows. In contrast, companies such as IBM, Gateway, and Apple that refused to exclude Microsoft's rivals or that distributed competing products were threatened or actually penalized with higher prices and inferior support for Windows or the loss of other, critical Microsoft products.

Microsoft Targeted Netscape and Java

The most direct and extensive part of Microsoft's illegal campaign was aimed at rival browsers, particularly Netscape's Navigator. Among other things, Microsoft tied its own,

separate browser product, Internet Explorer, to its Windows operating systems and required both OEMs and PC users to take Internet Explorer as a condition of obtaining the operating system. Microsoft, like the rest of the industry, recognized that users demand for browsers was separate from demand for operating systems -- that is, users wanted the option of obtaining Windows with no browser or only with a browser other than Internet Explorer. Nevertheless, Microsoft tied the two together, refusing to sell Windows 95 or Windows 98 without Microsoft's browser or to permit OEMs to remove the browser before selling their PCs loaded with Windows. With Windows 98, Microsoft also unnecessarily "welded" the browser to the operating system, so that using another browser would be a "jarring experience," further excluding rival browser suppliers.

Microsoft also entered into a variety of other restrictive agreements with OEMs, Internet access providers, and Internet content providers, all of which made it substantially more difficult for Netscape to distribute its browser and raised its costs. None of these agreements served any legitimate business purpose. In addition, Microsoft gave its browser away for free, without any expectation or basis for believing that it could defray the huge development, promotion, and distribution costs associated with Internet Explorer other than by entrenching its operating system monopoly.

Similarly, Microsoft engaged in predatory and anticompetitive conduct to impede other platform threats, particularly Java. Among other actions, Microsoft "polluted" Java by developing and distributing its own, non-cross-platform version, induced third parties not to support cross-platform Java and to help fragment the Java platform, and engaged in anticompetitive conduct to impede the distribution of cross-platform Java.

Consumers and Competition Have Been Injured

Microsoft's predatory campaign has caused significant anticompetitive effects, has injured consumers, and threatens to cause even greater harm in the future. Microsoft's conduct has succeeded in blunting cross-platform middleware threats and thereby maintaining the applications barrier to entry. Microsoft substantially impeded the most effective channels of distribution for both Netscape and Java, raised its rivals' costs, and, ultimately, effectively eliminated Netscape as a platform threat, further entrenching and maintaining Microsoft's operating system monopoly. By hampering and weakening Netscape, Microsoft's predatory conduct has also dangerously threatened monopolization of the market for Internet browsers.

Microsoft's entire course of conduct aimed at blunting potential middleware threats has further reinforced the applications barrier to entry by maintaining and expanding Microsoft's ability to influence and control standards in the increasingly important area of network-based computing, and thereby to extend its monopoly power into servers, Internet protocols, and other industry segments. Microsoft's efforts to preempt threats to this control will, in part, inhibit the emergence of other potential paradigm shifts.

Microsoft's illegal maintenance of its monopoly has already deprived consumers of the potential benefits of greater choice, more innovation, and lower prices for Windows, and greater innovation in markets related to Windows, that might have resulted from uninhibited operating system competition.

The Proposed Findings

The Proposed Findings of Fact which follow are substantial, as is the evidence in the record which supports Plaintiffs' claims. The full Table of Contents provides a top-level

summary of the proposed findings and the supporting evidence. Background findings and evidence are set forth in Part I. In the body of the Findings, individual proposed findings are preceded by Arabic numerals while the detailed evidence that supports each finding follows it and is designated by small Roman numerals.