From: Robert Riemersma
To: Microsoft ATR
Date: 1/24/02 2:02am
Subject: Microsoft Settlement

To: Renata B. Hesse
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Under the Tunney Act, I wish to comment on the proposed Microsoft settlement. I agree with the problems identified in Dan Kegel's analysis (on the Web at http://www.kegel.com/remedy/remedy2.html), namely:

The PFJ doesn't take into account Windows-compatible competing operating systems

* Microsoft increases the Applications Barrier to Entry by using restrictive license terms and intentional incompatibilities. Yet the PFJ fails to prohibit this, and even contributes to this part of the Applications Barrier to Entry.

The PFJ Contains Misleading and Overly Narrow Definitions and Provisions

* The PFJ supposedly makes Microsoft publish its secret APIs, but it defines "API" so narrowly that many important APIs are not covered.
* The PFJ supposedly allows users to replace Microsoft Middleware with competing middleware, but it defines "Microsoft Middleware" so narrowly that the next version of Windows might not be covered at all.
* The PFJ allows users to replace Microsoft Java with a competitor's product -- but Microsoft is replacing Java with .NET. The PFJ should therefore allow users to replace Microsoft.NET with competing middleware.
* The PFJ supposedly applies to "Windows", but it defines that term so narrowly that it doesn't cover Windows XP Tablet PC Edition, Windows CE, Pocket PC, or the X-Box -- operating systems that all use the Win32 API and are advertised as being "Windows Powered".
* The PFJ fails to require advance notice of technical requirements, allowing Microsoft to bypass all competing middleware simply by changing the requirements shortly before the deadline, and not informing ISVs.
* The PFJ requires Microsoft to release API documentation to ISVs so they can create compatible middleware -- but only after the deadline for the ISVs to demonstrate that their middleware is compatible.
* The PFJ requires Microsoft to release API documentation -- but prohibits competitors from using this documentation to help make their

operating systems compatible with Windows.
* The PFJ does not require Microsoft to release documentation about the format of Microsoft Office documents.
* The PFJ does not require Microsoft to list which software patents protect the Windows APIs. This leaves Windows-compatible operating systems in an uncertain state: are they, or are they not infringing on Microsoft software patents? This can scare away potential users.

The PFJ Fails to Prohibit Anticompetitive License Terms currently used by Microsoft

* Microsoft currently uses restrictive licensing terms to keep Open Source apps from running on Windows.
* Microsoft currently uses restrictive licensing terms to keep Windows apps from running on competing operating systems.
* Microsoft's enterprise license agreements (used by large companies, state governments, and universities) charge by the number of computers which could run a Microsoft operating system -- even for computers running competing operating systems such as Linux! (Similar licenses to OEMs were once banned by the 1994 consent decree.)

The PFJ Fails to Prohibit Intentional Incompatibilities Historically Used by Microsoft

* Microsoft has in the past inserted intentional incompatibilities in its applications to keep them from running on competing operating systems.

The PFJ Fails to Prohibit Anticompetitive Practices Towards OEMs

* The PFJ allows Microsoft to retaliate against any OEM that ships Personal Computers containing a competing Operating System but no Microsoft operating system.
* The PFJ allows Microsoft to discriminate against small OEMs -- including regional 'white box' OEMs which are historically the most willing to install competing operating systems -- who ship competing software.
* The PFJ allows Microsoft to offer discounts on Windows (MDAs) to OEMs based on criteria like sales of Microsoft Office or Pocket PC systems. This allows Microsoft to leverage its monopoly on Intel-compatible operating systems to increase its market share in other areas.

The PFJ as currently written appears to lack an effective enforcement mechanism.

I also agree with the conclusion reached by Dan Kegel's analysis, namely that the Proposed Final Judgment, as written, allows and encourages

significant anticompetitive practices to continue, would delay the emergence of competing Windows-compatible operating systems, and is therefore not in the public interest. It should not be adopted without substantial revision to address these problems.

Sincerely,

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