

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 (CKK)

Next Court Deadline: March 6, 2002
Tunney Act Hearing

**RESPONSE OF THE UNITED STATES TO
PUBLIC COMMENTS ON THE REVISED PROPOSED FINAL JUDGMENT**

CHARLES A. JAMES

Assistant Attorney General

DEBORAH P. MAJORAS

Deputy Assistant Attorney General

PHILLIP R. MALONE

RENATA B. HESSE

DAVID BLAKE-THOMAS

PAULA L. BLIZZARD

KENNETH W. GAUL

ADAM D. HIRSH

JACQUELINE S. KELLEY

STEVEN J. MINTZ

BARBARA NELSON

DAVID SEIDMAN

DAVID P. WALES

Attorneys

U.S. Department of Justice

Antitrust Division

601 D Street N.W., Suite 1200

Washington, D.C. 20530-0001

(202) 514-8276

PHILIP S. BECK

Special Trial Counsel

February 27, 2002

Ed A

TABLE OF CONTENTS

	<u>Page</u>
INTRODUCTION	2
I. GENERAL COMMENTS	5
A. Should Never Have Brought Suit	5
B. Allegations Of Political Influence	7
C. Removing The “Fruits” Of Microsoft’s Anticompetitive Conduct	9
D. The Litigating States’ Proposal	13
E. Fines	14
F. Senate Hearing	15
II. TUNNEY ACT ISSUES	17
A. Adequacy Of The United States’ Competitive Impact Statement	17
1. The CIS Complies With The Requirements Of The Tunney Act	18
2. The CIS Recites “A Description And Evaluation Of Alternatives To Such Proposal Actually Considered By The United States”	20
B. The United States Fully Complied With All Tunney Act Requirements Regarding Determinative Documents	21
C. Timing And Process Of Hearing	23
1. The Court Has Discretion To Determine The Nature And Format Of The Tunney Act Proceedings	23
2. An Evidentiary Hearing Is Not Required In This Case	24
3. The Court Is Not Required To Permit Any Third-Party Participation	26
4. Allowing Third-Party Participation Through An Evidentiary Hearing Would Unnecessarily Delay And Complicate These Proceedings	27

5.	The Tunney Act Proceedings Should Not Be Held In Conjunction With, Or Rely Upon Evidence From, The Litigating States' Remedy Hearing	28
D.	Standard Of Review Under The Tunney Act	30
1.	The Tunney Act Requires That Entry Of The RPFJ Be "In the Public Interest"	31
2.	The Court Should Grant Deference to the Judgment of the United States	33
E.	Microsoft's Compliance With Section 16(g)	39
III.	DEFINITIONS	41
A.	Definition Of "ISV" (RPFJ § VI.I)	41
B.	"Microsoft Middleware" (RPFJ § VI.J)	42
1.	Distributed Separately To Update A Windows Operating System Product	44
2.	Trademarked Or A Major Version Of Any Microsoft Middleware Product	46
3.	Same Or Substantially Similar Functionality	48
4.	Includes At Least The Software Code That Controls Most Or All Of The User Interface	50
5.	Major Updates	51
C.	"Microsoft Middleware Product" (RPFJ § VI.K)	52
D.	"Non-Microsoft Middleware" (RPFJ § VI.M)	55
E.	"Non-Microsoft Middleware Product" (RPFJ § VI.N)	58
F.	"Personal Computer" (RPFJ § VI.Q)	60
G.	"Trademarked" (RPFJ § VI.T)	63
H.	"Windows Operating System Product" (RPFJ § VI.U)	65
1.	Microsoft's Discretion	65

2.	Prior Windows Versions	67
3.	Operating Systems for Other Devices	69
IV.	OEM PROVISIONS	70
A.	Overreliance On OEMs	70
B.	Non-Retaliation (RPFJ § III.A)	72
1.	Section III.A Is Sufficiently Broad	74
2.	Section III.A Properly Allows Microsoft To Enforce Intellectual Property Rights	76
3.	Section III.A Protects OEMs From Arbitrary Termination Of Their Licenses	77
4.	Requiring Proof Of Knowledge Is Necessary And Can Be Met	78
5.	Microsoft’s Permitted Use Of “Consideration” Is Appropriate	78
6.	The RPFJ Uses The Common Language Definition Of “Retaliate”	79
C.	Uniform Terms (RPFJ § III.B)	79
1.	Top Twenty OEMs	80
2.	MDAs Or Other Discounts	81
3.	OEMs Should Be Able To Negotiate	82
4.	Volume Discounts	84
5.	Termination — Cause, Materiality, And Notice	85
6.	Servers Or Office	85
7.	Key License Terms	86
8.	Prohibition On Enforcing Agreements Inconsistent With The RPFJ	87

D.	Freedom Of OEMs To Configure Desktop (RPFJ § III.C)	87
1.	Section III.C.1	89
2.	Section III.C.2	91
3.	Section III.C.3	92
4.	Section III.C.4	94
5.	Section III.C.5	95
6.	Comparison To Litigating States' Proposal	96
E.	Microsoft's Obligations To Provide Add/Remove Functionality And Automatic Invocations (RPFJ § III.H)	98
1.	Obligation To Provide Add/Remove Functionality	98
2.	Obligation To Provide Automatic Invocations And Exceptions	100
a.	Obligations To Provide Automatic Invocations	100
b.	Exceptions To The Obligation To Provide Automatic Invocations	104
3.	Microsoft's Ability To Change Configurations	106
4.	Timing Issues	109
F.	Commingling Of Operating System Code And Middleware Code	114
V.	RETALIATION AGAINST ISVs OR IHVs (RPFJ § III.F)	122
A.	Comments On Section III.F.1	123
B.	Comments On Section III.F.2	127
C.	Comments On Section III.F.3	130
VI.	EXCLUSIONARY AGREEMENTS (RPFJ § III.G)	130
A.	Omissions	130

B.	Exemptions	132
VII.	DISCLOSURE PROVISIONS (RPFJ §§ III.D, III.E)	137
A.	Disclosure Of APIs (RPFJ § III.D)	137
1.	Product Issues	137
a.	Microsoft’s Ability To Manipulate The Definitions To Avoid Disclosure	138
b.	Products Other Than Microsoft Middleware	139
c.	Products Other Than Windows Operating System Products	142
2.	API Issues	143
a.	Definition Of “APP”	143
b.	Definition Of “Documentation”	145
c.	Source Code Access	148
d.	Intellectual Property Issues	150
3.	Timing Issues	150
a.	First Disclosures: Windows XP Service Pack 1 Or No Later Than November 2002	150
b.	Triggered By New Version Of Microsoft Middleware: Last Major Beta Test Release	153
c.	Triggered By New Version Of Windows Operating System Product: Timely Manner (RPFJ § VI.R)	154
B.	Disclosure Of Communications Protocols (RPFJ § III.E)	157
1.	Product Issues	158
a.	Windows Operating System Product	158
b.	Microsoft Server Operating System Product	159

c.	Non-Microsoft Client Operating Systems	160
d.	Server-To-Server Communications	162
e.	Other Devices	162
2.	Communications Protocols, Disclosure And Licensing	163
a.	Definition Of “Communications Protocols” (RPFJ § VI.B)	163
b.	The Meaning Of “Interoperate”	164
c.	License For Use	166
d.	The Meaning Of “Natively”	167
e.	Licensing On “Reasonable And Non-Discriminatory Terms”	168
3.	Timing Issues	169
C.	Compulsory Licensing (RPFJ § III.I)	171
1.	Reasonable And Non-Discriminatory Royalty	172
2.	Restriction On Sublicenses	174
3.	Cross-Licenses	175
4.	Scope Of Intellectual Property Rights	175
5.	Comparison To Litigating States’ Proposal	177
D.	Security Carve-Outs (RPFJ § III.J)	177
1.	Limitation On Obligations To Document, Disclose Or License	178
2.	Conditioning Licenses On Certain Requirements	181
E.	Disclosure Of File Formats	183

VIII. ENFORCEMENT	185
A. The Enforcement Powers Of Plaintiffs And The Court	186
B. The Technical Committee	187
1. Technical Committee Powers	188
2. Composition And Control Of The Technical Committee	191
C. Internal Compliance	194
D. Voluntary Dispute Resolution	196
E. Proposals For A Special Master	197
F. Proposed Reporting Requirements	200
IX. TERMINATION	202
X. COMPARING THE RPFJ TO THE IFJ	206
A. Structural Relief vs. Conduct Restrictions	206
B. Anti-Tying Provisions	207
C. Intentionally Disabling Rival Software	208
D. Agreements Limiting Competition	210
XI. OTHER PROPOSED REMEDIES	212
A. Restrictions On Software Development Tools	212
B. Java Must-Carry	214
C. Porting Microsoft Office	215
D. Licensing Of Predecessor Versions Of Windows	217
E. Industry Standards	219
F. Protection For Large End Users	222

G.	Non-Retaliation For Participation In Litigation	224
XII.	MISCELLANEOUS COMMENTS	225
A.	Microsoft's ".Net" Initiative	225
B.	Course Of Conduct	227
C.	Restoring Java/Netscape Threats	228
D.	Microsoft's Responses To The Litigating States' RFAs	229
	1. Meeting Of The Minds	229
	2. Objections To Language In The CIS As "Vague And Ambiguous"	231
E.	"Open Source" Community	231
F.	"Reasonableness" Standard	234
G.	Computers For Schools	237

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**RESPONSE OF THE UNITED STATES TO
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1. Pursuant to the requirements of the Antitrust Procedures and Penalties Act (“Tunney Act”), 15 U.S.C. §§ 16(b)-(h), the United States hereby responds to the public comments received regarding the Revised Proposed Final Judgment (RPFJ) in this case.

2. Simultaneously with this Response, the parties have filed a Second Revised Proposed Final Judgment (SRPFJ), which includes modifications to which the United States, Microsoft, and the Settling States have agreed.¹ Because every comment addresses the RPFJ, this Response is couched in terms of, and generally refers to, the proposed decree before the modifications (i.e., the RPFJ), addressing the modifications of the SRPFJ only as required. However, the decree the Court should enter is the *modified* version of the RPFJ — that is, the SRPFJ.

¹The United States also filed, simultaneously with this Response, a Memorandum Regarding Modifications Contained in Second Revised Proposed Final Judgment. The SRPFJ is a logical growth of the RPFJ, its incremental modifications responding to public comments, and the overall result further advances the public interest.

INTRODUCTION²

3. The United States and Microsoft³ filed the RPFJ on November 6, 2001, thereby proposing to end on mutually agreeable terms litigation that began on May 18, 1998. Pursuant to the requirements of the Tunney Act, the United States filed its Competitive Impact Statement (CIS) on November 15, 2001, and published the RPFJ, CIS, and a description of the procedures for submitting public comments on the proposed decree in the *Federal Register* on November 28, 2001. 66 Fed. Reg. 59,452 (2001). The United States also posted information on those procedures on the Department of Justice website. See <<http://www.usdoj.gov/atr/cases/ms-settle.htm>>.

4. The 60-day public comment period began on November 28, 2001, and ended on January 28, 2002.⁴ During that period, the United States received 32,329 public comments. This was by far the most comments ever received on any proposed decree under the Tunney Act. By comparison, the number of comments received on the RPFJ vastly exceeds the number received in the *AT&T* case — which completely restructured the telecommunications industry — by more

²A full description of the history of this litigation — both procedural and substantive — can be found in Memorandum Of The United States In Support Of Entry Of The Revised Proposed Final Judgment 1-11 (filed Feb. 27, 2002) (“U.S. Memorandum”).

³In addition, nine State plaintiffs (the “Settling States”) from *New York v. Microsoft Corp.*, No. 98-CV-1233 (D.D.C.) (CKK) (“*New York*”), agreed to settle their dispute with Microsoft under the RPFJ. Ten other plaintiffs from *New York* (the “Litigating States”) did not agree to the terms of the RPFJ and are continuing their suit in a separate proceeding.

⁴The United States also chose to accept and treat as Tunney Act comments various communications from members of the public commenting on the proposed settlement that were received by the Department of Justice beginning on November 5, 2001, the first business day following submission of the initial Proposed Final Judgment to the Court, even though the official 60-day comment period had not yet begun. See 15 U.S.C. § 16(b) (60-day period begins upon publication in the *Federal Register*).

than an order of magnitude. *United States v. AT&T*, 552 F. Supp. 131, 135 (D.D.C. 1982) (“over six hundred documents”), *aff’d mem. sub. nom. Maryland v. United States*, 460 U.S. 1001 (1983); 47 Fed. Reg. 21,214-24 (1982) (listing name and address of each commentor on proposed *AT&T* decree, with length of comment in pages).⁵

5. The large volume of comments in this case reflects, in part, the widespread use of electronic mail to submit comments (approximately 90-95% of the comments were submitted via e-mail, as opposed to approximately 5-10% via facsimile and fewer than 1% via hand delivery) and the fact that various groups, both opposed to and in favor of entry of the RPFJ, placed solicitations on their websites or sent mass electronic mailings urging submission of comments on the proposed settlement.⁶

6. Approximately 1,500 comments were unrelated to either the *United States v. Microsoft* case generally or the RPFJ specifically, or were merely duplicate copies of comments by the same individual or entity. A small number of these submissions are simply advertisements or, in at least one case, pornography. The United States has not filed these comments with the Court and does not intend to publish them. Approximately 1700 comments relate to other antitrust suits against Microsoft.⁷ Most of these comments address only the proposed settlement of the private, class action against Microsoft, and not the RPFJ; erring on the side of over-

⁵By contrast, the United States’ 1994 consent decree with Microsoft generated only five public comments. *See* 59 Fed. Reg. 59,426, 59,427-29 (1994).

⁶*See, e.g.*, <<http://www.salon.com/tech/col/rose/2002/01/16/competitor/index/html>>.

⁷Porcher. The Response generally uses abbreviations to identify commentors. An index of comments cited, along with unique identifying numbers, is found in Appendix A to this Response.

inclusiveness, the United States has filed these latter unrelated comments with the Court and will publish them.

7. Approximately 22,750 comments express an overall view of the RPFJ. Of these, roughly 5,700 do not, for example, attempt to analyze the substance of the RPFJ, do not address any of its specific provisions, and do not describe any particular strengths or shortcomings of it.⁸ Approximately 16,700 comments can be characterized as containing some generally limited analysis of the RPFJ. These comments typically are one-to-two pages and contain limited discussion of issues related to the RPFJ.⁹ The remaining 350 comments expressing an overall view can be characterized as containing a degree of detailed substance concerning the RPFJ. These comments range from one- or two-page discussions of some aspect of the RPFJ, to 100-plus-page, detailed discussions of numerous of its provisions or alternatives.¹⁰ There is substantial overlap among these more substantial comments in terms of the issues and arguments that they address. Of these roughly 350 comments, the United States characterized 47 as “detailed” comments based on their length and the detail with which they analyze significant issues relating to the RPFJ.¹¹ There is also considerable duplication of the issues addressed and arguments raised among these “detailed” comments.

⁸Reid; Karkess.

⁹Becker; Gallagher.

¹⁰Daly; Love.

¹¹The United States provided copies of these detailed comments to the Court on February 14, 2002, and posted copies of these comments on the Department of Justice website on February 15, 2002. These comments may be found at <<http://www.usdoj.gov/atr/cases/ms-major.htm>>.

8. Of the total comments received, roughly 10,000 are in favor of or urge entry of the RPFJ, roughly 12,500 are opposed, and roughly 9,500 do not directly express a view in favor of or against entry. For example, a significant number of comments contain opinions concerning Microsoft generally (e.g., “I hate Microsoft”), or concerning this antitrust case generally (e.g., “This case should never have been brought”), but do not state whether they support or oppose entry of the RPFJ.

9. In the remainder of this Response, the United States responds to the various types of comments according to the issues that the comments raise. For example, we respond to comments that raise issues relating to the disclosure provisions of the RPFJ (Sections III.D and III.E) in one section, and we respond to comments that suggest that the United States should have pursued a structural remedy against Microsoft in another section. Although the United States has reviewed and categorized every comment individually, it is not responding to comments on an individual comment-by-comment basis; rather, it summarizes the issues raised by specific comments and provides references for locating these issues in specific comments. On each issue, the Response refers to some of the comments that raised it;¹² other comments may raise the same issue but are not identified in this Response.

I. GENERAL COMMENTS

A. Should Never Have Brought Suit

10. Many comments complain about the legitimacy of the charges brought against Microsoft. These comments typically characterize the prosecution of Microsoft as an unjustified

¹²Thus, unless otherwise noted, citations to specific comments merely are *representative* of comments on that issue, and should not be interpreted as an indication that other comments were not reviewed.

assault upon a successful business, and often refer to the benefits Microsoft has generated for the economy and shareholders. These comments object to the RPFJ as unnecessary relief.¹³

11. Comments challenging the validity of the United States' case, or alleging that it should not have been brought, are challenges to the initial exercise of the United States' prosecutorial discretion and are outside the scope of this proceeding. The purpose of this proceeding is not to evaluate the merits of the United States' case. A Tunney Act proceeding is not an opportunity for a "de novo determination of facts and issues," but rather "to determine whether the Department of Justice's explanations were reasonable under the circumstances" because "[t]he balancing of competing social and political interests affected by a proposed antitrust decree must be left, in the first instance, to the discretion of the Attorney General." *United States v. Western Elec. Co.*, 993 F.2d 1572, 1577 (D.C. Cir. 1993) (citations omitted). Courts consistently have refused to consider "contentions going to the merits of the underlying claims and defenses." *United States v. Bechtel*, 648 F.2d 660, 666 (9th Cir. 1981). Accordingly, those comments seeking to challenge the legitimacy of the United States' underlying case against Microsoft are beyond the purview of appropriate Tunney Act inquiry.

12. Nevertheless, the United States notes in response to these comments that, prior to filing the Complaint, the United States conducted an extensive and thorough investigation into specific Microsoft practices that unlawfully restrained competition in the PC operating system market. This investigation led the United States to conclude that Microsoft undertook several illegal actions to protect its market position. Both the District Court's decision and the

¹³CMDC 1-11; Skinn 1; Wagstaff 1; Lloyd 1; Peterson 1; Bode 1; Poindexter 1; Williams 1.

unanimous, en banc Court of Appeals' decision "uphold[ing] the District Court's finding of monopoly power in its entirety," and affirming in part "the District Court's judgment that Microsoft violated § 2 of the Sherman Act by employing anticompetitive means to maintain a monopoly in the operating system market," *United States v. Microsoft Corp.*, 253 F.3d 34, 51, 46 (D.C. Cir. 2001) (en banc) (per curiam) ("*Microsoft*"), support the United States' conclusion.

B. Allegations Of Political Influence

13. Certain commentators allege that the RPFJ resulted from improper influence exerted by Microsoft on the United States. They generally base their allegations on the fact and size of Microsoft's political contributions and assert that, because the RPFJ does not contain the relief that the commentators prefer, the RPFJ must be the result of malfeasance or corruption on the part of the United States.¹⁴

14. The commentators' allegations, however, lack any factual support. Commentors contend that Microsoft extensively lobbied both the legislative and executive branches of the federal government to bring an end to the litigation.¹⁵ By citation to Microsoft's lobbying and political contributions, commentators apparently seek to raise an inference of impropriety on the part of representatives of the Antitrust Division of the Department of Justice. Commentors suggest that these representatives somehow were corrupted by Microsoft's general lobbying activities.

¹⁴Relpromax 3-4, 18, 20-22, Ex. 10; CCIA 18-34 & Decl. Edward Roeder; ProComp 78-86.

¹⁵Commentors also allege that Microsoft has failed adequately to disclose lobbying contacts as required by the Tunney Act, 15 U.S.C. § 16(g). Pursuant to the Court's Order dated February 13, 2002, Microsoft will respond to allegations of deficiencies in its compliance with § 16(g).

15. Allegations that the substance of the RPFJ reflects any kind of political corruption are meritless. Just as a judge should not accept conclusory allegations of bias or prejudice based upon mere opinions or rumors as the basis for disqualification,¹⁶ so too must allegations of corruption on the part of Department of Justice attorneys be supported by something more than supposition and innuendo.¹⁷ Actual evidence of corruption is required in order to support rejection of a consent decree. Mere speculation and conjecture are insufficient. Because there is simply no credible evidence of corruption in this case, there are no specific facts to which the United States can respond on this issue.

16. More generally, the comments on this issue ignore the indisputably neutral influences on the settlement process, such as (1) the decision of nine independent States to join the settlement, (2) the decision by the Court of Appeals in *Microsoft*, which significantly narrowed the scope of Microsoft's potential liability and cast substantial doubt on the legal viability of potential remedies, particularly divestiture, and (3) the interest in obtaining prompt implementation of remedies without the delay inherent in further litigation and appeals.

¹⁶See, e.g., *United States v. Haldeman*, 559 F.2d 31, 134 (D.C. Cir. 1976); *In re United States*, 666 F.2d 690, 695 (1st Cir. 1981) (a judge should ignore "rumors, innuendos, and erroneous information published as fact in the newspapers"); *McClelland v. Gronwaldt*, 942 F. Supp. 297 (E.D. Tex. 1996).

¹⁷Lobbying activities by the defendant, even though "intensive and gross," are insufficient to establish corruption on the part of the United States. See, e.g., *United States v. Associated Milk Producers*, 394 F. Supp. 29, 39-40 (W.D. Mo. 1975), *aff'd*, 534 F.2d 113 (8th Cir. 1976).

C. Removing The “Fruits” Of Microsoft’s Anticompetitive Conduct

17. Certain public comments suggest that the RPFJ does not sufficiently remove the “fruits” of Microsoft’s illegal conduct,¹⁸ and that the decree must go further than simply barring Microsoft from further bad behavior.¹⁹ Such criticism is not well-taken. As the United States previously stated in the CIS (at 24), the restoration of competition is the “key to the whole question of an antitrust remedy,” *United States v. E.I. du Pont de Nemours & Co.*, 366 U.S. 316, 326 (1961). Competition was injured in this case principally because Microsoft’s illegal conduct maintained the applications barrier to entry into the PC operating system market by thwarting the success of middleware that had the potential to erode that barrier. Thus, the key to the proper remedy in this case is to end Microsoft’s restrictions on potentially threatening middleware, prevent it from hampering similar nascent threats in the future, and restore the competitive conditions created by similar middleware threats. In this context, the fruit of Microsoft’s unlawful conduct was Microsoft’s elimination of the ability of potentially threatening middleware to undermine the applications barrier to entry without interference from Microsoft. The RPFJ addresses and remedies precisely this issue.

18. Criticism of the RPFJ’s alleged failure to remove the fruits of Microsoft’s unlawful conduct falls into two general categories: (1) comments that define “fruits” consistently with the Court of Appeals’ ruling, as described in the preceding paragraph, but claim that the RPFJ does not restore competitive conditions sufficiently that middleware has the potential to flourish

¹⁸AOL 31; Henderson 10; Gifford 8; Litan 58-59; RealNetworks 10; SIIA 7-8, 44-48.

¹⁹Nader/Love 6.

without risk of interference from Microsoft; and (2) comments whose definition of “fruits” is inconsistent with either the claims alleged in this case, the Court of Appeals’ decision, or both.

19. The first group argues that the RPFJ permits Microsoft to retain the fruits of its illegal conduct by allowing it “free rein to squash nascent, albeit unproven competitors at will,”²⁰ and does not sufficiently remove the applications barrier to entry.²¹ In the phrasing of one commentator, as a result of its anticompetitive conduct toward Netscape, Microsoft allegedly is left with the freedom from a competitive environment in which threats could be nurtured.²² As described in detail below (*see* Sections III-VII), however, the RPFJ protects the ability of middleware to compete by imposing a variety of affirmative duties and conditions on Microsoft. The RPFJ is devised to ensure that middleware developers have access to the necessary information — e.g., through disclosure of APIs and server communications protocols — to create middleware that can compete with Microsoft’s products in a meaningful way.²³ It also restricts Microsoft’s conduct toward OEMs and others, and thus opens the door for competing middleware to obtain necessary support, promotion, and distribution.

²⁰ProComp 29-30 (quoting *Microsoft*, 253 F.3d at 79). Similarly, CCIA complains that one of the chief advantages gained by Microsoft was the ability to control the browser, not just as a source of alternate OS-neutral APIs, but specifically as the gateway to Internet computing. As such, this commentator defines the fruit as the “suppressed development of competitive threats,” but criticizes the decree as not addressing this concern.

²¹Kegel 3.

²²Catavault 9.

²³Certain comments assert that erosion of the applications barrier to entry would be accomplished better through mandatory support of cross-platform Java. Litigating States 17; SIIA 49; Nader/Love 6. For a discussion regarding the United States’ decision to promote opportunities for all middleware, rather than a particular competitor, see the discussion of comments that propose a “Java Must Carry” provision, at ¶¶ 428-29 below.

20. The second group of commentators sets forth a variety of different views regarding what the “fruit of the illegal conduct” is in this case. Many of these comments rely on assertions that exceed the scope of either the liability findings in this case, or the theory of the case generally, or both. For example, some comments define the fruit as Microsoft’s enduring monopoly in its Windows operating system and suggest that an appropriate remedy must directly attack the operating system monopoly.²⁴ But the United States never alleged in this case that Microsoft illegally acquired its operating system monopoly. And neither the District Court nor the Court of Appeals adopted the view that Microsoft “would have lost its position in the OS market but for its anticompetitive behavior.” *Microsoft*, 253 F.3d at 107; *see also United States v. Microsoft Corp.*, 84 F. Supp. 2d 9, 111 at ¶ 411 (D.D.C. 1999) (“*Findings of Fact*”) (“There is insufficient evidence to find that, absent Microsoft’s actions, Navigator and Java already would have ignited genuine competition in the market for Intel-compatible PC operating systems.”). In keeping with the original framework of the case and the Court of Appeals’ decision, the United States believes that there is no basis for imposing a remedy that seeks to strip Microsoft of its position in the operating system market.

21. Other commentators define the “unlawful fruit” as Microsoft’s control of the browser market and contend that any remedy must prevent Microsoft from using similar conduct to gain control of services that rely on Internet Explorer.²⁵ Other criticism is directed toward the

²⁴Sun 6.

²⁵SIIA 7-8; CCIA 42; Litigating States’ Proposal § 17.

decree's failure to ban contractual tying.²⁶ A number of commentators, including the Litigating States, propose that Microsoft be required to offer open source licenses to Internet Explorer source code without royalty.²⁷ These commentators claim that, because Microsoft's intent in offering Internet Explorer as a free product was central to its unlawful conduct, the open source remedy may be appropriate to restore competition and deprive Microsoft of the fruits of its unlawful conduct.²⁸ Similarly, certain commentators propose that Microsoft be required to port Internet Explorer to other operating systems.²⁹

22. Stripping Microsoft of its market position in the browser market or banning contractual tying, however, are remedies that are not warranted on the existing record. This case was not a monopoly leveraging case, and the Court of Appeals reversed the District Court's judgment as it related to attempted monopolization of the browser market, and vacated and remanded the District Court's judgment on the tying claim. *Microsoft*, 253 F.3d at 46. The remedy in this case must be evaluated in terms of the *viable claims* remaining after the Court of Appeals' decision; under that construct, remedial measures targeted at Internet Explorer are unsupportable.

23. In particular, neither open sourcing the Internet Explorer source code nor requiring Microsoft to port Internet Explorer to other operating systems would be an appropriate remedy. As one commentator notes, that remedy would benefit Microsoft's competitors rather than

²⁶AOL 31-32.

²⁷CCC 19-20; Harris 15; Litigating States' Proposal 16-17 (§ 12); PFF 30; SSI 19, 45.

²⁸CCC 19-20.

²⁹CCC 19-20; Palm 13.

ensuring a level playing field for all participants in the software industry.³⁰ Most importantly for consumers, it would not significantly enhance those competitors' incentives or ability to develop new or better products. The disclosure provisions of the RPFJ instead provide middleware developers with access to sufficient information for interoperability that will allow them to create middleware — including browsers — that have the ability to compete with Microsoft's middleware in a meaningful way.³¹ The goal of the RPFJ is to restore the opportunity for middleware of all types. The United States believes that this approach is consistent with the Court of Appeals' opinion and will sufficiently deprive Microsoft of the fruits of its unlawful conduct.

D. The Litigating States' Proposal

24. A number of comments suggest that the United States should have proposed a remedy similar to the proposal submitted by the Litigating States in their remedy proceeding with Microsoft in *New York*.³² The United States' primary consideration when crafting the RPFJ was to focus on the practices engaged in by Microsoft that the Court of Appeals found unlawful. As explained in the CIS, elsewhere in this Response, and in the U.S. Memorandum, the United States believes that the RPFJ takes the correct approach toward addressing the anticompetitive

³⁰CompTIA 17 (mandatory sharing of source code).

³¹Carroll 4 (“It's the external behavior that's important for interoperability, not the internal design.”).

³²See Plaintiff Litigating States' Remedial Proposals (“Litigating States' Proposal”). The Litigating States' Proposal is Exhibit B to the Litigating States' comment. Comments that advocate the Litigating States' Proposal include SBC 131-132; AOL 58-61; Litan 69-74; PFF 29-31; CFA 101; Davis; Pratt.

conduct found by the Court of Appeals, preventing its recurrence, and restoring lost competitive conditions in the marketplace.³³

25. Where relevant, we have addressed the differences between the Litigating States' proposals and their counterparts in the RPFJ and have responded to the comments that address these differences. The Litigating States' Proposal also contains several provisions that are not directly comparable to any of the provisions in the RPFJ. For the reasons described below, the United States believes that such provisions are not appropriate as a remedy for the violations found by the Court of Appeals.

E. Fines

26. Many comments criticize the RPFJ for not imposing monetary damages on Microsoft. According to these critics, the decree does not "include anything that would make Microsoft pay for its past misdeeds."³⁴ Others similarly complain that the proposed decree does not contain any provision for the disgorgement of illegal profits.³⁵ Still others complain that the decree should

³³We again note, as discussed in the U.S. Memorandum and elsewhere in this Response, that the Litigating States' Proposal and the RPFJ are to be evaluated under different standards, and are properly addressed separately by the Court. We address the Litigating States' Proposal for the sole purpose of responding to those commentators (including the Litigating States themselves) who contend that the United States should have adopted a remedy identical, or similar, to the proposal by the Litigating States.

³⁴ Nader/Love 6; Holland 1; Brinkerhoff 1; McWilliams 1; Lewis 1; Harris 2; Alexander 2.

³⁵KDE 17; Maddux ¶ 2; Thomas 2-3.

have required Microsoft to reimburse the United States for the attorneys' fees expended on this case.³⁶

27. Monetary damages, including attorneys' fees, are not available to the United States in this case. This is a government civil action for injunctive relief, and monetary damages are not available in such actions. *See* 15 U.S.C. § 4 (authorizing the United States "to institute proceedings in *equity* to prevent and restrain such violations") (emphasis added). *Cf.* 15 U.S.C. § 15(a) (damages available to United States when it is "injured in its business or property"). Moreover, the goals of the remedy in this case are to enjoin the unlawful conduct, prevent its recurrence, and restore competitive conditions in the market affected by Microsoft's unlawful conduct. *See Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 697 (1978); *United States v. E.I. du Pont de Nemours & Co.*, 366 U.S. 316, 326 (1961). The RPFJ accomplishes these goals. By contrast, punishment is not a valid goal.³⁷

F. Senate Hearing

28. The Senate Judiciary Committee submitted a comment consisting of the record from its hearing on December 12, 2001, "The Microsoft Settlement: A Look to the Future." The hearing record consists of the following items: (1) a list of witnesses at the hearing; (2) a transcript of the hearing; (3) written statements of Senators Leahy, Hatch, Kohl, Durbin and Sessions; (4) written statements of Charles A. James (Assistant Attorney General - Antitrust Division, U.S. Department of Justice), Jay L. Himes (New York Attorney General's Office),

³⁶Philips; Wong.

³⁷*See United States v. E.I. du Pont de Nemours & Co.*, 366 U.S. 316, 326 (1961); *United States v. Oregon State Med. Soc'y*, 343 U.S. 326, 333 (1952); *United States v. Nat'l Lead Co.*, 332 U.S. 319, 338 (1947).

Charles F. Rule (counsel to Microsoft), Professor Lawrence Lessig (Stanford Law School), Dr. Mark N. Cooper (Consumer Federation of America), Jonathan Zuck (Association for Competitive Technology), Matthew Szulick (Red Hat, Inc.), and Mitchell E. Kertzman (Liberate Technologies); (5) written statements submitted for the record of Ralph Nader and James Love (Consumer Project on Technology), Mark Havlicek (Digital Data Resources, Inc.), Jerry Hilburn (Catfish Software, Inc.), Lars H. Liebeler (Computing Technology Industry Association), and Dave Baker (EarthLink, Inc.); (6) the RPFJ; (7) News Statement of Citizens Against Government Waste; (8) letter from Senator Hatch to Assistant Attorney General James; (9) letter from Assistant Attorney General James to Senator Hatch; (10) letter from Robert H. Bork to Senators Leahy and Hatch; (11) letter from James L. Barksdale to Senators Leahy and Hatch; (12) letter from Vermont Attorney General William H. Sorrell to Steven A. Ballmer; (13) written questions of Senators Leahy, Hatch, Kohl, DeWine, Durbin, and McConnell; and (14) answers to written questions from Assistant Attorney General James, Professor Lawrence Lessig, Mitchell Kertzman, Matthew Szulick, Charles F. Rule, Jonathan Zuck, and Jay L. Himes.

29. The materials submitted by the Senate Judiciary Committee constitute a self-contained record of the Committee's comments on the settlement (in the form of both questions and written and oral statements) submitted to the Department of Justice, and the Department's responses to those comments. As such, the United States does not respond again here to those comments specifically. The United States notes, however, that many of the Committee's comments on the settlement are identical to or overlap with other comments (including an individual comment from Senator Kohl), to which the United States does respond.

II. TUNNEY ACT ISSUES

A. Adequacy Of The United States' Competitive Impact Statement

30. Several commentators claim that the CIS fails to comply with the Tunney Act.³⁸ Thus, one commentator contends that the CIS is deficient for failing to include substantive economic analysis.³⁹ Another contends that the CIS is too terse, and therefore does not meet the requirements of the statute, the standard set by the CIS filed by the United States in *AT&T* (47 Fed. Reg. 7170-01), or requirements of agency rulemakings.⁴⁰ Other commentators assert that the CIS is inadequate for failing to provide a detailed explanation for rejection of alternative remedies.⁴¹ Still other commentators fault the CIS for allegedly misstating or adding terms to the RPFJ.⁴² One commentator specifically criticizes the CIS' lack of explanation of (1) the use of a definition of "Middleware" in the RPFJ that differs from that used by the Court of Appeals; (2) the lack of a Java-related remedy; (3) the failure of the RPFJ to prohibit all forms of retaliation; and (4) the failure of the RPFJ to address all of the harms identified by the Court of Appeals.⁴³

³⁸These comments include ProComp 80-82; CCIA 33-34; AOL 53-56; PFF 10-17; AAI 12; Relpromax 8-9, Ex. 11. Similar issues also were raised in the complaint filed in *American Antitrust Institute v. Microsoft*, Civ. No. 02-CV-138 (D.D.C.) (CKK), and Motion for Intervention filed by Relpromax Antitrust, Inc.

³⁹Relpromax 8-9.

⁴⁰PFF 10-17.

⁴¹AAI 12; PFF 15.

⁴²ProComp 82; CCIA 33-34.

⁴³AOL 53-56.

Another comment also contends that the United States has failed to produce “determinative documents,” as required by 15 U.S.C. § 16(b).⁴⁴

31. As this recitation shows, while the commentators couch their objections in terms of an alleged failure by the United States to comply with the Tunney Act, for the most part the objections are in substance comments on the RPFJ itself. Because the CIS fully complies with the Tunney Act requirements, none of the objections is well taken.

1. The CIS Complies With The Requirements Of The Tunney Act

32. Congress enacted the Tunney Act, among other reasons, “to encourage additional comment and response by providing more adequate notice [concerning a proposed consent judgment] to the public,” S. Rep. No. 93-298, at 5 (1973) (“Senate Report”); H.R. Rep. No. 93-1463, at 7 (1974) (“House Report”), *reprinted in* 1974 U.S.C.C.A.N. 6535, 6538. The CIS is the primary means by which Congress sought to provide more adequate notice to the public. The Tunney Act requires that the CIS “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;

⁴⁴Further explanation of the United States’ compliance with its obligations under the Tunney Act is contained in the U.S. Memorandum, Part II.

- (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.

15 U.S.C. § 16(b).

33. When Senator Tunney introduced the bill that became the Act, he explained that a purpose of the six items of information required in a CIS was to “explain to the public[,] particularly those members of the public with a direct interest in the proceeding, the basic data about the decree to enable such persons to understand what is happening and make informed comments o[r] objections to the proposed decree during the 60-day period.” 119 Cong. Rec. 3452 (1973) (Remarks of Sen. Tunney) (“Tunney Remarks”).⁴⁵ The purpose could be achieved, Senator Tunney suggested, without adding greatly to the United States’ workload: the six prescribed items “do not require considerably more information than the complaint, answer and consent decree themselves would provide and, therefore, would not be burdensome requirements.” The Antitrust Procedures and Penalties Act: Hearings on S. 782 and S. 1088 Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary, 93d Cong. 3 (1973) (“Senate Hearings”) (statement of Sen. Tunney) (“Tunney Statement”). In light of the more than 30,000 public comments concerning the RPFJ submitted to the United States, there can be little debate that the CIS contained sufficient information for the public to make “informed comments o[r] objections” relating to the RPFJ.

34. There is no serious dispute that the CIS satisfies the requirements of the Tunney Act with respect to items 1, 2, 4, and 5 listed above. Also as discussed above, most of the comments

⁴⁵The other purpose, Senator Tunney explained, was to focus the attention of the parties during settlement negotiations. Tunney Remarks, 119 Cong. Rec. at 3452.

purporting to address item 3 (explanation of the proposed judgment) in fact are complaints about the substance of the RPFJ and not the sufficiency of the CIS. These comments are addressed in this Response according to the provision of the RPFJ to which they apply. To the extent that any comments intend to suggest that the explanation in the CIS itself is deficient, the United States believes that the CIS is more than adequate to its intended purpose of describing the proposed decree's provisions and eliciting public comments.

2. The CIS Recites "A Description And Evaluation Of Alternatives To Such Proposal Actually Considered By The United States"

35. Section V of the CIS (CIS at 60-63) describes alternatives the United States considered and rejected,⁴⁶ and describes the reasons why they were rejected. It explains why the United States viewed the RPFJ as a superior alternative to continued litigation; why the United States decided not to continue to seek a break-up of Microsoft; and the reasons for differences between the interim conduct provisions of the Initial Final Judgment (IFJ), *United States v. Microsoft Corp.*, 97 F. Supp. 2d 59, 66-69 (D.D.C. 2000), *vacated*, 253 F.3d 34, 46 (D.C. Cir. 2001) (en banc) (per curiam), and the provisions of the RPFJ. It also lists a number of other remedy proposals, the criteria used to evaluate them, and the results of that evaluation. The recitations contained in the CIS are fully consistent with providing "basic data about the decree to enable [members of the public with a direct interest] to understand what is happening and make informed comments o[r] objections to the proposed decree," 119 Cong. Rec. 3452 (1973)

⁴⁶As the CIS makes clear (CIS at 63), it does not describe literally *every* remedial proposal considered and rejected. The statute should not be interpreted to require that the CIS do so, for such a requirement would be unduly burdensome and serve no useful purpose. As Senator Tunney said, the CIS ought to provide "*some* of the alternatives that were considered by the Department." Senate Hearings at 108 (remark of Sen. Tunney) (emphasis added).

(Tunney Remarks), and with Senator Tunney's view that the statutory requirements should not be burdensome. *See* Tunney Statement. The number and nature of the comments themselves suggest that the level of analysis in the CIS was more than adequate to stimulate informed public comment about the proposed remedy and about the relative merits of alternative remedies. As the United States described recently in its response to AAI's lawsuit,⁴⁷ the recital complied with the statutory requirement and fulfilled its purpose.

B. The United States Fully Complied With All Tunney Act Requirements Regarding Determinative Documents

36. The Tunney Act requires the United States to make available to the public copies of "any other materials and documents which the United States considered determinative in formulating [the proposed final judgment]." § 16(b). The CIS explained that the United States is not filing any determinative documents in this case because there are none within the meaning of the statute. One comment says that this disclosure is deficient,⁴⁸ but it is mistaken.

37. The United States did not file any determinative documents with the Court or disclose any in the CIS for the simple reason that there are no such documents in this case. The Court of Appeals has addressed the definition of "determinative documents" in a Tunney Act case. *Mass. Sch. of Law at Andover, Inc. v. United States*, 118 F.3d 776 (D.C. Cir. 1997) ("*MSL*"). In *MSL*, the court held that a third party was not entitled a wide range of documents from the

⁴⁷United States' Motion to Dismiss, *AAI v. Microsoft Corp.*, No. 02-CV-138 (D.D.C.) (CKK), at 16-23 (Feb. 8, 2002) ("Br. Dismiss AAI"); *see also* U.S. Memorandum at 20-28.

⁴⁸ProComp 81-82.

government's files.⁴⁹ The United States there said the statute referred to documents "'that individually had a significant impact on the government's formulation of relief — i.e., on its decision to propose or accept a particular settlement.'" *Id.* at 784 (quoting brief of the United States). The court concluded that the statutory language "seems to point toward the government's view . . . and confines § 16(b) at the most to documents that are either 'smoking guns' or the exculpatory opposite." *Id.* The court added that "[t]he legislative history in fact supports the government's still narrower reading." *Id.*; see also *United States v. Bleznak*, 153 F.3d 16, 20-21 (2d Cir. 1998) (only documents that were a "substantial inducement to the government to enter into the consent decree" need be disclosed). No court of appeals has said otherwise.⁵⁰

⁴⁹See also Br. Dismiss AAI 19-21.

⁵⁰ProComp cites *United States v. Central Contracting Co.*, 527 F. Supp. 1101, 1104 (E.D. Va. 1981), in which the court called "almost incredible" the United States' representation that no determinative documents existed. After further review, and acknowledging that in most cases a "smoking gun" document will not exist, the court adopted a broader standard under which, even if documents are individually not determinative, they can be determinative in the aggregate. See *United States v. Central Contracting Co.*, 537 F. Supp. 571, 575 (E.D. Va. 1982). The United States does not believe that there are determinative documents in this case even under the standard of *Central Contracting*. But in any event, *Central Contracting's* broad definition of determinative documents has not been followed by any Tunney Act court, has been squarely repudiated by one district court, *United States v. Alex. Brown & Sons, Inc.*, 169 F.R.D. 532, 541 (S.D.N.Y. 1996) ("*Central Contracting's* broad definition of 'determinative documents' may conflict with Congress's intent to maintain the viability of consent decrees") (cited with approval in *MSL*, 118 F.3d at 785), *aff'd sub nom. United States v. Bleznak*, 153 F.3d 16 (2d Cir. 1998), and cannot be reconciled with decisions of the Court of Appeals for the District of Columbia Circuit and the Second Circuit. See *MSL*, 118 F.3d at 784; *Bleznak*, 153 F.3d at 20 (citing *MSL* and quoting "'smoking gun' or exculpatory opposite" with approval). *Central Contracting* is simply not good law in this regard.

38. Thus, the commentor who asserts that the United States must have failed to comply with the statute because it “cannot be accurate” that no determinative documents exist,⁵¹ misapprehends the meaning of “determinative documents.” The United States simply did not consider any document in this case to be a “smoking gun or its exculpatory opposite” with a significant impact on the formulation of its decision regarding the RPFJ.

C. Timing And Process Of Hearing

39. Several comments say that an evidentiary hearing with third party participation is necessary and that the hearing should be held in conjunction with — or even after — the remedy hearing in *New York*. We disagree.

1. The Court Has Discretion To Determine The Nature And Format Of The Tunney Act Proceedings

40. A court in a Tunney Act proceeding is vested with great discretion concerning the nature of any proceedings to review a proposed consent decree. Congress clearly intended that “the trial judge will adduce the necessary information through the least time-consuming means possible,” *see* S. Rep. No. 298, 93d Cong. 6 (1973) (“Senate Antitrust Report”); H.R. Rep No. 93-1463, 93d Cong. Sess. 8 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6535, 6539 (“House Antitrust Report”), even though the court *may* take other steps as it may deem appropriate. 15 U.S.C. § 16(f). The procedural devices enumerated in Section 16(f) are discretionary — the legislative history characterizes them as “tools available to the district court or [sic] its use, but use of a particular procedure is not required.” 119 Cong. Rec. 3453 (Feb. 6, 1973) (Remarks of

⁵¹ProComp 81.

Sen. Tunney). Such procedures were made discretionary “to avoid needlessly complicating the consent decree process.” *Id.*

41. The legislative history further indicates that Congress did not intend the Tunney Act to produce lengthy hearings on the merits and thereby undermine the incentives for the United States and defendants to reach settlements in civil antitrust cases. *See* Senate Antitrust Report at 3. Rather, Congress meant to retain the consent decree as a viable settlement option, calling it “a substantial antitrust enforcement tool.” *See* Senate Antitrust Report at 6-7; House Antitrust Report at 8; *United States v. Microsoft Corp.*, 56 F.3d 1448, 1456 (D.C. Cir. 1995) (“*Microsoft I*”).

2. An Evidentiary Hearing Is Not Required In This Case

42. Several commentators argue that the Court should conduct an evidentiary hearing given the complexity and importance of this case.⁵² But the Tunney Act does not mandate a hearing or trial. *See United States v. Airline Tariff Publ’g Co.*, 836 F. Supp. 9, 11 n.2 (D.D.C. 1993); *United States v. NBC*, 449 F. Supp. 1127 (C.D. Cal. 1978). Indeed, such a hearing could largely defeat the principal considerations behind the RPFJ: to avoid the uncertainty of a trial and to obtain “prompt relief in a case in which illegal conduct has long gone unremedied.” CIS at 60. The legislative history “clearly and expressly establishes that ‘[i]t [was] not the intent of the committee to compel a hearing or trial on the public interest issue.’” *NBC*, 449 F. Supp. at 1143-44 (*quoting* Senate Antitrust Report, *quoted with approval in House Antitrust Report at 8-9*). Instead, the “Tunney Act expressly allows the court to make its public interest determination on

⁵² AAI 12; AOL 55-58; Novell 34-35; ProComp 84.

the basis of the competitive impact statement and response to comments alone.” *United States v. Enova Corp.*, 107 F. Supp. 2d 10, 17 (D.D.C. 2000).

43. The court may, in its discretion, invoke additional procedures when it determines that such proceedings may assist in the resolution of issues raised by the comments. *See id.* But the legislative history indicates that “[w]here the public interest can be meaningfully evaluated simply on the basis of briefs and oral argument, this is the approach that should be utilized.” House Antitrust Report at 8. “Only where it is imperative that the court should resort to calling witnesses for the purpose of eliciting additional facts should it do so.” *Id.* Even in *AT&T*, which at the time was considered “the largest and most complex antitrust action brought since the enactment of the Tunney Act,” the court concluded that “none of the issues before it require[d] an evidentiary hearing,” and instead invited briefing from interested individuals and allowed participation through oral argument at the two-day hearing on the proposed modifications to the final judgment that were at issue. *AT&T*, 552 F. Supp. at 145, 219.

44. It is not imperative to hold an evidentiary hearing in this case because the Court has sufficient information to determine whether to approve a consent decree. *United States v. Associated Milk Producers*, 394 F. Supp. 29, 45 (W.D. Mo.), *aff’d*, 534 F.2d 113 (8th Cir. 1976); *United States v. G. Heileman Brewing Co.*, 563 F. Supp. 642, 650 (D. Del. 1983). In this case, the Court already has the benefit of a broad array of materials to assist in making the public interest determination. Over 30,000 public comments were submitted, including detailed comments from, among others, some of Microsoft’s primary competitors and most vociferous critics (such as Sun Microsystems, AOL/Time Warner, and RealNetworks) as well as computer and software industry trade groups representing the interests of such firms (such as ProComp,

CCIA, and SIIA). The Court also has this Response, as well as additional briefing submitted by the United States, Microsoft, and the Settling States. The Court has scheduled a two-day hearing on the RPFJ, during which the Court has indicated it will hear oral argument from the United States, Microsoft, and the Settling States, as well as pose questions to the parties. The Court has further indicated that it may hear brief oral argument from third parties during the hearing, although the precise nature of third-party participation, if any, is still under consideration. The Court will have access to a sufficient body of materials to determine whether the RPFJ is in the public interest without resorting to an evidentiary hearing that would both delay and unnecessarily complicate the evaluation of the RPFJ.

3. The Court Is Not Required To Permit Any Third-Party Participation

45. Whether and to what extent to allow third parties to participate is left to the Court's discretion; the Tunney Act permits, but does not require, the Court to authorize third-party participation. 15 U.S.C. § 16(f)(3). Courts usually deny third-party participation in Tunney Act proceedings both because the potential for delay outweighs the benefit from intervention (*see, e.g., United States v. IBM Corp.*, 1995 WL 366383 (S.D.N.Y. June 19, 1995)) and because interested third parties are heard through the comments process. *United States v. G. Heileman Brewing Co.*, 563 F. Supp. 642, 652 (D. Del. 1983); *United States v. Carrols Devel. Corp.*, 454 F. Supp. 1215, 1221-22 (N.D.N.Y. 1978). That is particularly true in this case, where a large number of highly interested and motivated third parties have taken full advantage of the opportunity to submit extensive comments that set forth their views of the RPFJ and whether the Court should enter it. As a result, although the Court ultimately may choose to hear from third

parties,⁵³ they have already had a full and effective mechanism to present to the Court any arguments or concerns they believe it should address in its public interest determination.

4. Allowing Third-Party Participation Through An Evidentiary Hearing Would Unnecessarily Delay And Complicate These Proceedings

46. Insofar as commentators claim that third parties should be allowed to participate in an evidentiary hearing, doing so would serve only to complicate and delay these proceedings. Allowing third-party participation in an evidentiary hearing would delay the much-needed relief the United States seeks in the public interest. As the court in *IBM* wisely observed, “[a]dditional parties always take additional time. Even if they have no witnesses of their own, they are a source of additional questions, objections, briefs, arguments, motions and the like which tend to make the proceedings a Donnybrook Fair.” *IBM*, 1995 WL 366383, at *5 (quoting *Crosby Steam Gage & Valve Co. v. Manning, Maxwell & Moore, Inc.*, 51 F. Supp. 972, 973 (D. Mass. 1943)).

47. Much of the “evidence” that such commentators seek to present during an evidentiary hearing consists of materials that have been, or could have been, included in their public comment submissions⁵⁴ or that could be addressed through briefing and oral argument, should the Court choose to allow such third-party participation. Resubmitting such materials through the form of testimony would result only in delay and a waste of judicial resources. The commentators — who already have been given an opportunity fully to be heard — have not

⁵³CCC 2; ProComp 84-86.

⁵⁴AOL 53; Litan 59-60; ProComp 84-86.

demonstrated that an evidentiary hearing would in any way advance the public interest or permit them to improve materially on the points made in the extensive comments already submitted.

5. The Tunney Act Proceedings Should Not Be Held In Conjunction With, Or Rely Upon Evidence From, The Litigating States' Remedy Hearing

48. Finally, a number of comments propose that the Court consider the RPFJ either in conjunction with, or after, consideration of the Litigating States' proposed remedy in *New York*. Some argue that the Court should not make its determination regarding the RPFJ until after the Litigating States have presented their case, claiming that such an approach is necessary to avoid prejudicing the Litigating States' case.⁵⁵ Others assert that the Court should hold a hearing on the RPFJ, if at all, only after the Litigating States' hearing.⁵⁶ Finally, at least one commentator proposes that the Court hold a single hearing to evaluate all possible remedial options, including the Litigating States' proposal, the RPFJ, and major structural remedies.⁵⁷

49. These proposals are ill-advised and unworkable for a number of reasons. *First*, the RPFJ and the Litigating States' proposed remedy are to be evaluated separately and under different standards. *See* U.S. Memorandum at 35-46. *Second*, it would be inappropriate to introduce evidence relating to *New York* in this Tunney Act proceeding. The United States is not a party to *New York*, has not participated in the discovery or other aspects of that case, has played no role in the development of the evidence related to that case, and will not participate in that hearing. Consideration of evidence from that case in this proceeding, therefore, would be

⁵⁵ AAI 11; SIIA 8-9.

⁵⁶ AOL 58-61; Litan 59-60; Novell 3, 34-35.

⁵⁷ PFF 4.

inappropriate. *Cf.* Fed. R. Evid. 804(b)(1) (testimony given in another hearing in a different proceeding can be admitted against a party only “if the party against whom the testimony is now offered or . . . a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination”).

50. Finally, proposals to have the two cases considered concurrently, or to postpone consideration of the RPFJ until after the remedial hearing in *New York*, unnecessarily would delay the Court’s public interest determination regarding the RPFJ. *See* U.S. Memorandum at 74-78. The Litigating States’ hearing is scheduled to begin on March 11, 2002. The parties there have proposed between 170 and 300 hours of total testimony in that case. *See* Joint Status Report 2, No. 98-CV-1233 (Feb. 13, 2002). Although the Court has indicated that the proposed length is far longer than it expected or believes is reasonably necessary, the Court has not yet determined the precise format or length of that hearing. *See* Tr. 2/15/02 at 26-27, No. 98-CV-1233. In all likelihood, the hearing could last several weeks.

51. All of these proposals stand to delay consideration, and entry of, the RPFJ by the Court. Delay of this nature, which will not result in the Court hearing more or better information about the settlement, is not only unnecessary but also subverts one of the primary goals of both the RPFJ and the Tunney Act — prompt relief.⁵⁸ The Court therefore should not postpone entry of the RPFJ.

⁵⁸ Although Microsoft has agreed to be bound by much of the RPFJ pending its entry (Stipulation ¶ 2 (Nov. 6, 2001)), some important provisions become effective only after entry. *See, e.g.*, RPFJ § IV.B (Technical Committee must be created “[w]ithin 30 days of entry of this Final Judgment”); *id.* § IV.C (Microsoft’s internal compliance program begins “within 30 days of entry”).

D. Standard Of Review Under The Tunney Act⁵⁹

52. Numerous comments address the standard of review applicable under the Tunney Act to the RPFJ.⁶⁰ These comments range from brief references to the language of the Tunney Act⁶¹ to lengthy discourses on the correct standard citing legislative history, case law, and treatises.⁶²

53. These comments have at least three overriding themes. First, most agree, citing *Microsoft*, that the correct standard for relief is to unfetter a market from anticompetitive conduct, terminate the illegal monopoly, deny to the defendant the fruits of its illegal conduct, and ensure that no practices remain likely to result in monopolization in the future.⁶³ Second, most argue that, because of the procedural posture of the case, the judgment of the United States in agreeing to the RPFJ as an appropriate resolution of the charges it brought and the case it proved is due little or no deference.⁶⁴ And finally, many argue, again because of the procedural posture of the case, that the District Court is required to apply a more stringent review, and even entitled to fashion its own relief based upon an independent review of the record.⁶⁵ Although the

⁵⁹The standard to be applied in this proceeding is discussed in U.S. Memorandum, Part III.

⁶⁰RealNetworks 5-10; Red Hat 9-10; SBC 21-32; Litan 4-11, 31-42; Sen. Kohl 2; Kegel 3; KDE 1-2; Elhauge 5-6, 10, 13; Economides 4; CFA 2; CompTIA 4-5; CCIA 9-11, 18-41; AAI 2-13; ACT 2-18; SIA 9-11; WLF 3-4; PFF 1-9; ProComp 1-25; Novell 30-37; AOL 1-9.

⁶¹WLF 3; CFA 2; Kegel 3; Sen. Kohl 2; KDE 1-2; CompTIA 4-5.

⁶²ProComp 1-25; ACT 2-18; AAI 2-13; CCIA 9-11; Litan 4-11; SBC 21-32.

⁶³CCIA 9, 34-38; Red Hat 9; ProComp 2, 16-20; Litan 34; AOL 2-8; Kegel 3; SIA 9-10.

⁶⁴ProComp 2, 12, 20-23 (no deference); AAI 5-9; CCIA 9-10, 19-33; SBC 30.

⁶⁵Novell 30-37; RealNetworks 5-10; ProComp 15-23; AOL 4-9; Litan 33-36; SBC 29-32; AAI 4-13; CCIA 19-39.

commentors correctly identify the relevant standard of relief set forth by the Court of Appeals, they are incorrect in concluding that the procedural posture of the case eliminates any need for deference to the judgment of the United States or justifies a court-created remedy. In essence, these commentors argue that the Court of Appeals' mandate precluded the possibility of a negotiated settlement. It did not. The Court of Appeals recognized that even a litigated remedy should be "tailored to fit the . . . drastically altered scope of Microsoft's liability . . ." *Microsoft*, 253 F.3d at 107. As explained in the U.S. Memorandum, and below in Sections IV through XII, the RPFJ fits that altered scope of liability.

1. The Tunney Act Requires That Entry Of The RPFJ Be "In the Public Interest"

54. As noted by the United States in its CIS and by virtually all commentors remarking on the issue, the Tunney Act requires that the Court determine whether entry of the RPFJ is "in the public interest." 15 U.S.C. § 16(e). In making that 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.

Id. (emphasis added). As is apparent from the permissive language of the statute, these factors for consideration are discretionary.⁶⁶

⁶⁶S. Rep. No. 93-298, at 6 (1973).

55. In determining whether the RPFJ is in the public interest, the Court may properly consider whether “the remedies [are] so inconsonant with the allegations charged as to fall outside of the ‘reaches of the public interest.’” *United States v. Microsoft Corp.*, 56 F.3d 1448, 1461 (D.C. Cir. 1995) (“*Microsoft I*”) (internal citations omitted). In *Microsoft I*, and again in *Massachusetts School of Law at Andover, Inc. v. United States*, 118 F.3d 776 (D.C. Cir. 1997) (“*MSL*”), the D.C. Circuit explained that this inquiry entails consideration of four specific factors:

The district court must examine the decree in light of the violations charged in the complaint and should withhold approval only [1] if any of the terms appear ambiguous, [2] if the enforcement mechanism is inadequate, [3] if third parties will be positively injured, or [4] if the decree otherwise makes “a mockery of judicial power.” See [*Microsoft I*, 56 F.3d] at 1462.

MSL, 118 F.3d at 783.⁶⁷

56. The requirements of an antitrust remedy are familiar. As the Court of Appeals noted in remanding this case:

a remedies decree in an antitrust case must seek to “unfetter a market from anticompetitive conduct,” *Ford Motor Co. [v. United States]*, 405 U.S. [562,] 577 [(1972)], 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,” *United States v. United Shoe Mach. Corp.*, 391 U.S. 244, 250 . . . (1968); see also *United States v. Grinnell Corp.*, 384 U.S. 563, 577 . . . (1966).

253 F.3d at 103.

57. The Court of Appeals also emphasized, however, that the “[m]ere existence of an exclusionary act does not itself justify full feasible relief against the monopolist to create maximum competition.” *Id.* at 103 (quoting 3 *Antitrust Law* ¶ 650a, at 67). The scope of the

⁶⁷For further discussion of these factors, see U.S. Memorandum at 36-42.

remedy must be clearly related to the anticompetitive effects of the illegal conduct. *Microsoft I*, 56 F.3d at 1460 (quoting *International Salt Co. v. United States*, 332 U.S. 392, 401 (1947)).

Although an antitrust conduct remedy is not limited to enjoining precisely the conduct found to be unlawful, e.g., *United States v. Hartford-Empire Co. v. United States*, 323 U.S. 386, 409 (1945); *AT&T*, 522 F. Supp. at 150 n.80, nevertheless “the remedies must be of the ‘same type or class’ as the violations, and the court is not at liberty to enjoin ‘all future violations of the antitrust laws, however unrelated to the violations found by the court.’” *Microsoft I*, 56 F.3d at 1460.⁶⁸

2. The Court Should Grant Deference to the Judgment of the United States

58. Commentors assert that the current procedural posture of the case, after trial and affirmance on appeal, eliminates any need for deference to the judgment of the United States. Commentors urge the Court to undertake an independent review of the record, and even substitute a litigated remedy for that of the RPFJ. Such a result is inconsistent with the purposes and intent of the Tunney Act.

59. As explained in the U.S. Memorandum, the Court’s assessment of the adequacy of the RPFJ must take into account the risks and uncertainties of further litigation that would be required before there could be an adjudicated final judgment, safe from further challenge on appeal, that would remedy the anticompetitive harm attributable to conduct found to violate the Sherman Act. See U.S. Memorandum at 45-46. The Court of Appeals explained in *Microsoft I* that it is “inappropriate for the judge to measure the remedies in the decree as if they were fashioned after trial. Remedies which appear less than vigorous may well reflect an underlying

⁶⁸Nor may relief in a civil antitrust case be punitive. See page 15 & n.37 above.

weakness in the government's case, and for the district court to assume that the allegations in the complaint have been formally made out is quite unwarranted." *Id.* at 1461.⁶⁹

60. This case does differ from *Microsoft I* in that there have been both findings of fact and conclusions of liability affirmed on appeal. But the difference is one of degree, not kind. Although the Court of Appeals in this case affirmed the District Court's judgment of liability for monopoly maintenance, it emphasized that neither it, nor the District Court, had so far found "a causal connection between Microsoft's exclusionary conduct and its continuing position in the operating systems market," 253 F.3d at 106-07, sufficient to justify structural relief (although it did not rule out the possibility that the District Court would find such a connection on remand).⁷⁰ Moreover, the Court of Appeals vacated the District Court's judgment of liability with respect to tying, *id.* at 84 (leaving open the possibility of further litigation on remand), and reversed as to attempted monopolization, *id.* at 80-84; it also limited the scope of the conduct found to constitute illegal monopolization, reversing on 8 of the 20 acts found by the District Court. The

⁶⁹Congress intended that the statutory "public interest" concept encompass "compromises made for non-substantive reasons inherent in the process of settling cases through the consent decree procedure." House Report at 12.

⁷⁰Among the goals of an antitrust decree are "terminat[ing] the illegal monopoly" and "deny[ing] to the defendant the fruits of its statutory violation." *Microsoft*, 253 F.3d at 103 (internal quotation omitted). But plaintiffs never alleged, and neither the District Court nor the Court of Appeals found, that Microsoft *acquired* its monopoly unlawfully. *See id.* at 58 (Microsoft "violated § 2 by engaging in a variety of exclusionary acts . . . to maintain its monopoly"); *see also Microsoft I*, 56 F.3d at 1452. Thus, whether, and to what extent, Microsoft now has an "illegal monopoly" depends on whether its unlawful conduct increased or extended Microsoft's monopoly — that is, whether the fruits of its statutory violations included increments to the magnitude or duration of its market power. Again, neither the District Court nor the Court of Appeals found this direct causal connection between the conduct and the continuance of the monopoly.

remedy ultimately imposed on remand, the Court of Appeals directed, “should be tailored to fit the wrong creating the occasion for the remedy.” *Id.* at 107.

61. In the absence of a settlement, therefore, the United States would face the prospect of extended litigation with respect to the numerous issues related to relief in this case. An appeal likely would follow the conclusion of the proceedings in the District Court. Microsoft also might choose to seek Supreme Court review of the Court of Appeals’ decision affirming its liability for monopolization. *See* Petition for a Writ of Certiorari, No. 01-236 (listing issues for future petition). Despite the *Findings of Fact* and *Conclusions of Law*, and despite the Court of Appeals’ affirmance of a number of the holdings, including liability for monopolization, the ultimate outcome of continued litigation is uncertain, and the path of litigation would be both risky and costly in terms of resources that might otherwise be devoted to other antitrust enforcement concerns.⁷¹

62. Thus, although the litigation risks the United States faces here are not identical to the litigation risks it faces when it negotiates a settlement prior to trial, the teaching of *Microsoft I* remains applicable. The District Court’s evaluation of the RPFJ is properly informed by the public interest in a certain and timely remedy for Microsoft’s unlawful conduct and must take account of the uncertainties and risks of further litigation, an inquiry that properly respects the realistic choices the United States faced in deciding to settle the case on the negotiated terms of the RPFJ.

⁷¹See Note, *The Scope of Judicial Review of Consent Decrees under the Antitrust Procedures and Penalties Act of 1974*, 82 Mich. L. Rev. 153, 175 n.143 (1974) (“The legislative history of the [Tunney Act] should make the courts sensitive to the efficient allocation of the Department’s resources in making their public interest determinations.”).

63. Moreover, in making its determination, the District Court properly accords significant weight to the United States' predictive judgments as to the efficacy of remedial provisions. Indeed, such deference is proper even outside the consent decree context. See *Ford Motor Co. v. United States*, 405 U.S. 562, 575 (1972) (“once the Government has successfully borne the considerable burden of establishing a violation of law, all doubts as to the remedy are to be resolved in its favor”) (quoting *United States v. E.I. du Pont de Nemours & Co.*, 366 U.S. 316, 334 (1961)). Similarly, it is proper to defer to the United States as representative of the public interest when the parties are requesting entry of an agreed-upon judgment.⁷²

64. As the Court of Appeals has explained, the degree of deference the trial court gives to “the government’s predictions as to the effect of the proposed remedies” in a Tunney Act proceeding may vary with the extent of the court’s familiarity with the market and other factors. *Microsoft I*, 56 F.3d at 1461. But, as the Court of Appeals also emphasized, even a court that has extensive relevant expertise should not lightly reject the government’s predictions. For example, in the case of the *AT&T* decree — “a decree the oversight of which had been the business of a district judge for several years,” *Microsoft I* at 1460 — the Court of Appeals instructed that the district court should not reject an agreed-upon modification of the decree unless the court had “exceptional confidence that adverse antitrust consequences [would] result — perhaps akin to the confidence that would justify a court in overturning the predictive judgments of an administrative agency.” *Id.* (quoting *United States v. Western Elec. Co.*, 993 F.2d 1572, 1577 (D.C. Cir. 1993)). Indeed, if courts do not give appropriate deference to the United States’

⁷²See, e.g., *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 177 (1948); *United States v. Borden Corp.*, 347 U.S. 514, 518 (1954); *United States v. Bechtel Corp.*, 648 F.2d 660, 666 (9th Cir. 1981).

views, Tunney Act proceedings will become equivalent to the proceedings that lead to adjudicated judgments with adjudicated remedies.

65. Commentors are also incorrect in their assertion that the procedural posture of the case requires the District Court to fashion and impose an adjudicated judgment. The District Court's role in making this public interest determination differs from its role in formulating an adjudicated judgment. Because the District Court "is evaluating a settlement, it is not as free to exercise its discretion in fashioning a remedy," *AT&T*, 552 F. Supp. at 151, as it would be in a case litigated to an adjudicated judgment. The District Court is not "empowered to reject [the remedies sought] merely because [it] believe[s] other remedies [are] preferable." *Microsoft I*, 56 F.3d at 1460. In this procedural setting, the District Court's "function is not to determine whether the resulting array of rights and liabilities 'is the one that will *best* serve society,' but only to confirm that the resulting settlement is "within the *reaches* of the public interest.'" *Id.* (quoting *United States v. Western Elec. Co.*, 990 F.2d 283, 309 (D.C. Cir. 1990) ("*Triennial Review Opinion* ") (emphasis in original), in turn quoting *United States v. Bechtel Corp.*, 648 F.2d 660, 666 (9th Cir. 1981), in turn quoting *United States v. Gillette Co.*, 406 F. Supp. 713, 716 (D. Mass. 1975)).

66. This standard reflects not only the proper role of a court of equity asked to lend its authority to the parties' agreement, but also the critical role that consent decrees play in effective public antitrust enforcement. *See* Senate Report at 5 ("the consent decree is of crucial importance as an enforcement tool, since it permits the allocation of resources elsewhere"); 119 Cong. Rec. 24,600 (1973) (Statement of Sen. Gurney) (Tunney Act "is designed to enhance the value and effectiveness of the consent decree as a tool of public policy"). A consent decree, such

as the RPFJ, is the product of negotiation. The parties weigh the benefits of prompt and certain resolution of the case against the possibility that continued litigation might improve their respective positions. Settlements potentially offer the public the benefits of more timely and certain relief, as well as significant savings in judicial and prosecutorial resources. But if courts refused to enter any consent decree that did not match precisely the relief the court would have imposed in the absence of a settlement, “defendants would have no incentive to consent to judgment and this element of compromise would be destroyed. The consent decree would thus as a practical matter be eliminated as an antitrust enforcement tool, despite Congress’ directive that it be preserved.” *AT&T*, 552 F. Supp. at 151.

67. Thus, even in the *AT&T* case, a case of unparalleled public importance in which the trial court had unusual familiarity with both the evidence and the legal arguments of the parties, *see id.*, the court determined to approve the parties’ settlement “[i]f the [proposed] decree meets the requirements for an antitrust remedy.” *Id.* at 153. The court made clear that it intended to follow that standard whether or not the proposed decree corresponded to the decree the court itself would have imposed had the parties pushed forward to an adjudicated judgment. *See id.* at 166 n.147 (noting that if the case “were to proceed to final judgment and liability were found, the Court might determine that [certain measures not part of the proposed decree] are appropriate remedies, either as alternatives to the divestiture of the Operating Companies or in addition to such divestiture”).

E. Microsoft's Compliance With Section 16(g)

68. Several comments question whether Microsoft made adequate disclosures under 15 U.S.C. § 16(g).⁷³ At the February 8, 2002, Status Conference, the Court directed Microsoft to brief the issue of its compliance with Section 16(g), and expressed its assumption that this issue was one that “the government isn’t necessarily going to be commenting on, but it is something that is [Microsoft’s] responsibility.”⁷⁴ The United States therefore supplies the following information concerning the purpose of the disclosures required pursuant to Section 16(g), but does not respond to the substance of the comments that question Microsoft’s compliance with the requirements of Section 16(g).

69. The Tunney Act treats disclosure requirements intended to inform public comment regarding a proposed consent judgment entirely separately from the other disclosure requirements set forth in the Act. To facilitate public comment on a proposed consent judgment in a government civil antitrust case, the Tunney Act provides, in a single subsection, that the proposed decree itself must be published in the *Federal Register*, along with a CIS, which the United States must furnish to any person requesting it. 15 U.S.C. § 16(b). In addition, that same subsection requires the United States to file in the Tunney Act district court, and any other district court the Tunney Act court designates, copies of the proposed decree and “any other materials and documents which the United States considered determinative in formulating such proposal.” *Id.* But the Tunney Act does not depend solely on the *Federal Register* to inform the public. The next subsection, 15 U.S.C. § 16(c), requires the United States to publish, repeatedly,

⁷³Relpromax 21-23; CCC 3; CCIA 26-32.

⁷⁴Tr. 2/8/02 at 16-17.

summaries of the proposal and the CIS, together with a list of the determinative documents made available for “meaningful public comment,” in general circulation newspapers.

70. By contrast, the lobbying provision at issue here, Section 16(g), merely requires *defendants* in antitrust cases to file their disclosure statements with the Tunney Act court — there are no requirements of public notice, *Federal Register* publication, newspaper summaries, or distribution to other district courts. Moreover, the statutory provisions addressing disclosure of information supporting informed public comment (Sections 16(b), (c)), appear immediately before the provisions dealing with consideration of, and response to, public comment (Section 16(d)) and the court’s public interest determination (Sections 16(e), (f)). The lobbying provision comes *after* all of those Sections. The statutory structure thus makes clear the different purposes of the two different kinds of disclosure provisions.⁷⁵ Thus, even if Microsoft failed to satisfy the requirements of Section 16(g), that would not provide any basis to begin the comment period anew and further delay entry of the RPFJ.⁷⁶

⁷⁵Although the statutory language is unambiguous, legislative history also bears out the distinction. The Senate Report notes that the “bill seeks to encourage additional comment and response by providing more adequate notice to the public,” S. Rep. No. 93-298 at 5, and goes on to describe the provision of information to the public. As in the Tunney Act, the Report’s description of the lobbying provision is separated from its treatment of the provision of information to the public by another topic entirely, the court’s public interest determination. *See id.* at 6-7. The House Report is to the same effect. *See* H.R. Rep. No. 93-1463 at 6-7 (information provided to public through *Federal Register* and newspapers); *id.* at 9 (lobbying disclosures).

⁷⁶For a fuller discussion, see Br. Dismiss AAI at 24-28.

III. DEFINITIONS

A. Definition Of “ISV” (RPFJ § VI.I)

71. Several comments address Section VI.I, which defines “ISV” as “an entity other than Microsoft that is engaged in the development or marketing of software products.” All of the comments concern the breadth of the definition.

72. Several commentors misread the definition, contending that “ISV” inappropriately covers only companies creating software that runs on Windows Operating System Products.⁷⁷ The definition shows on its face that this concern is misplaced: any “software product” is covered, whether or not it runs on Windows.

73. Several commentors suggest expanding the definition of “ISV” explicitly to include developers of particular categories of products. One commentor worries that Microsoft could construe the definition to exclude developers or marketers of non-Microsoft operating systems, and suggests that the definition be modified to include them explicitly.⁷⁸ Another worries that the definition does not clearly encompass developers of software products designed to run on new versions of Windows or on other next-generation devices, and that it excludes vendors of competing servers.⁷⁹ These concerns are misplaced and, therefore, the proposed modifications are unnecessary. The RPFJ defines “ISV” to include developers or marketers of “software products,” and that very broad category of products unambiguously includes operating systems

⁷⁷Palm 10; Carroll 2.

⁷⁸Red Hat 24.

⁷⁹AOL, Klain 9-10, 12.

(including server operating systems), operating system products (including server operating system products), and software designed to run on any platform on any device.

74. Other commentators express concern that individuals, particularly individual developers writing and trading code within the “open source” community, might not qualify as “entities” and so might not qualify as “ISVs” under Definition VI.I.⁸⁰ The RPFJ, however, sets no minimum size or organizational standard for an “entity.” Any individual or group of individuals, whether incorporated or not, that otherwise meets the definition of “ISV” is considered to be an ISV within the meaning of the RPFJ.

B. “Microsoft Middleware” (RPFJ § VI.J)

75. Many commentators criticize the RPFJ definition of Microsoft Middleware. Occasionally, a commentator simply fails to realize which middleware definition, Microsoft Middleware Product or Microsoft Middleware, is used in a given section.⁸¹ To review, Microsoft Middleware Product describes functionality and products, as an end user might perceive them. This definition is used in Sections III.C and III.H, as well as indirectly, via the Microsoft Platform Software definition, in Sections III.A, III.F and III.G.

76. In contrast, the Microsoft Middleware definition describes software code, and is only used in Sections III.D and III.G. Most commentators focus on its use in Section III.D concerning API disclosure. The reason Microsoft Middleware is directed at software code and not functionality is that it is difficult to take any given piece of functionality and identify exactly which pieces of software code correspond to that functionality. For instance, a word processor

⁸⁰AAI 38; KDE 16; Wang 1.

⁸¹Henderson 5-6; Gifford 3.

displays text on a screen, and that is a functionality that the end user associates with the word processor. The software code that draws characters on the screen, however, is driven largely by code that many would consider part of the operating system. The word processor uses some of its own software code and some of the operating systems services to make the functionality appear to the user. Therefore, to avoid confusion and disagreements over which software code corresponded to which functionality, the United States designed a software code-based definition for use in Section III.D.

77. In response to comments, two of the specific requirements of the Microsoft Middleware definition have been changed in the SRPFJ to more clearly reflect the parties' intent. Each requirement and any associated modifications are discussed individually below. For reference, the complete revised definition is as follows:

RPFJ Section VI.J. "Microsoft Middleware" means software code that

1. Microsoft distributes separately from a Windows Operating System Product to update that Windows Operating System Product;
2. is Trademarked or is marketed by Microsoft as a major version of any Microsoft Middleware Product defined in Section VI.K.1; and
3. provides the same or substantially similar functionality as a Microsoft Middleware Product.

Microsoft Middleware shall include at least the software code that controls most or all of the user interface elements of that Microsoft Middleware.

Software code described as part of, and distributed separately to update, a Microsoft Middleware Product shall not be deemed Microsoft Middleware unless identified as a new major version of the Microsoft Middleware Product. A major version shall be identified by a whole number or by a number with just a single digit to the right of the decimal point.

1. Distributed Separately To Update A Windows Operating System Product

78. Some commentators argue that it is inappropriate for Microsoft Middleware to depend on separate distribution from a Windows Operating System Product.⁸² They argue that there is no logical reason for such a distinction and that requiring separate distribution merely provides another way for Microsoft to avoid its disclosure requirements.

79. The definition requires separate distribution for two reasons. First, there must be a straightforward and enforceable way to determine which software code is implicated. Separate distribution provides a clear line between two segments of code. Moreover, interfaces between pieces of code that have never been distributed separately are more likely to be internal interfaces that are not tested or durable. In contrast, interfaces between separately distributed pieces of code are more often tested and durable, because there is always the risk that the other side of the interface will be a different version than expected. Interfaces that are not tested and durable may be unreliable, potentially resulting in malfunctions.

80. Second, the competitive significance of middleware products such as browsers and media players will be relatively small if they are never distributed in any form separate from a Windows Operating System Product. If Microsoft chooses only to distribute its programs by including them in Windows, then it will not be able to reach the large installed base of Windows machines. Instead, Microsoft will only be able to offer new versions when users choose to upgrade their operating system or buy new computers. Competing middleware products, in contrast, would not be limited to such methods of distribution and might offer many new

⁸²CCIA 65; AAI 20-21; ProComp 44; NetAction 12; Novell 9-10; Maddux ¶ 19; Kegel 5, 23; SIA 18.

versions over the course of the two to three year hardware upgrade cycle. Thus, while a competitor might offer three new versions of its program every year, Microsoft only would be able to offer a single version every two to three years. In the past, with programs such as Internet Explorer, Windows Media Player, and Windows Messenger, Microsoft always has offered separate versions available for download.

81. Commentors point to specific products that have never been distributed separately and argue that they should be included. Several commentors point out that Windows Media Player 8, sometimes referred to as Windows Media Player for Windows XP, is only included in Windows XP and that the interfaces between this player and the operating system will not be disclosed.⁸³ This is correct. However, the interfaces between Windows Media Player 7.1, the latest version available for download or redistribution, will be disclosed. While there may be some unique interfaces that Windows Media Player 8 uses to call on services in Windows XP, the United States is not aware of any such interfaces that are not also in Windows Media Player 7.1. Thus, for example, the API for a digital rights management technology called Secure Audio Path is a key interface used by Windows Media Player 7.1 and thus will be disclosed. Moreover, if Windows Media Player 8 is ever distributed separately in the future, then its interfaces would be disclosed.

82. Other commentors argue that Active Directory, a Microsoft directory service, should be Microsoft Middleware, but it does not qualify because it has never been distributed separately

⁸³CCIA 65; RealNetworks 12; Maddux ¶ 19.

from a Windows Operating System Product.⁸⁴ As this commentor notes, however, directory services “have become competitively critical links between the desktop and network computing.”⁸⁵ Accordingly, directory services are most protected under Section III.E, which addresses the licensing of Communications Protocols used natively by Windows Operating System Products to interoperate with Microsoft server operating system products. For instance, if Active Directory software is included natively in Windows XP and that software uses a Communications Protocol to communicate with a Windows 2000 server, then the Communications Protocol must be available for license. Thus, a competing active directory service could license and implement the Communications Protocol and communicate with Windows XP using the same method as Active Directory.

2. Trademarked Or A Major Version Of Any Microsoft Middleware Product

83. The second requirement for Microsoft Middleware is that the software code either be Trademarked or marketed by Microsoft as a major version of any Microsoft Middleware Product as defined in Section VI.K.1. This is a modification reflected in the SRPFJ that differs from the RPFJ version, which required that software satisfy the Trademark requirement in order to be considered Microsoft Middleware. The SRPFJ modification means that software can now satisfy this element of the definition by being either (1) Trademarked, or (2) marketed as a major version of any of the named Microsoft Middleware Products as defined in Section VI.K.1 (i.e., Internet Explorer, Microsoft’s Java Virtual Machine, etc.).

⁸⁴Novell 13-16.

⁸⁵Novell 13.

84. Many commentators argue that the Trademarked requirement is inappropriate, or that at a minimum, many existing Microsoft Middleware Products would not have any corresponding Microsoft Middleware code.⁸⁶ Turning to the latter, several argue that products such as Internet Explorer, Windows Media Player, Microsoft's Java Virtual Machine, and Window Messenger arguably were not Trademarked as that term is defined in the RPFJ, or argue that the Trademarked requirement was not appropriate. The United States does not necessarily agree with any or all of these arguments concerning whether these particular products satisfied the definition of Trademarked. To clarify any issues surrounding the status of these products, however, the Microsoft Middleware definition was modified to include explicitly the software code that is marketed by Microsoft as a major version of any Microsoft Middleware Product under VI.K.1. The limitation in the modified language to a major version of a Microsoft Middleware Product is simply a restatement of the limitation in the last paragraph of the definition, discussed further below, which limits the covered software code to that identified as a major version of a Microsoft Middleware Product. This change should resolve many of the concerns raised. Under the revised definition, each Microsoft Middleware Product discussed by commentators has corresponding Microsoft Middleware.

85. Other commentators argue that inclusion of the Trademarked requirement has no relation to the function of the software code and should not be part of the Microsoft Middleware definition. The requirement that the software code satisfy the Trademarked definition is based on the business reality that Microsoft develops logos and names for marketing the technologies that

⁸⁶CFA 93-94; CCIA 65-67; AOL 49-50; AAI 21; ProComp 44-46; Palm 9-10; Novell 10; Maddux ¶ 19; Litan 51; KDE 16; Gifford 3; Sen. Kohl 2-3; Relpromax 14; SBC 36-38; Giannandrea 6; SIIA 27-28.

it wishes developers and consumers to adopt. Software code that is not marketed under a distinctive logo or a name that satisfies the definition of Trademarked is unlikely to achieve the widespread usage needed for competitive significance. Additionally, this definition was not intended to capture security patches, minor “bug” fixes, or other small downloads that Microsoft makes available via Windows Update. Limiting the covered software code to that which is Trademarked or marketed as a major version of a Microsoft Middleware Product under Section VI.K.1 ensures that code not comprising a “product,” as that term is generally understood by the public, will not be included.

3. Same Or Substantially Similar Functionality

86. Some commentators opine that Microsoft Middleware should not be required to have the same or substantially similar functionality as a Microsoft Middleware Product. Microsoft Middleware Products, as defined, include only products distributed with a Windows Operating System Product. Commentors argue that software that comes under some concept of middleware should be included, regardless of whether it is the same or substantially similar to a Microsoft Middleware Product. For instance, some commentors argue that Microsoft Office should be Microsoft Middleware, and the interfaces between Office and a Windows Operating System Product should be disclosed.⁸⁷

87. The focus of the plaintiffs’ case was never Internet Explorer or middleware technologies that were only distributed separately; the focus was always on applications that were *both* integrated into Windows and distributed separately. One of the reasons that Microsoft’s anticompetitive actions were able to have the effect that they did was that they covered multiple

⁸⁷Palm 9-10; Kegel 13; SBC 38-39; SIA 17-20, 38-41, 62-64; Johnson 5.

distribution channels. Internet Explorer and Microsoft's Java Virtual Machine were bundled with Windows, *and* they were included in the "First Wave" contracts with ISVs covering separately distributed products, *and* they were available for separate download.

88. The disclosure of interfaces between software that is not the same or substantially similar to functionality distributed with a Windows Operating System Product is beyond the scope of the case as it emerged from the Court of Appeals. For example, even assuming *arguendo* that Office has some characteristics that make it middleware, Office has never been integrated into Windows or referred to by Microsoft as being part of a Windows Operating System Product. Office is a separate product that is purchased separately.

89. Finally, some commentators argue incorrectly that requiring Microsoft Middleware to have the same or substantially similar functionality as a Microsoft Middleware Product encourages commingling of software code.⁸⁸ Commingling of code, as discussed by the Court of Appeals and the District Court, is "placing code specific to Web browsing in the same files as code that provided operating system functions." *Microsoft*, 253 F.3d at 65. Products can be distributed with Windows and not have their code commingled with operating system functions. To the contrary, requiring software to be *both* distributed separately and substantially similar to software distributed with Windows encourages the opposite: because the code must be distributed separately, there must be a clear distinction between code that belongs to the Microsoft Middleware and code that belongs to the operating system. If all the code for a Microsoft Middleware Product is commingled into operating system files, then the separately

⁸⁸Novell 10; Palm 10; Maddux ¶ 19; RealNetworks 11, 28; SBC 37, 39.

distributed Microsoft Middleware version will be enormous and constitute a redistribution of the operating system. Clearly, such a separate distribution would be unworkable.

4. Includes At Least The Software Code That Controls Most Or All Of The User Interface

90. The RPFJ included a fourth requirement, that Microsoft Middleware must include at least the software code that controls most or all of the user interface elements of that Microsoft Middleware. This provision now has been clarified in the SRPFJ such that it is no longer the fourth required element, but is a separate paragraph at the end of the definition. This change reflects the fact that the first three requirements are sufficient to define Microsoft Middleware. The now-separate sentence always was intended to be a minimum size or “floor” as to the collection of software code that is included in a particular piece of Microsoft Middleware. This “floor” prevents Microsoft from arbitrarily breaking up into separate pieces the software code of what would otherwise be Microsoft Middleware, thereby omitting from the Microsoft Middleware definition certain critical or significant pieces of code that constitute the Microsoft Middleware. Some commentators read this provision to mean that Microsoft could create artificially small subsets of code containing only the user interface elements of Microsoft Middleware Products.⁸⁹ Commentors point out that the interfaces between user interface elements and the Windows Operating System Product are unlikely to be competitively significant.⁹⁰ This modification does not substantively change this definition, but instead makes

⁸⁹CCLA 64; Pantin 32; Palm 10; Novell 10-11; Harris 11.

⁹⁰CCLA 64; Harris 11.

clear that this provision governs the scope of what code must be included in the Microsoft Middleware.

5. Major Updates

91. The last paragraph of Microsoft Middleware discusses software code described as part of, and distributed separately to update, a Microsoft Middleware Product. That code shall be deemed Microsoft Middleware if it is identified by a new major version number, i.e., a whole number (“6.0”) or a by a number with a single digit to the right of the decimal point (“7.1”). Several commentators argue that Microsoft can withhold interfaces simply by updating its products with version numbers such as “7.11” that do not qualify as major versions, and that the major version limitation is inappropriate.⁹¹

92. It was necessary to draw a line to include some code updates as Microsoft Middleware and exclude others. Per standard software engineering practices, Microsoft assigns every change to the code a new version number, and the importance of the change is designated by how far to the right the number is. For instance, a tiny change may be designated by an increase from 5.011 to 5.012; a slightly larger change is designated as going from 5.01 to 5.02, and a major version is designated as 5.1 to 5.2. Although Microsoft maintains these version numbers, they are not always advertised to the public because small changes are not advertised as new, improved, or updated products. Rather, products that are significant upgrades that will be promoted to the public are designated with new major version numbers.

93. The United States does not believe that requiring Microsoft continuously to review small changes to its Microsoft Middleware would yield significant competitive effects that would

⁹¹Pantin 12, 32; NetAction 10, 13; Kegel 5; Harris 11; Maddux ¶ 15.

outweigh the costs to Microsoft. Significantly improved features, including those based on better APIs, are most likely to be designated by new major version numbers. Microsoft has little reason to develop a new feature based on improved services from the operating system, such as improved speed or better coordination with other operating system functions, and then not promote that feature to developers or consumers. Moreover, should Microsoft Middleware use a new API in an update that is not a new major version, then that API still will be disclosed, at a minimum, when the next new major version is released. The only way for Microsoft to hide an API indefinitely is to never release a new major version, which historically has not happened and is not likely to happen in the future.

C. “Microsoft Middleware Product” (RPFJ § VI.K)

94. A number of commentors address Section VI.K, which defines “Microsoft Middleware Product.” This definition is referenced in Sections III.C (prohibiting Microsoft from imposing certain restrictions on OEM licensees) and III.H (ensuring OEM flexibility in product offerings) and, as subsumed by Section VI.L’s definition of “Microsoft Platform Software,” is also referenced in Sections III.A (prohibiting retaliation against OEMs), III.F (constraining Microsoft’s relationships with ISVs), and III.G (prohibiting certain exclusionary contracts). “Microsoft Middleware Product” means either the functionality provided by one of a set of existing, named products (e.g., Internet Explorer) and their successors or, for products that do not now exist, the functionality that meets several specific conditions.

95. Contrary to the views of several commentors, the definition does not limit Microsoft Middleware Products to a set of products that now exist, and so does not fail to account for future

development.⁹² This critique ignores the second part of the definition, which explains what future technology will be considered Microsoft Middleware Products. Similarly, there are no limits in the definition on the kinds of products (in the commentor's words, "categories of applications") that may, in the future, be considered Microsoft Middleware Products.⁹³ It thus is inaccurate to state that the Litigating States' proposed definition (Provision 22(x)) of Microsoft Middleware Product applies to products to be developed in the future and the RPFJ does not.⁹⁴

96. Although the Litigating States' proposed definition of Microsoft Middleware Product is somewhat broader than the definition in the RPFJ, the United States believes that its definition is clearer and therefore more enforceable. Unlike the Litigating States' list of current products, for example, the RPFJ's list (Section VI.K.1) consists solely of known named products; there is no room to debate, for instance, exactly what "systems and enterprise management software" (Litigating States Provision 22(c)i) is and is not covered.

97. Similarly, the RPFJ's restriction on future products to those that are Trademarked helps clearly to define the set of covered products and reflects the business reality that Microsoft often names and markets the technologies that it wishes developers and consumers to adopt. Microsoft has little incentive to bury its new products inside other applications in order to avoid having it meet the Trademark standard, as one commentor worries.⁹⁵ Some commentors claim

⁹²SBC 38; AOL 49; Henderson 6.

⁹³SBC 39 n.7.

⁹⁴SBC 158-59.

⁹⁵AOL, Klain 6.

that the Trademarked requirement would leave out many Microsoft products currently in the market, but the commentators do not identify any particular product.⁹⁶

98. The Litigating States object that the definition of Microsoft Middleware Product, as it pertains to future products, excludes software that has not been distributed separately from a Windows Operating System Product or that is not similar to a competitor's product.⁹⁷ The nature of their concern is unclear, however, given that the Litigating States' own definition of Microsoft Middleware Product in their own Proposed Final Judgment contains very similar exclusions.⁹⁸

99. Some commentators object to the omission of Microsoft Office from the list of existing products that are Microsoft Middleware Products within the meaning of the RPFJ, pointing to Office's status as middleware and its large market share among office suites.⁹⁹ Others object to the omission of other specific products or technologies, e.g., Microsoft Outlook, MSN Messenger, MSN RunTime, MSN Explorer, the MSN client software, Passport, Microsoft Exchange, Microsoft Visual Studio, Microsoft .Net, and software that synchronizes handheld devices with PCs.¹⁰⁰ The reasons for the omission of these products from the definition vary. Some of these products have never been part of a Windows Operating System Product, but only are installed separately and so logically should not be included in the list of Microsoft Middleware Products (e.g., Microsoft Office, Outlook, handheld synchronization software,

⁹⁶Palm 10.

⁹⁷Litigating States, Ex. A 18.

⁹⁸Litigating States, Ex. B at 34-35.

⁹⁹SBC 38 n.6; SIIA 18.

¹⁰⁰AOL 49-50, Klain 13; Palm 9-10; SIIA 19.

Microsoft Visual Studio, Microsoft Exchange). Others, such as Microsoft .Net, are in fact covered as to the elements that products marketed under the .Net label are among the products named in the definition of Microsoft Middleware Product.¹⁰¹ And some lack the competitive significance of the products that are included in the list of existing Microsoft Middleware Products (e.g., MSN Explorer, MSN Messenger).

100. The definition of Microsoft Middleware Product goes well beyond the Internet browser and Java technologies that, as threats to the Windows operating system against which Microsoft took anticompetitive actions, were at issue in this case. Further, this definition balances the desire to include future middleware products — the character of which no one can accurately predict — with the need for certainty in compliance and enforcement.

D. “Non-Microsoft Middleware” (RPFJ § VLM)

101. The definition of Non-Microsoft Middleware is one of the most important definitions in the RPFJ, but it received very little criticism by commentators. Non-Microsoft Middleware is the term used most often to describe the products that the decree is intended to protect. Toward that end, it is one of the broadest definitions in the decree.

102. One criticism, which while serious was based on an inadvertent error, points out that due to the definition of API, on which Non-Microsoft Middleware depends, it might be impossible for any Non-Microsoft software to satisfy the definition.¹⁰² These commentators point out that the API definition only includes Microsoft APIs, rendering the other definitions that use the term API nonsensical. This was an inadvertent error in the RPFJ, and it has been corrected in

¹⁰¹AOL, Klain 13; Palm 9-10; Kegel 6.

¹⁰²AAI 33-34; Giannandrea 7.

the SRPFJ. The previous definition of API has been inserted directly in Section III.D, which was the only section it was designed to address. A generic definition of API, which is intended to invoke the common usage of the term API, and not to be tied to Microsoft products, has been inserted as definition VI.A. The definition now reads: “‘API’ means application programming interface, including any interface that Microsoft is obligated to disclose pursuant to III.D.” *See also* Section VII.(A)(2) below.

103. One commentator argues that certain important software categories such as web-based software and digital imaging software are not present in any of the middleware definitions.¹⁰³ This assertion is incorrect, because neither of the Non-Microsoft Middleware definitions use any categories at all; both cover any software functionality that otherwise meets the requirements. Given that these definitions provide the substance of what the decree protects, it would be inappropriate to place any category restrictions, such as digital imaging software, in the definition. In a somewhat similar fashion, one commentator argues that there is no longer any demand for Non-Microsoft Middleware, but bases his argument on browsers, failing to realize that Non-Microsoft Middleware can have any functionality.¹⁰⁴

104. One commentator argues that the definition proposed by the Litigating States or the definition from the IFJ would be preferable, but offers no specific criticisms of Non-Microsoft Middleware.¹⁰⁵ Another commentator suggests that “non-Microsoft software product” be replaced

¹⁰³Litigating States, Ex. B 17, 28.

¹⁰⁴Gifford 8.

¹⁰⁵SBC 158.

with “non-Microsoft technology” but also states that the definition seems appropriate to define middleware.¹⁰⁶

105. One commentator argues that the definition should not be limited to software that runs on Windows Operating System Products, because that limitation leaves Microsoft free to retaliate against middleware software that runs on other devices, such as servers and handhelds.¹⁰⁷ The intended meaning of this comment is unclear, because the retaliation section of the decree applicable to ISVs and IHVs, Section III.F, does not use the term Non-Microsoft Middleware.

106. Finally, the Non-Microsoft Middleware definition is criticized on the ground that Netscape 1.0 would not have satisfied it, because the earliest version of Netscape did not expose a range of functionality to ISVs through published APIs.¹⁰⁸ Nevertheless, the United States finds this definition completely appropriate, because it is the presence of APIs that allows middleware to threaten the applications barrier to entry. To remove the requirement for APIs from the definition would be to ignore the theory of the case.¹⁰⁹ Moreover, whether or not software has published APIs is completely within the control of the software developer.

¹⁰⁶Pantin Comment VI.5, VI.3.

¹⁰⁷Palm 9.

¹⁰⁸Giannandrea 7.

¹⁰⁹Stockton 2 (argues that middleware has very little to do with exposing APIs).

E. “Non-Microsoft Middleware Product” (RPFJ § VI.N)

107. Several comments raise issues relating to the definition of Non-Microsoft Middleware Product.¹¹⁰ The majority of these comments relate to subsection (ii) of the definition, which requires that “at least one million copies” of the product have been distributed in the United States within the previous year.¹¹¹ Other commentators complain that the definition does not include web-based software.¹¹² Finally, one commentator questions whether Netscape Navigator would have satisfied the definition of Non-Microsoft Middleware Product because it does not expose Microsoft APIs.¹¹³

108. The RPFJ’s provisions apply generally not only to a wide range of currently marketed middleware products, but also to products that have not yet been developed. Certain of these provisions, of course, impose affirmative obligations on Microsoft to take actions vis-a-vis middleware products. To ensure that Microsoft can undertake these obligations in compliance with the RPFJ’s provisions (and that the United State can enforce them), the characteristics of what products will be considered middleware in the future must be defined today according to objective criteria. The definition of Non-Microsoft Middleware Product relates and is incorporated into the portion of the definition of Microsoft Middleware Product that sets forth

¹¹⁰Thomas 5-6; Sen. Kohl 2; Palm 9; SBC 40-41, 159; ProComp 65-66; AOL 50; AOL, Klain 13-14; PFF 21; Litigating States, Ex. A 17-18; CCIA 85; Litan 50; RealNetworks 13-14; AAI 34; Giannandrea 7.

¹¹¹Thomas 5-6; Sen. Kohl 2; Palm 9; SBC 40-41, 159; ProComp 65-66; AOL 50; AOL, Klain 13-14; PFF 21; Litigating States, Ex. A 17-18; CCIA 85; Litan 50; RealNetworks 13-14.

¹¹²Litigating States, Ex. A 18; AOL 50; AOL, Klain 14.

¹¹³AAI 34.

the characteristics that future products must meet to be considered Microsoft Middleware Products.

109. The one-million-copy limitation applies only to the affirmative obligations that Microsoft make public the APIs used in its own middleware products (as set forth in Section III.D), and redesign the operating system to provide a competing middleware product “default” status, i.e., the ability to override automatically Microsoft middleware functions integrated into the operating system (as set forth in Section H). The limitation strikes the proper balance between (1) the substantial costs associated with such documentation and redesign efforts, which these obligations require and (2) the competitive potential of products with fewer than one million copies distributed. In a nutshell, it prevents Microsoft from having to undertake documentation and redesign work any time an ISV has a concept for a product it decides to call “middleware.” In a world of about 625 million PC users and software distribution via downloads and direct mail, *distribution* of only one million copies, rather than sales, installation or usage, is a relatively minor threshold in the software industry today. Indeed, almost ten years ago the Mosaic browser achieved distribution to over 2 million people in “just a year.” Gina Smith, *Inside Silicon Valley, A High-Tech Top 10 Computers & Technology*, SAN FRANCISCO EXAMINER, 1995 WL 4901748 (Jan. 1, 1995).

110. Web-based software and web-based services are not explicitly excluded from the definition of Non-Microsoft Middleware Product. Any portion of web-based software or services that runs on a Windows Operating System Product and otherwise meets the requirements of the definition could qualify as a Non-Microsoft Middleware Product. To the extent that any Microsoft software natively implemented in a Windows Operating System

Product communicates natively with a Microsoft server operating system product, the Communications Protocols must be available for license pursuant to Section III.E.

111. Finally, the suggestion that Netscape Navigator could not satisfy the definition of Non-Microsoft Middleware Product in the RPFJ, because Navigator does not expose Microsoft APIs, is correct where the erroneous definition of API contained in the RPFJ is applied. Based on comments that correctly identified a flaw in the definition of API, however, the United States and Microsoft have agreed to modify the definition. *See* Section VII(A)(2) below. Under the new definition of API in the SRPFJ,¹¹⁴ Netscape Navigator would qualify as a Non-Microsoft Middleware Product.

F. “Personal Computer” (RPFJ § VI.Q)

112. A few commentators raise concerns about the RPFJ’s definition of “Personal Computer.”¹¹⁵ *See* RPFJ § VI.Q. This definition is referenced in RPFJ Sections III.A (prohibiting retaliation against OEMs) and III.H (ensuring OEM flexibility in product offerings), and in Definitions VI.H (“IHV”), VI.O (“OEM”), VI.P (“Operating System”), and VI.U (“Windows Operating System Product”).

113. One commentator argues that the definitions of “Personal Computer” and “Windows Operating System Product” might, when read together, unintentionally exclude future Microsoft operating systems from the RPFJ’s provisions. The commentator expresses concern that the restriction of “Personal Computer” to a computer “configured so that its primary purpose is for

¹¹⁴Definition VI.A in the SRPFJ now reads: “‘API’ means application programming interface, including any interface that Microsoft is obligated to disclose pursuant to III.D.”

¹¹⁵Clapes 22; Litigating States 35 (offering own definition); ProComp B-2 (offering own definition).

use by one person at a time” would, in combination with the restriction of “Windows Operating System Product” to software distributed “for use with Personal Computers,” cause future Microsoft operating systems not to be covered by the RPFJ if Microsoft continues its evolution toward operating systems — like Windows XP — that facilitate shared or multiple-person use or that facilitate home networking.¹¹⁶ This concern is unwarranted. What Windows XP allows is for different users of the same computer (e.g., members of the same family) to store individualized settings in the computer and access them through personal passwords. Whether or not a computer is configured primarily to facilitate use by different people at different moments in time is immaterial to whether it is configured primarily to be used by one person at a given moment in time — the relevant criterion for its designation as a Personal Computer in the RPFJ.

114. Several commentators question the exclusion of machines made by Apple Computer from the definition of “Personal Computer.”¹¹⁷ Apple’s machines do not contain “Intel x86 compatible (or successor) microprocessors,” and so do not fall within the meaning of the definition. Indeed, Apple computers were expressly excluded from the relevant market in which Microsoft was found to be a monopolist. *See Microsoft*, 253 F.3d at 52. The sole conduct that the United States alleged, and the Court of Appeals found, to be unlawful relating to Apple computers was the exclusive dealing arrangement that Microsoft imposed on Apple. *See id.* at 74. Section III.G.1 of the RPFJ fully addresses this conduct by prohibiting such exclusive arrangements with certain entities, including ISVs — a category that unquestionably includes

¹¹⁶SBC 43, n.10.

¹¹⁷Maddux ¶ 58; Giannandrea 7.

Apple. Modifying the definition of Personal Computer to include Apple computers would improperly expand the scope of the RPFJ beyond the liability findings in this case.

115. Other commentators raise concern about the final sentence in Section VI.Q,¹¹⁸ which reads: “Servers, television set top boxes, handheld computers, game consoles, telephones, pagers, and personal digital assistants are examples of products that are not Personal Computers within the meaning of this definition.” One commentator appears to suggest that any such devices for which Microsoft eventually offers a version of a Windows Operating System Product should be considered Personal Computers for purposes of the RPFJ.¹¹⁹ The United States disagrees with the commentators’ views that any change to expand application of the RPFJ to software written for, for example, telephones and pagers, is justified by the Court of Appeals’ decision in this case, which is limited to the illegal maintenance by Microsoft of its monopoly in operating systems for Intel-compatible PCs.¹²⁰ Moreover, such a change would be inconsistent with the intent of the RPFJ to identify Personal Computers with clarity because it would create unmanageable circularity: a Personal Computer would be a machine for which a Windows Operating System Product is available, and a Windows Operating System Product would be a product designed for use with a Personal Computer.

¹¹⁸Palm 8-9, 14-15.

¹¹⁹Pantin 34.

¹²⁰Maddux ¶ 58; Pantin 34; Alexander (unpaginated).