From: Rufus Polson
To: Microsoft ATR
Date: 1/22/02 12:37 pm
Subject: Proposed Microsoft Settlement

Dear Officers of Justice,

I should note before beginning that I am Canadian, and as such lack standing in a United States proceeding. But it has been suggested to me that it would, nonetheless, not be improper to submit a respectfully phrased opinion, and I have serious concerns about this matter.

My first worry about the proposed settlement is that it cannot be enforced. The only penalty for noncompliance with the settlement, as I understand it, is that the settlement may be extended for two years. But how much effect can this have? Surely a company failing to comply with a settlement would have little trouble continuing for two more years to fail to comply. The history of Microsoft's behaviour suggests that failing to comply with a settlement is within the scope of their normal actions; the likelihood of this happening must be taken into account in any settlement, with noncompliance penalties on a scale sufficient to create strong disincentive even to such a massive entity.

My second is the lack of any penalty. In a country in which the criminal law strongly endorses retribution and deterrence as principles of justice, and in which corporations are legal entities with much of the rights and standing of persons, it seems appropriate to keep in mind the principles that are routinely applied to persons when dealing with corporate lawbreaking. This is the more true for corporations such as Microsoft in which the direction is so clearly set by a very few individuals, whose fortunes and identities are wrapped up closely in the corporation. In short, Microsoft as a corporation is guilty of a serious crime--this has been established. Microsoft as a corporation should be seen to be penalized, so that other corporations and their administrations realize that illegal monopolist tactics will not cause their companies to prosper.

My third is the weakness of much of the language, such that many things which the settlement appears on the surface to prohibit are in fact not prohibited in any serious way, whereas it seems that others still can be twisted in such a manner as to actually legitimize practises that would not normally be considered acceptable. Many other submissions, as I understand it, have gone into detail on these issues. I will not spend words describing them yet again.

Another problem is the inspectors. Their powers are unclear, and should be strongly specified. The selection process seems inappropriate--why should Microsoft have a voice in selecting their watchdog? It is like letting a drug dealer vote on his parole officer. In addition, it seems as if they are to be paid by Microsoft--this is another damper on

independence. It seems more reasonable that Microsoft should disburse a sum immediately, sufficient for their payment for the entire duration of the settlement, and the Department of Justice should pay them out of that sum.

Finally, the settlement seems of marginal impact even in its intent. Even if one were to ensure that it was complied with, clean up ambiguities in language so that the compliance reflects what some of the broader statements indicate to be the intent, and empower inspection sufficiently well to verify compliance, the results seem unlikely to curb Microsoft's anti-competitive behaviour to any great extent. Rather, it seems likely that Microsoft will be forced to curtail a few fringe practises, leaving the general pattern untouched and perhaps pushing them to intensify new anti-competitive practises in areas such as the internet and encryption, where they might take advantage of such laws as the DMCA to use proprietary encryption schemes and claim any attempt to interoperate with their encrypted files to be illegal.

In short, the proposed settlement is flabby and overspecific even in its intent--no tiger capable of reining such a massive organization, but a tabby cat. Its actual wording makes it a paper tabby. Let us not forget that this is a corporation with such contempt for the administration of justice that they presented falsified evidence to the trial court (their so-called demonstration of Windows 98 running slower without Internet Explorer, which was a mockup fabricated for the sole purpose of deceiving the court--an action which would have surely left any ordinary defendant facing additional charges for perjury and/or contempt of court); how likely is it that they will comply with any judicial decision one micron farther than they are absolutely compelled to? How likely is it, in fact, that any settlement without a major structural component will impact Microsoft's practises in any significant way? In the absence of structural remedies, it is at least essential that any settlement present a comprehensive catalogue of practises which are absolutely barred, presented in ironclad language, with massive, immediate penalties for deviation. And if this case is to deter others from similar practises and, in general, pass the message that antitrust law remains alive in the United States, it should involve a substantial penalty for past anticompetitive actions.

Respectfully yours,
Rufus Polson