

ORAL ARGUMENT SCHEDULED ON NOVEMBER 4, 2003

No. 02-7155

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

STATE OF NEW YORK, *EX REL, ET AL.*,

Plaintiffs-Appellees,

COMMONWEALTH OF MASSACHUSETTS, *EX REL*,

Plaintiff-Appellant,

v.

MICROSOFT CORPORATION,

Defendant-Appellee,

On Appeal from the United States District Court for the District of Columbia

**FINAL BRIEF OF THE COMPUTER AND COMMUNICATIONS
INDUSTRY ASSOCIATION, THE PROJECT TO PROMOTE
COMPETITION & INNOVATION IN THE DIGITAL AGE, AND
THE SOFTWARE AND INFORMATION INDUSTRY ASSOCIA-
TION AS *AMICI CURIAE* IN SUPPORT OF APPELLANTS**

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

(A) Parties and Amici. All parties, intervenors, and amici appearing before the district court and in this Court are listed in the Brief for Appellants.

(B) Rulings under review. References to the rulings at issue appear in the Brief for Appellants.

(C) Related cases. All related cases are identified in the Brief for Appellants.

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omy. ProComp too has participated as *amicus curiae* in several phases of this case. ProComp has no shareholders or other owners.

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TABLE OF CONTENTS

	Page
GLOSSARY	vii
INTEREST OF THE AMICI CURIAE	1
INTRODUCTION	1
ARGUMENT	5
THE STATES ARE ENTITLED TO RELIEF THAT, UNLIKE THE DISTRICT COURT’S REMEDY, FULLY REDRESSES MICROSOFT’S PROVEN VIOLATIONS.	5
A. The Remedy Should Undo Microsoft’s Suppression Of Middleware Platform Threats.....	5
B. The District Court Disregarded This Court’s Instructions About The Appropriate Scope Of An Antitrust Remedy In This Case.	8
C. The States’ Proposals Should Supplant The Manifestly Inadequate Remedial Provisions Entered By The District Court.	10
1. The District Court Permitted Microsoft To Continue Illegally Commingling Code.....	10
2. Having Foreclosed Java From The Most Efficient Distribution Channels, Microsoft Should Be Compelled To Distribute Java With Its Monopoly Product.....	20
3. The Disclosure Requirements Are Inadequate Without The Bolstering Suggested By The States.....	23
CONCLUSION	28

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.</i> , 429 U.S. 477 (1977).....	22
* <i>Ford Motor Co. v. United States</i> , 405 U.S. 562 (1972)	3, 8, 9
<i>International Salt Co. v. United States</i> , 332 U.S. 392 (1947)	8
<i>National Society of Professional Engineers v. United States</i> , 435 U.S. 679 (1978).....	8, 19
<i>New York v. Microsoft Corp.</i> , 224 F.Supp.2d 76 (D.D.C. 2002)	<i>passim</i>
<i>United States v. Glaxo Group Ltd.</i> , 410 U.S. 52 (1973).....	1
<i>United States v. Microsoft Corp.</i> , 84 F.Supp.2d 9 (D.D.C. 1999)	6, 11, 20
* <i>United States v. Microsoft Corp.</i> , 253 F.3d 34 (D.C. Cir. 2001) (en banc)	<i>passim</i>
* <i>United States v. United Shoe Machinery Corp.</i> , 391 U.S. 244 (1968)	3, 9
Statutes, Rules & Regulations	
Fed. R. App. P. 32(a)(7)(B)(iii)	29
Miscellaneous	
*AREEDA & HOVENKAMP, ANTITRUST LAW (2d ed. 2002 & Supp. 2002).....	<i>passim</i>
Rebecca Buckman, <i>Microsoft Net Profit Fell 13% in Recent Quarter</i> , Wall St. J. Europe, Jan. 18, 2002, at UK-1	16
DAVID ECK, THE MOST COMPLEX MACHINE: A SURVEY OF COMPUTERS AND COMPUTING (1995).....	16
Richard Epstein, <i>Phew!</i> , Wall St. J., June 29, 2001, at A10.....	16

* Authorities on which we principally rely are marked with astericks.

TABLE OF AUTHORITIES — CONTINUED

	Page(s)
General Server Licensing Information (http://members.microsoft.com/-consent/Info/TaskInfo.aspx?pkid=920).....	24
Java Community Process (http://www.jcp.org/en/home/index).....	22
Joseph Menn, <i>The Comeback's Missing Piece: Silicon Valley's Venture Capitalists Need More Than Technological Innovation To Begin Investing Again. They Need Guts</i> , L.A. Times, Mar. 9, 2003, at I-23	7
Microsoft Protocol License Agreement (http://members.microsoft.com/-consent/Info/SampleAgreement.aspx).....	24
Susan Stellin, <i>Most Wanted: Drilling Down/Internet Software</i> , N.Y. Times, Sept. 9, 2002, at C6.....	6
Jacques Surveyer, <i>The Components of Change</i> , InformationWeek, May 6, 1996 (1996 WL 10308381)	16
Joe Wilcox, <i>Windows faces new competition: Itself</i> , CNET News.com, Apr. 21, 2003 (http://news.com/com/2100-1016.-997509.html).....	20

GLOSSARY

- API** Application programming interface. APIs “exposed” by a computer program, such as an operating system or middleware, provide other computer programs with means of access to blocks of code that perform particular tasks, such as displaying text on the computer screen. *United States v. Microsoft Corp.*, 84 F.Supp.2d 9, 12 (D.D.C. 1999) (¶ 2).
- CLR** Common Language Runtime. The CLR is a type of middleware, developed by Microsoft, which has been incorporated into Windows. It is similar to a Java Virtual Machine, in that it provides a platform or environment for applications. It is part of Microsoft’s .NET framework. 224 F.Supp.2d at 261 n.131; Tr. 5966:19-5967:9 (Madnick).
- GB** Gigabyte. A unit of computer memory or data storage capacity equal to 2^{30} bytes (1,073,741,824 bytes), or 1,024 megabytes. In common usage when measuring the capacity of hard drives, one billion bytes (1,000,000,000 bytes) is often called one gigabyte.
- ISV** Independent software vendor. A developer of software application programs. 84 F.Supp.2d at 17 (¶ 28).
- MB** Megabyte. A unit of computer memory or data storage capacity equal to 2^{20} bytes (1,048,576 bytes), or 1,024 kilobytes. In common usage when measuring the capacity of hard drives, one million bytes (1,000,000 bytes) is often called one megabyte.
- OEM** Original equipment manufacturer. A manufacturer of PCs. 84 F.Supp.2d at 13 (¶ 10).
- PC** Personal computer. A digital information processing device designed for use by one person at a time. 84 F.Supp.2d at 12 (¶ 1).
- PX** Plaintiffs’ exhibit in the district court proceedings before Judge Jackson.
- SX** Plaintiff States’ exhibit in the district court remedy proceeding before Judge Kollar-Kotelly.

INTEREST OF THE AMICI CURIAE

The breadth and diversity of the parties joining this brief reflect a fundamental commitment in the information technology industry to maintain legal protection of free competition under the antitrust laws. The Computer & Communication Industry Association has represented computer technology and telecommunications companies on competition policy and other issues for nearly thirty years. The Project to Promote Competition & Innovation in the Digital Age is an association of technology companies and trade associations founded for the purpose of analyzing competition and other policy issues pertaining to information technology. The Software & Information Industry Association, the principal trade association of the software code and electronic information content industries, represents approximately 650 companies. The three organizations represent the full range of industry participants with substantial expertise and a significant stake in this proceeding.

INTRODUCTION

Antitrust's consumer benefits arise not from abstract assessment of liability, but from how enforcement restores and protects the competitive process, while deterring future efforts to suppress competition. The formulation of the remedy is the "most significant phase of the case." *United States v. Glaxo Group Ltd.*, 410 U.S. 52, 64 (1973). Microsoft's proven violations strangled competition in an industry sector of surpassing importance to the national economy. To craft an adequate

remedy for Microsoft's sophisticated offenses unquestionably is challenging. The district court's remedial order, however, renders the liability judgment virtually meaningless, and grants many of Microsoft's most dangerous predatory tactics immunity from the antitrust laws.

Microsoft's liability rested on its suppression of emerging competition to its Windows monopoly that was threatened by two middleware products: the Netscape Navigator browser and the cross-platform Java technologies. See *United States v. Microsoft Corp.*, 253 F.3d 34, 59-78 (D.C. Cir. 2001) (*en banc*) (JA 203-288, 228-47). Those alternative middleware platforms could run atop different operating systems, and exposed application programming interfaces (APIs) to which software applications developers could key their programs in place of the APIs of the underlying operating system. Had a significant number of developers chosen the alternative APIs, the applications barrier to entry into the PC operating system market would have been eroded, and along with it Microsoft's monopoly. See JA 222, 224. Microsoft destroyed this platform threat by foreclosing Navigator and Java from the most efficient distribution channels, while inserting Microsoft's own version of middleware inextricably into every new PC. Thus, the competing middleware did not obtain sufficiently widespread distribution to tempt developers away from Windows, while developers could be certain that each new PC included APIs for Microsoft's own browser and its non-standard, "polluted" Java.

The remedy in this case, this Court instructed, should “‘unfetter [the] market from anticompetitive conduct,’ * * * ‘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.’” JA 272 (quoting *Ford Motor Co. v. United States*, 405 U.S. 562, 577 (1972), and *United States v. United Shoe Machinery Corp.*, 391 U.S. 244, 250 (1968)). The decree entered here does not satisfy those goals. Rather than unfettering the market, the decree leaves the market monopolized and thoroughly insulated from threats to erode the applications barrier to entry. The decree does not return Microsoft to its competitive position before its illegal campaign, when it feared that browser and Java technologies could plunge Windows into a competitive market. Rather, the browser and Java threats that Microsoft illegally suppressed remain suppressed. The decree leaves Microsoft with the full benefits of its years of illegal conduct, with its monopoly further entrenched, and does not prevent Microsoft from engaging in similar — and some of the same — illegal practices in the future.

By dealing with icons rather than software functions, the district court chose to remedy appearance rather than substance. The district court’s interface disclosure requirements also deal with icons rather than with middleware functionality so the firm seeking disclosure will often receive totally inadequate information. The district court believed that the States’ remedial proposal was overbroad in some re-

spects, but that view — even if it had been correct, which it was not — did not justify refusing all meaningful relief for proven violations.

This brief highlights three of the many respects in which the district court’s remedy is wholly ineffective by contrast with the superior alternatives in the States’ Remedy (and its “key elements” pressed on appeal, States’ Br. 45, 48-61). By requiring Microsoft to distribute versions of Windows without its own middleware products, the States’ Remedy would prevent Microsoft from suppressing new middleware threats in exactly the same way it suppressed Navigator. By requiring Microsoft to distribute cross-platform Java with Windows, the States’ Remedy would deprive Microsoft of some of the accrued benefits of its years of suppressing Java distribution. The States’ Remedy would add substance to the interface and protocol disclosure requirements that now are too vague and unknowable to carry the heavy remedial weight placed upon them. It may be difficult for “[p]ure conduct relief * * * to accomplish the goals” that this Court set out, *AREEDA & HOVENKAMP*, *ANTITRUST LAW* ¶ 1820, at 810 (Supp. 2002), but the States’ Remedy has a substantial chance of success. By contrast, the district court’s decree undermines the deterrent value of antitrust enforcement by permitting Microsoft to maintain its unthreatened position, insulated by a long course of unremedied illegal conduct. To the extent that the district court’s acquiescence may foster further prolongation of the monopoly, the decree has additional harms, as innovative new en-

trants are excluded and alternative paths of technical development are foreclosed. This Court should reverse and remand with instructions to constrain Microsoft's ability to exploit its ill-gotten market gains and to replicate its illegal conduct in new settings.

ARGUMENT

THE STATES ARE ENTITLED TO RELIEF THAT, UNLIKE THE DISTRICT COURT'S REMEDY, FULLY REDRESSES MICROSOFT'S PROVEN VIOLATIONS.

The district court did not acknowledge that its Final Judgment is almost identical to the settlement Microsoft reached with the United States. As the States point out (States' Br. 41-42), Microsoft did not even attempt to *prove* that the settlement met the criteria enunciated by this Court. The district court appeared to indulge the presumption that a monopolist and an adjudicated lawbreaker should not be forced to do anything significant that it did not want to do. In effect, the district court let Microsoft choose its remedy. As a consequence, the district court's Final Judgment should be viewed with suspicion. To a significant extent, that Judgment neither prevents the recurrence of Microsoft's violations nor undoes the competitive harms produced in the past.

A. The Remedy Should Undo Microsoft's Suppression Of Middleware Platform Threats.

Although the district court hesitated to take strong action because of purported rapid changes in the computer industry, JA 28, little of consequence to this

case has changed since Microsoft began its illegal course of conduct. Microsoft still possesses a stranglehold on the PC operating systems market, with a market share well above 90%. The applications barrier to entry remains in place. If anything, the competitive landscape has deteriorated. While in the mid-1990s Netscape Navigator offered the real promise of potential platform competition (JA 308, ¶ 68), now Internet Explorer's market share is approximately 90%. JA 838, ¶ 124 & n.103; Susan Stellin, *Most Wanted: Drilling Down/Internet Software*, N.Y. Times, Sept. 9, 2002, at C6 (96%). Java, too, is less widely distributed than it was. See States' Br. 8.

Unlike today, in 1995 Microsoft was under siege. As Bill Gates explained, the Netscape browser threatened to “commoditize the underlying operating system.” PX 20, at MS98 0112876.3. Microsoft then realized that Windows soon might become “obsolete” in the face of this new technology (PX 510, at MS7 004127) and the cross-platform, “write once, run anywhere” promise of Java (JA 309, ¶¶ 74-75).

“[T]he core of th[is] monopolization case consisted of Microsoft's efforts to suppress Middleware as a competitive threat.” AREEDA & HOVENKAMP ¶ 651, at 781 (Supp. 2002). See JA 223. Because software applications could be written to rely on middleware APIs instead of Windows APIs, “middleware could usurp the operating system's platform function and might eventually take over other operat-

ing system functions.” JA 222. Netscape Navigator and Java were the ultimate targets of the misconduct supporting liability, as Microsoft successfully prevented either from gaining the “critical mass of users” necessary to become a serious platform threat. JA 229.

An appropriate remedy in this case must deal with both the illegal conduct and its anticompetitive effects by preventing the commingling of middleware code with Windows, nullifying the effects of Microsoft’s successful thwarting of the widespread distribution of Java and Navigator, and requiring Microsoft to publicize the APIs for its operating systems so that middleware could develop without artificial hindrance. Yet the district court did next to nothing to rectify the suppression of non-Microsoft middleware or to shield the development of other platform threats. Rather, by confirming that Microsoft has free rein to suppress competition using some of the same tactics it used before, the decree discourages funding of any potential competitive threats to Microsoft. See Joseph Menn, *The Comeback’s Missing Piece: Silicon Valley’s Venture Capitalists Need More Than Technological Innovation To Begin Investing Again. They Need Guts*, L.A. Times, Mar. 9, 2003, at I-23. “[M]any venture investors * * * swear off backing anything in Microsoft’s path.” *Ibid.* There might as well have been no antitrust case, and no remedy, at all.

B. The District Court Disregarded This Court’s Instructions About The Appropriate Scope Of An Antitrust Remedy In This Case.

The district court’s Final Judgment not only skirted the central theory of liability, but also took a grudging view of the law governing antitrust remedies. As the Supreme Court has explained, a remedy must not only prevent “recurrence of the violation,” but also must “eliminate its consequences.” *National Society of Professional Engineers v. United States*, 435 U.S. 679, 697 (1978). Contrary to the district court’s practice, see States’ Br. 41, “any plausible doubts should be resolved against the monopolist.” JA 3777. Furthermore, a remedy’s effectiveness should be judged with respect to where the market is going, not where it has been. The remedy must take into account “probable future trends in the * * * market” that are “visible at the time” of the violation (*Ford*, 405 U.S. at 580 (Stewart, J., concurring in the judgment)); antitrust decrees should “deal with the future economic condition of the enterprise as well as past violations.” *International Salt Co. v. United States*, 332 U.S. 392, 400 n.10 (1947).

Against this background, this Court explained that an appropriate remedy would “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.” JA 272 (internal quotation marks omitted). The district court seemed to believe that these standards did not fully apply without absolute, quantitative proof of causation. But while this Court suggested that clearer evi-

dence of causation was required to support *divestiture*, JA 275, the Court recognized that causation *had* been proved: “Microsoft’s actions increased its browser usage share and thus protected its operating system monopoly from a middleware threat,” which amply proved “harm to competition in the operating system market.” JA 236.

1. The remedy should have eliminated those aspects of the monopoly that were strengthened by Microsoft’s illegal conduct. At a minimum, the remedy must “*render impotent* the monopoly power found to be in violation of the Act.” *United Shoe*, 391 U.S. at 252 (emphasis added and internal quotation marks omitted). If Microsoft is to be left, to any extent, “in possession of the power” it has illegally maintained, it cannot retain “full freedom to exercise” that power anti-competitively. *Ford*, 405 U.S. at 574 n.9 (internal quotation marks omitted). Thus, the remedy should undercut Microsoft’s power to protect its monopoly by undoing the suppression of past platform threats, making it impossible to engage in the same *types* of anticompetitive abuses, and laying the groundwork for successful future platform threats.

2. The district court left Microsoft with all the “fruits” of its illegal conduct — the complete suppression of the major platform threats to Windows and a fortified applications barrier to entry in the operating systems market, and an increased browser usage share. The remedy should have restored the same or similar

platform threats to the position they would have occupied but for Microsoft's illegal conduct — poised to strike the very blow Microsoft feared.

3. The district court did not even preclude Microsoft from engaging in some of the same illegal “practices likely to result in monopolization in the future” (JA 272 (internal quotation marks omitted)) that it used in the past, let alone prevent it from devising new but similar tricks. An injunctive remedy “must be tailored with sufficient breadth to ensure that a certain ‘class’ of acts, or acts of a certain type or having a certain effect, not be repeated.” JA 3776 (emphasis added). This decree, had it been in place, would not have hindered Microsoft from some of its most effective exclusionary tactics against Netscape Navigator and Java.

C. The States’ Proposals Should Supplant The Manifestly Inadequate Remedial Provisions Entered By The District Court.

This brief addresses three of the most significant shortcomings of the Final Judgment. One, that Judgment permits Microsoft to continue to commingle code illegally. Two, the Judgment allows Microsoft to reap the rewards of its illegal suppression of Java. Three, the Judgment relies heavily for its prophylactic effect on disclosure requirements that are unrealistically narrow and unenforceably vague.

1. *The District Court Permitted Microsoft To Continue Illegally Commingling Code.*

This Court concluded that Microsoft employed at least three separate unlaw-

ful practices to ensure that its browser would be present upon every Windows system. First, Microsoft licensed Windows to OEMs with a prohibition against “the removal of desktop icons, folders, and Start menu entries” for Internet Explorer. JA 230. Second, Microsoft excluded Internet Explorer from the Add/Remove Programs utility to prevent OEMs and users, as a technical matter, from easily removing the applications code. See JA 234. Third, and most important, Microsoft commingled the code of Windows and Internet Explorer so that Internet Explorer could not be removed without “crippl[ing]” Windows. *Ibid.* By putting the code for browsing in the same file with general operating system code, Microsoft “ensured that the deletion of any file containing browsing-specific routines would also delete operating system routines.” *Ibid.*

The OEM license restrictions on icon removal — which applied only to OEMs, not to end-users — are entirely separate from Microsoft’s more effective efforts to prevent consumers as well as OEMs from choosing which middleware code to install. “Microsoft’s executives believed” that “contractual restrictions placed on OEMs would not be sufficient in themselves” to prevent the spread of competing middleware, and therefore “set out to bind” Internet Explorer “more tightly to Windows 95 as a technical matter.” JA 233 (quoting JA 330, ¶ 160). Microsoft argued that its product-design decisions, including commingling, were beyond the reach of the antitrust laws. This Court flatly rejected that proposition,

JA 234, concluding instead “that such commingling has an anticompetitive effect,” JA 235. In particular, commingling of code deterred OEMs from installing middleware that competed with the program commingled with Windows — Internet Explorer — because of product testing and support costs. Although OEMs might have installed competing middleware if they could remove the commingled application’s code, far fewer would install a second product providing similar functionality. JA 233. Commingling also deterred users from using middleware that competed with the commingled application. *Ibid.* Because the commingling of code “reduce[d] [Microsoft’s] rivals’ usage share,” it reduced “developers’ interest in rivals’ APIs as an alternative to the API set exposed by Microsoft’s operating system.” JA 235. Thus, to this day, commingling reinforces the applications barrier to entry.

Microsoft singled out commingling in its petition for rehearing, asking this Court to reverse itself on that point, or at a minimum to place the commingling violation beyond the scope of any remedy. In its August 2, 2001 Order Denying Rehearing, however, this Court explicitly declined to exempt any violation from the operation of the remedial principles it had prescribed. JA 5431.

The district court gave Microsoft the victory that this Court twice refused. The Final Judgment provides no relief for Microsoft’s unlawful commingling. Rather, the district court merely requires Microsoft to make available a Windows

feature that permits OEMs and end users “to enable or remove *access* to” Microsoft Middleware via “a mechanism readily accessible from the desktop or Start menu such as an Add/Remove icon” utility. JA 558, § III.H.1 (emphasis added). In other words, under the Final Judgment Microsoft may continue to commingle its software in exactly the same manner that it has in the past; it merely must allow that software not to be identified by an icon on the screen.

a. ***The Icon-Flexibility Provisions Leave The Commingling Violation Unredressed.***

Although Section III.H of the district court’s remedy allows OEMs to hide Microsoft middleware, that provision permits Microsoft to ensure that software developers will have full access to that middleware’s *APIs* no matter what. According to district court, “the ability to remove end-user access to any commingled functionality would sufficiently address the anticompetitive aspect of the conduct.” JA 83. But that is not so. “End-user access” had nothing to do with the commingling violation (or with the violation related to the Add/Remove *Programs* utility, for that matter). To the contrary, this Court identified unalterable end-user access as the anticompetitive effect of the *contractual* limitations on *OEMs*’ removal of the IE icon. See JA 229-30. That milder and less effective offense is *all* that the

district court remedied when it purported to address commingling.¹

The availability and prominence of an application's icon may be significant for the purpose of attracting end-users.² Allowing OEMs to hide Internet Explorer may lead a few more people to use Netscape Navigator or the Opera browser. But these effects have little to do with the focus of this case — monopolization of the *operating systems* market. In platform competition, the availability of the application is only a means to the desired end. Middleware is competitively significant not in itself, but only through its potential development into a competing platform for software applications.

Developers don't write to icons; they write to APIs. The inclusion of Microsoft middleware functionality in every copy of Windows — and its practical inextricability, regardless of OEM or end-user preferences — is what matters, regardless of icons or user interfaces. If developers know that the plumbing for a Micro-

¹ The provisions for icon display and removal do not address even the exclusion of Internet Explorer from the Add/Remove Programs utility. That utility generally removed a substantial portion, though not all, of the underlying code of a program. The Judgment, however, allows Microsoft to leave installed all of the middleware other than its icon, even after a consumer believes she has “removed” the software.

² The district court undercut any incentives for ISVs to pay OEMs for favorable icon placement, however; the decree allows Microsoft to prompt consumers, with a single mouse-click, to authorize reconfiguration of a PC to Microsoft's rather than the OEM's settings. JA 196, § III.H.3. Permitting end-users to remove icons that launch certain Microsoft programs, JA 195, § III.H.1, remedies nothing; end-users always have been able to delete icons.

soft version of middleware will be on *every* PC because it is commingled with Windows, then developers will write to the Microsoft version's APIs. Rival middleware will be unable to undermine the monopoly.

b. ***The States' Proposal Would Constrain Microsoft's Illegal Commingling.***

The States' Remedy would have required Microsoft to unbind its middleware from Windows, so that "the binary code for each Microsoft Middleware Product * * * may be readily removed," and to offer both bound and unbound versions of future operating systems. JA 3166; see also States' Br. 49 & n.38. In other words, Microsoft could continue selling versions of Windows that include its middleware, but OEMs could release a version of Windows XP that includes Netscape Navigator and RealOne Player *instead of* Internet Explorer and Windows Media Player, and *without* the APIs exposed by Microsoft's middleware. Thus, developers would no longer assume that every computer had those APIs.

That provision literally would "unfetter [the] market from anticompetitive conduct." JA 272. Moreover, by increasing the chance that Microsoft's middleware will not be completely ubiquitous, the States' Remedy would significantly increase the possibility that third-party middleware may become a competing platform for developers. There is nothing technically or financially infeasible about this remedy (see States' Br. 50-52): in the software industry, lines of code can be packaged (and marketed) in many different ways without affecting the operation of

programs once they are installed. As Microsoft's James Allchin acknowledged, software "code is malleable," so that "[y]ou can make it do anything you want." Rebecca Buckman, *Microsoft Net Profit Fell 13% in Recent Quarter*, Wall St. J. Europe, Jan. 18, 2002, at UK-1 (quoting Allchin).

Antitrust courts properly hesitate to impinge on "innovation," but Microsoft's central programming practice has nothing to do with technological progress or efficiency. Microsoft focuses on making additional software functions inseparable from one or more monopoly products, to provide extra layers of protection for its core monopoly just as an onion adds extra layers to protect what lies within. This is the antithesis of sound software programming practices, which rely on modular design for maximum adaptability. *E.g.*, DAVID ECK, *THE MOST COMPLEX MACHINE: A SURVEY OF COMPUTERS AND COMPUTING* 215-218 (1995); Jacques Surveyer, *The Components of Change*, InformationWeek, May 6, 1996 (1996 WL 10308381). Indeed, Microsoft used modular design in Windows XP Embedded, a program aimed at the competitive market for embedded operating systems. JA 624, 4049, 4068, 4070; see States' Br. 51 n.40. Even the most anti-interventionist commentators expected that any remedy based on this Court's imposition of liability for commingling necessarily would "undo[] a few product-design decisions." Richard Epstein, *Phew!*, Wall St. J., June 29, 2001, at A10. It surpasses belief that Microsoft should now receive a free pass on its illegal commingling.

Indeed, the States' proposal should be strengthened. Because this Court held that the commingling of Internet Explorer and Windows was illegal, Microsoft should be forced to unbind Internet Explorer from *all* future copies of Windows, allowing OEMs or end-users to install it or not as they wish. Furthermore, the States' proposal would not even *mandate* that Microsoft release a non-commingled version of its operating system; only if an OEM or major licensee requests it would Microsoft need to release such a version. The futility of the district court's remedy is shown by the fact that, since Microsoft's unilateral decision in July 2001 to permit OEMs to eliminate end-user access to Internet Explorer, *not one* has ventured to test Microsoft's reaction by doing so. JA 2597-98, ¶ 72. That result is not surprising; the Final Judgment permits Microsoft to use market development programs to buy OEMs' overall loyalty, see JA 192-93, § III.B, a financial incentive of high importance in the low-margin PC manufacturing industry. Because it also relies on OEM requests, the anti-commingling provision by itself may not counteract Microsoft's past suppression of platform-threatening middleware.

That deficiency underscores the need for relief that directly restores the threat to the Windows monopoly posed by Internet browsers and the remote computing resources available through them. When applications are based on remote servers, the applications barrier to entry ceases to protect the operating system of the client. JA 882, ¶¶ 36-37. Much as Microsoft anticipated, the browser has be-

come the universal client for computing performed on servers elsewhere in an enterprise or across the Internet. See JA 879, 881, ¶¶ 22, 31-32; JA 838, ¶ 124. The States' proposal that Microsoft be required to license Internet Explorer (JA 3178; States' Br. 60) would restore the browser as a competitive threat to the Windows monopoly.

c. ***“Fragmentation” Of Windows Provides No Basis For Refusing To Restrict Commingling.***

The district court categorically rejected any remedy that would require Microsoft to allow OEMs to sell versions of Windows that omit certain Microsoft Middleware Products, because this would “result in the ‘balkanization’ or ‘fragmentation’ of Windows,” which “would hinder, or even destroy, Microsoft’s ability to provide a consistent API set.” JA 177. In this view, the Windows monopoly is pro-consumer because it provides a convenient standard, and any remedy that injects competition into the operating systems market harms consumers by diluting standardization.

This is simply an argument against competition. Competition of any kind will lead to a multiplicity of standards, at least temporarily: “fragmentation” is just another word for “standards competition.” The real worry is that, if PCs do not automatically include Microsoft’s middleware APIs, then applications developers may rely on third-party middleware, rather than on Microsoft’s middleware. While the tendency of consumers to coalesce around a standard may explain the acquisi-

tion of a large market share, it does not provide permanent carte blanche to transform a leading position into a durable monopoly buttressed by exclusionary conduct.

To the contrary, the antitrust laws rely on competition, not entrenched monopoly, to constrain prices and spark innovation that benefits consumers. The Supreme Court has “foreclose[d] the argument that because of the special characteristics of a particular industry, monopolistic arrangements will better promote trade and commerce than competition.” *Professional Engineers*, 435 U.S. at 689. By condemning the disarray that might result from competition in software markets, Microsoft mounts a “frontal assault on the basic policy of the Sherman Act.” *Id.* at 695. The market, not a monopolist, should decide whether the benefits of price and quality competition are more attractive than the carefully rationed future planned by a monopolist.

In any event, Microsoft’s fragmentation argument blinks at Microsoft’s *own* “fragmentation.” Microsoft could “provide a” *truly* “consistent API set” (JA 177) only if every PC were absolutely identical to every other PC. In a world where some PCs run Windows 98SE and others run Windows XP Home or Professional, where some PCs have Microsoft Word and others don’t, where some users have downloaded all of Microsoft’s security patches and bug fixes and others have not, fragmentation of the kind Microsoft decries is already rampant as a result of Mi-

Microsoft's own actions: "Analysts describe Microsoft's fragmentation of Windows as expansive and deliberate." Joe Wilcox, *Windows faces new competition: Itself*, CNET News.com, Apr. 21, 2003 (<http://news.com/com/2100-1016.-997509.html>). Fears of "fragmentation" provide no basis for failing to remedy the commingling offense proved in this case.

2. *Having Foreclosed Java From The Most Efficient Distribution Channels, Microsoft Should Be Compelled To Distribute Java With Its Monopoly Product.*

Much of Microsoft's illegal campaign to protect its operating-systems monopoly was aimed at suppressing the distribution of Java. See JA 222. Microsoft viewed Java as "our major threat" and Netscape as Java's "major distribution vehicle." PX 113, at MS7 027366. Microsoft engaged in multiple illegal actions specifically designed to retard the distribution of cross-platform Java, including exclusive agreements, threats against Intel, and outright deception of software developers. JA 244-46. Moreover, Microsoft's unlawful campaign to destroy Netscape also was meant to slow the spread of Java, which Netscape distributed with Navigator. JA 244-45. It was the "combined efforts of Netscape and Sun" that "threatened to hasten the demise of the applications barrier to entry." JA 310, ¶ 77.

Although the suppression of Java was central to the theory of liability in this case, and despite this Court's strict instruction that "relief * * * should be tailored to fit the wrong creating the occasion for the remedy" (JA 276), the district court

did nothing to rectify the illegal suppression of Java, but proceeded as if that suppression had never occurred or did not matter. Although Microsoft has had the advantage of years of delay, it is not too late to undo that suppression. Having abandoned its effort to “pollute” Java, Microsoft is only now beginning ubiquitous distribution of its competing programming environment, the Common Language Runtime (“CLR”). See States’ Br. 11. A remedy that would place Java on the equal distribution footing it otherwise likely would have attained would lead to full competition between Java and the CLR, rather than competition biased in Microsoft’s favor by its past illegal actions.

That is what the States propose: to require Microsoft to distribute a compliant version of Java with Windows. JA 3179-80, ¶ 13; States’ Br. 60. This would cost Microsoft literally nothing. Sun would have to provide compliant Java software to Microsoft for free and in a timely manner; it is trivial to distribute a 5 MB file with a 1.5 GB program in an era of 40 GB hard drives. This remedy would directly deny Microsoft the fruits of its unlawful conduct — decreased ubiquity for Java — and weakens Microsoft’s illegal monopoly by restoring a threat to where it likely would have been if not unlawfully impeded.³ Microsoft’s anticompetitive

³ The States’ Remedy does not go far enough, as it only requires Microsoft to distribute Java with *new* copies of Windows or Internet Explorer. See JA 3179-80, ¶ 13. To account for thwarted distribution to the installed base of PCs, Microsoft

conduct was directed precisely at forestalling Java distribution; the remedy, therefore, should undo that suppression.

The district court manifestly erred in suggesting that no remedy for Microsoft's suppression of Java was available because that remedy would benefit a competitor. See JA 113-14. The district court distorted the principle that "[t]he anti-trust laws * * * were enacted for the protection of *competition*, not *competitors*." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977) (emphasis in original) (internal quotation marks omitted). When illegal conduct is directed at particular competitors in order to harm the competitive process, restoring the particular threat is not only permissible, but necessary. That a distribution remedy might benefit Sun, the injured competitor, does not detract from, but adds to, the public benefit from restoring the actual and potential platform competition that cross-platform Java presented to Microsoft's Windows monopoly.⁴ A remedy should not cast aside relief for the direct victims of illegal conduct — who pose immediate competitive threats — in favor of indistinct hopes that another competitive threat may arise some time in the future. The latter approach provides strong

should have been required to distribute Java in its "Windows Update" service, which Microsoft currently uses to distribute the CLR.

⁴ Indeed, the benefit to Sun is overstated: the Java technology now is administered as an open industry standard by the many companies and individuals participating in the Java Community Process. See <http://www.jcp.org/en/home/index>.

incentives to act unlawfully and gain (as here) years of competitive advantage, at no cost even after the illegality is established.

3. *The Disclosure Requirements Are Inadequate Without The Bolstering Suggested By The States.*

The district court relied heavily on the prophylactic effects of the API and communications protocol disclosure requirements in its Final Judgment. The court explained that those provisions would “facilitat[e] interoperation between Microsoft’s PC operating system products and third-party middleware” and “increase[e] the ability of [non-Microsoft] middleware to threaten Microsoft’s PC operating system monopoly.” JA 96-97.

Would that this were so, but the district court’s disclosure remedies are narrow, vague, and unenforceable. No one knows what, if anything, Microsoft must release to comply with the district court’s order. Both the API and communications protocol disclosures are restricted to information needed “for the sole purpose of interoperating” with Windows. JA 193-94, § III.D-E. The district court recognized that “[t]he concept of interoperability encompasses a continuum” without any independently defined “standard,” JA 47, but refused to define “interoperate” (apart from the equally vague synonym “communicat[e]” in Section III.E). There accordingly is no standard against which any disclosure or non-disclosure can be measured.

Although it did not *define* interoperation, the district court nonetheless *ex-*

cluded most benchmarks for interoperation from the communications protocol disclosure obligation. The court recognized that “native” interoperation is only “one of at least five basic approaches” to client-server interoperability, JA 159, but the obligation reaches no further. See JA 194, § III.E. That is, the district court consciously excluded almost all the known bands on the “continuum” of interoperability, leaving Microsoft the ability to excuse itself from any protocol disclosure in the future merely by taking other “basic approaches.”⁵

The district court required Microsoft to disclose “the APIs and related Documentation that are used by Microsoft Middleware to interoperate with a Windows Operating System Product.” JA 193, § III.D. The definition of an API (*ibid.*) is meaningless, and other industry participants (and the court) have no way to tell if all APIs have been disclosed, or disclosed adequately. See JA 1268-69,

⁵ We are not aware of a single competitor that has successfully licensed the protocols from Microsoft in the nine months since identical communications protocol obligations became effective as part of the settlement with the United States. Despite three revisions to the protocol licensing program made at the urging of the Department of Justice, Microsoft continues to impose prices, terms and conditions that deter participation in the program. Continuing obstacles include: a very limited ability to examine and evaluate the protocols before entering into a license agreement (and agreeing to pay a \$100,000 up-front royalty); intellectual property grant-backs (stated as covenants not to sue); disproportionately costly per-server royalties; and use restrictions that exclude networks with PCs using Windows 98 or non-Microsoft PC operating systems. See generally Microsoft Protocol License Agreement §§ 2.6, 2.1 & Ex. J ¶¶ 1, 15 (<http://members.microsoft.com/consent/Info/SampleAgreement.aspx>); General Server Licensing Information, (<http://members.microsoft.com/consent/Info/TaskInfo.aspx?pkid=920>).

¶ 60; JA 3315.

In general, an API is an interface between two programs — here, Microsoft Middleware and Windows — but the obligation is defined so that, when middleware is installed on or with Windows, very little code on that hard disk counts as middleware, while Windows can encompass almost any code Microsoft wants it to encompass “*in its sole discretion.*” JA 202, § VI.U (emphasis added)). To begin with, Microsoft need not disclose APIs used by a middleware program that it distributes only with Windows. See JA 200, § VI.J.1. Microsoft can and does control that exemption: Microsoft distributed Windows Media Player 8 only with Windows XP, although versions 7 and 9 have been distributed separately.

Even when “Microsoft Middleware” *is* released separately, however, the disclosure obligation does not reach the APIs used to invoke the operating system to perform the middleware’s *function*. Rather, the only APIs that would be disclosed are those accounting for “most * * * of the user interface” of the middleware. JA 200, § VI.J. That is, Microsoft may avoid contempt by disclosing the APIs between Windows and the *shell* of the middleware, rather than the middleware *functionality* (which Microsoft is permitted, in its sole discretion, to define as part of Windows). This superficial disclosure is far too incomplete to support software that could pose a potential platform threat. See States’ Br. 28. A potential platform must efficiently and accurately invoke computing functions, not

merely present a pleasant appearance on the screen.

Finally, the district court’s API disclosure requirements aim at the wrong thing, because they require the publication only of APIs *used by Microsoft Middleware* to invoke resources from a Windows Operating System Product. Innovative rival software vendors do not need APIs between Microsoft Middleware and Windows. The truly threatening innovators are threatening precisely because their products perform functions that Microsoft’s do not. In those cases, by definition, there will not be any fully analogous Microsoft Middleware — just as Microsoft did not have an Internet browser when Netscape Navigator first appeared. Those developers need full access to *Windows* APIs — APIs for all functionalities enabled by the Windows platform, whether Microsoft designates them “internal” calls within Windows or external APIs that it distributes to ISVs — not to the limited subset used by a Microsoft version of similar middleware.⁶

The States’ proposals solve these flaws by adding sufficient precision to identify and enforce a concrete obligation. More important, the States’ proposals

⁶ The district court’s concern about “cloning” (see JA 100-02) rested in part on a misunderstanding of what an API is. An API *invokes* operating system functionality to perform a specific action — for example, displaying a window on the screen or reading data from a CD-ROM. Under the district court’s decree and the States’ proposals alike, what Microsoft must publish is in essence the grammar and passwords that another program should use to ask the operating system to perform a specific operation. How Windows then performs that operation is not released. If providing another means to an end is “cloning,” so is all competition.

would require Microsoft to disclose APIs it does not now disclose, and prevents Microsoft from defining its obligations into meaningless superficiality. See States' Br. 48. Although disclosure alone cannot bear the weight that the district court placed on it, the broader disclosure obligations that the States propose would facilitate future platform competition and help remediate Microsoft's unlawful actions.

CONCLUSION

The judgment should be reversed and remanded with instructions to enter effective relief.

Respectfully submitted.

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CERTIFICATE OF COMPLIANCE WITH RULE 32(A)(7)(B)

I hereby certify that — according to the word-count facility in Microsoft Word — this brief, excluding those portions omitted under Federal Rule of Appellate Procedure 32(a)(7)(B)(iii), consists of 6142 words and thus complies with the word-count limits established in this Court’s March 13, 2003, scheduling order.

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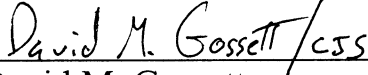
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