From: Jerry Clabaugh
To: Microsoft ATR
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Subject: Microsoft Settlement

"None of the people who run divisions are going to change what they do or think or forecast. Nothing."

-Bill Gates, interview in The Washington Post on the 1995 consent decree, August 1995

"The practices Microsoft agreed to forgo had already served their purpose. Gates was right when he summed up the effect of the [1995] consent decree in one word: 'Nothing.'"

-James Gleick, "Making Microsoft Safe for Capitalism"

The present Consent Decree has many shortcomings which render it ineffective in "unfettering the market from Microsoft's anticompetive conduct". In particular, the Technical Committee, which has been characterized as a major concession by Microsoft, gives the proposed Decree the appearance of meaningful enforcement while moving the reality of enforcement beyond reach. These are some of the difficulties with the Technical Committee:

(1) The Committee has wide powers to look at documents and interview individuals, but has no power to cause Microsoft to behave differently.

(2) The information gathered by the Committee will be confidential, unlike information gathered in the past by the Justice Department, further complicating enforcement (B9).

(3) Since Microsoft appoints one of the first two members, and the third member will be appointed by the first two, Microsoft is permitted to establish a committee with a majority of members who have no interest in enforcing the consent decree, even if thay had the power to do so.

(4) The members are supposed to be individuals who are experts in software design and programming (B2), while they will also require expertise in antitrust law and history.

Even though the terms of the proposed Decree are very relaxed, Microsoft, if it remains under the same management and philosophy of the 1990's, will pay no heed to the proposed Decree. If the Decree is accepted, we will be in the same position as in 1996, with a decree in place, but no enforcement options beyond bringing yet another antitrust action.

It is my belief that breaking up Microsoft would be a bitter experience, full of dislocations for all those with an equity in Microsoft; managers, employees, stockholders, and customers. Yet when the antitrust action is brought yet again, the only reasonable remedy then will be a breakup. The only measure we can take now to prevent this outcome is to provide meaningful, effective enforcement in the current case.

The Committee only impedes the job of enforcement. The dissenting States' proposal does include real enforcement terms, and is a preferable alternative to the proposed Consent Decree.

I have focussed on the Technical Committee, but the present Decree gives Microsoft the imprimatur of the Department of Justice to pursue many anticompetitive strategies. Reading the proposed Decree without context gives one the impression that it was the government that was found guilty of interfering with Microsoft's right to abuse its monopoly. If I have read the news accounts correctly, then it is instead the case that every federal judge who has had to evaluate the Microsoft's behavior (nine, to date) has found Microsoft guilty of abusing its monopoly. Why then, are there so many limitations and exceptions? Is Microsoft in such danger of being unfairly treated by law enforcement, when that enforcement has been vindicated again and again by the courts?

The proposed Decree unfairly limits the ability of the public to seek enforcement of antitrust law against Microsoft, and should therefore be discarded. Even a simple fine would motivate management at Microsoft to learn about the meaning of antitrust law, without limiting the rights of the public.

In addition, the proposed Decree does nothing to "deny Microsoft the fruits of its violations of the Sherman Act", as instructed by the Appeals Court.

The importance of implementing an effective remedy looms larger than ever before, since computer security is now an issue that needs very serious attention in the United States:

"In a report released this month titled "Cyber Threats and Information Security: Meeting the 21st Century Challenge," the Center for Strategic and International Studies (CSIS) concluded that the government and the private sector should be concerned about the "trustworthiness" of future Microsoft products"

-cnn.com, December 29, 2000

"Gartner recommends that enterprises hit by both Code Red and Nimda immediately investigate alternatives to IIS, including moving Web applications to Web server software from other vendors, such as iPlanet

and Apache. Although these Web servers have required some security patches, they have much better security records than [Microsoft's web server software] IIS"

-Gartner Group, September 19, 2001

The fact that Microsoft's attitude toward security remains so casual, despite many high-profile security failures is an indication of the unhealthy effect of their monopoly power. In a competitive market, competitive pressure should have caused Microsoft to 'clean up its act' with respect to security. Today, the United States cannot afford an unrestrained predatory monopoly in computer software.

Besides security, the other important reason to reject to proposed Decree and instead insist on real enforcement is economic: Microsoft's policy of extinguishing innovation that it cannot co-opt certainly has benefitted Microsoft and its investors, but threatens the larger United States economy.

The Microsoft monopoly and the consumer software market emerged simultaneously, so no one can say what the economic benefits of antitrust enforcement would be. I can only hope that the Court will give prosperity a chance.

I am in no way a competitor of Microsoft. Thank you for the opportunity to be heard,

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