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To: Microsoft ATR
Date: 12/7/01 9:49am
Subject: Anti-trust Settlement (Updated with some things I forgot)

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I am a technology professional who has been involved in software for over 16 years. I am currently the Vice President of Technical Architecture for a large distribution company (basically the CTO). My comments in this response to the anti-trust settlement proposal currently before the District Court are my own, and in no way affliated with my company. I only talked about my position, so that you could see that I have some credibility in my comments. Having said that, the following is where I see issues with the proposed settlement.

In section III. Prohibited Conduct, it states that Microsoft is prohibited from retaliating against an OEM for shipping a personal computer that either includes a non-Microsoft operating system or can boot more than one operating system. There seems to be a glaring omission here. Under these terms Microsoft could retaliate if an OEM ships a personal computer with only a non-Microsoft operating system. To give a simple example, if I were IBM, and I started shipping personal computers with Linux pre-installed as the only operating system for customers who didn't want a dual boot system, Microsoft could retaliate. The odds of this behaviour would go up substantially, if a large OEM like IBM started selling significant numbers of systems with only a non-Microsoft operating system.

In section III.C.2, it states that Microsoft cannot restrict by agreement any OEM from distributing or promoting non-Microsoft middleware by installing or displaying on the desktop of any size or shape so long as such shortcuts do not impair the functionality of the user interface. Who makes the judgement about impairing the functionality of the user interface? What constitutes an impaired user interface? If Microsoft just doesn't like the way it looks, can they have the OEM remove it? This raises more questions than it answers. It seems to me, that if an OEM really impairs the user interface, then their customers will be unhappy, and have them fix it, or get their PC's from somewhere else. I know that Microsoft position on this, is that it reflects on them. The truth of the matter is, the OEM handles the technical support for pre-installed copies of Windows, not Microsoft. How many people do you know blame Microsoft when there computer doesn't work? They simply say my computer doesn't work, and if they bought the system from an OEM with Windows pre-installed, they call the OEM. This section should have no exception, and the free market should be left to decide whether an OEM has impaired the user interface or not.

In section III.C.3, it states another user interface exemption for OEMs. This time is says that middleware that automatically launches on boot, can be replaced as long as it displays on the desktop no user interface or the user interface is of similar size and shape to Microsofts user interface. This prevents competitors from creating unique user interface paradigms, that may infact be better than Microsofts. In fact, it limits them into copying Microsofts products, and gives no ability to innovate with the user interface. I don't see how this can foster competition. If both products look and act the same to the user, then you have just removed one of the competitive advantages a competing product may have.

In section III.D, it states that Microsoft has to disclose to ISVs, IHVs, IAPs, ICPs, and OEMs the API's and related documentation that are used by Microsoft middleware. This goes to the heart of the issue alot of people have, which is that Microsoft hides API's that it uses for competitive advantage. This is a very good provision, but it has one very big omission. Today, open source projects create software that needs to interoperate with Windows (e.g. Samba) operating systems. These projects would not be covered by the list above. For this provision to have true meat behind it, Microsoft should be made to disclose the API's publicly to everyone. This will create significantly more competition in the marketplace, because it would allow open source projects to be more easily developed. This section is also incongruent with section III.E, which doesn't limit the disclosure of communication protocols between the Windows client and server. The two sections

should allow for disclosure to any and all third parties.

Section III.F.2 seems to be completely meaningless. The exception completely nullifies the behavioural prohibition. Everything from the word except on, should just be removed. Microsoft should in no way be allowed to limit what an ISV can develop or promote that competes with Microsofts own products. This section should be one of the cornerstones of an agreement, and should have no exceptions.

Section III.G.1 also seems meaningless. Again, the exception competely nullifies the behavioural prohibition. If you are going to eliminate the use of contracts that give consideration to certain entities based on solely supporting Microsofts products, at the expense of competitors products, then the agreement should do that without exception. The current exception takes all of the teeth out of this section.

Section III.H.1 & 2 has all the same problems of section III.C.3 which I stated above. Additionally, Microsoft has the option to have the end user confirm this chose of replacing the Microsoft product with the non-Microsoft product. Of course, this could confuse the user, and make them wary of making such a change. While I understand that a user could do this by accident, based on the provisions of this section, the user can make the Microsoft product the default selection just as easily. Besides that issue, I think that additional teeth should be put into this section in the following way. Microsoft should be prohibited from putting hooks into the operating system that prompts the user to switch back to the Microsoft product everytime the user uses the non-Microsoft product. They could easily do this under the provisions of this settlement, and make it very difficult for the user to use the competing product.

Section III.H.3 makes direct reference to my suggestion of what Microsoft will do to change the configuration to suit their needs and stiffle competition. The settlement only prohibits them from changing the configuration that the OEM supplied their customer for 14 days. After that time, they can pepper the user with dialogs that constantly ask them to switch the applications from competitors to theirs! This entire section should be changed to prohibit this behaviour completely. I don't see how this agreement can foster competition with this type of exemption. It also retains much of the power Microsoft has over OEMs. If the OEMs configuration can just be changed by Microsoft after a couple of weeks, it takes much of the value that the OEM can sell to Microsofts competitors away from the OEM. If I was a Microsoft competitor, and I wanted to sign an agreement for an OEM to ship my product versus Microsoft, and Microsoft can two weeks later bother the user to the point that they switch to the Microsoft product anyway, then I wouldn't be willing to pay the OEM very much. OEMs already struggle with margins, because Microsoft and Intel make all of the profit, and the product is a commodity. The only real way for OEMs to differentiate their products is through customization and third-party software bundles. Again, we should let the free market decide, without pestering prompts to switch to Microsoft products (and visa versa).

After section III.H, there are two bullets called 1 & 2, which don't seem to be a part of section H, but give Microsoft addtional exceptions. Bullet 2 says, a Microsoft middleware product may be invoked by the operating system when a non-Microsoft product fails to implement a reasonable technical requirement. What is a reasonable technical requirement? The example in the document is hosting an Active-X control. What if the replacement product can implement all of the functionality that a user needs without hosting an Active-X control? Who determines what is reasonable? These type of exceptions could make the agreement unworkable, especially if it can be argued in court. I see alot of additional wrangling in court to resolve disputes over things like this, and this additional time could be used by Microsoft to continue business as usual while the lawyers fight it out.

Section III.J gives Microsoft another way to wiggle out of disclosing API information. I think it is necessary to state that they cannot disclose the internal working of something that is against the law to disclose. As far as I know, no such cases exist. Actual authentication keys, tokens, etc. would not be apart of a working API, but the format of those would be. The way this is worded, Microsoft could prevent the disclosure of API's and communication protocols, and no one would be able to dispute them because they could argue that disclosure would be required to prove their case. Of course, you could argue that the technical committee could work to see if Microsoft is pulling the wool over everyone's eyes. The flaw in this, is that Microsoft could still fight it and win, and no third party could jump in to help the case without first getting disclosed on the API's and communications protocols. I see this as a catch-22 for enforcement.

After reviewing this entire proposed settlement, there is also one thing missing from the license and agreement restrictions. One of the main things that came out in the trial testimony is that Microsoft makes anyone who uses their development tools restrict the use of the software created with the tools to Microsoft operating systems. This affectively makes it impossible for a developer to take source code and port it to a competing operating system. If you want to restore competition for operating systems it has to be easy to port an application from Windows to competiting operating systems. If the developer cannot use their own source code to do this, then it will be next to impossible to get developers to make the investment needed to get applications on competitive operating systems. This is also a case of the tail wagging the dog. Microsoft is controlling another companies intellectual property. This is something that Microsoft has made sure doesn't happen to them in this very proposal!

Overall, this agreement doesn't go far enough in curbing Microsofts business practices. I think that a better solution is staring us all right in the face. The solution that I think would be better has three simple principles, of which two are captured in this proposed settlement. First, make Microsoft disclose all API's to everyone, without exception. Second, do not allow Microsoft to control other companies use of Windows or their own source code, whether it be configuration of the desktop, inclusion or exclusion of non-Microsoft and Microsoft products, or porting their own software to non-Microsoft operating systems. And third, allow Microsoft to bundle anything they want into Windows, and its successors, as long as it complies with a recognized open standard. The IETF (Internet Engineering Task Force) model of standardization should apply here. In their model, something does not become a standard until at least two interoperating implementations of the standard are widely deployed. This would make it very simple to monitor compliance, and would allow third parties, including open source projects, to compete head on with Microsoft in every product category.

Thanks for taking the time to read this, and I hope that the settlement can be improved to foster competition in the marketplace for operating systems.

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