

G. “Trademarked” (RPFJ § VI.T)

116. A number of commentors address the scope of the definition of “Trademarked” in the RPFJ.¹²¹ Most of these commentors suggest that the definition is too broad and would permit Microsoft to evade its disclosure obligations under the RPFJ by manipulating its use of trademarks.¹²² Several commentors complain that basing the determination of whether a product is either Microsoft Middleware or a Microsoft Middleware Product on whether the product has been Trademarked is inappropriate because it permits Microsoft to manipulate the application of the middleware definitions to its products.¹²³

117. The definition of Trademarked is designed to ensure that the Microsoft Middleware and Microsoft Middleware Products that Microsoft distributes (either for free or for sale) to the market as commercial products are covered by the RPFJ. Thus, the definition of Trademarked correctly describes the manner in which businesses typically identify the source of the products that they distribute in commerce, while seeking to carve out from the definition products, such as “bug” fixes, that might be distributed under the Microsoft® or the Windows® names but that are not of commercial significance.

118. Several commentors argue that the exception for generic or descriptive terms contained in the Trademarked definition is a significant loophole that will permit Microsoft to

¹²¹KDE 15-16; Litan 51; ProComp 44-45; CCIA 65-67; SBC 38 n.5; Pantin 36; Giannandrea 6.

¹²²For a discussion of issues relating to the intersection of the definition of Trademarked with the definitions of Microsoft Middleware and Microsoft Middleware Product, see Sections III(B) and III(C) above.

¹²³ProComp 44-45; CCIA 65-67; Pantin 36; Giannandrea 6.

exempt many products from coverage by the RPFJ.¹²⁴ The exception for generic and descriptive terms, however, simply reflects the reality that products distributed in commerce under such names may not be trademarked unless the names develop secondary meaning. Under the Trademarked definition, Microsoft simply announces in advance that it will not claim such terms as trademarks and, therefore, that such terms never will gain secondary meaning. It is for precisely this reason that any product distributed in commerce under, or identified by, marks that consist of any combination of generic or descriptive terms and a distinctive logo or other stylized presentation are not exempted from coverage as Trademarked, because such marks are inherently distinctive.

119. At least one commentator suggests that the portion of this definition relating to Microsoft's disclaimer of certain trademarks or service marks, and its abandonment of any rights to such trademarks or service marks in the future, conceivably operates to remove automatically trademark protection from marks that Microsoft already has registered but that also fall within this description.¹²⁵ But this portion of the definition of Trademarked does not operate in that manner. Instead, this clause is designed to ensure that, to the extent that Microsoft distributes a product in commerce under generic or descriptive terms or generic or descriptive terms in combination with either the Microsoft® or the Windows® name and claims on that basis that

¹²⁴ProComp 44-45; KDE 15-16; CClA 65-67; SBC 38 n.5.

¹²⁵See CClA, at 66-67 (“Indeed, Microsoft could plausibly argue that the Windows Media® mark does not come within the ‘Trademarked’ definition as it is, since even that mark consists of no more than the Windows® mark in combination with the generic term ‘media.’ RPFJ § VI(T) may therefore embody Microsoft’s ‘disclaim[er of] any trademark rights in such descriptive or generic terms apart from the Microsoft® or Windows® trademarks.’”).

such product does not fall within the definition of Microsoft Middleware or Microsoft Middleware Product, it will be unable to claim trademark protection for such marks in perpetuity.

H. “Windows Operating System Product” (RPFJ § VI.U)

120. Definition U defines “Windows Operating System Product” to mean “the software code . . . distributed commercially by Microsoft for use with Personal Computers as Windows 2000 Professional, Windows XP Home, Windows XP Professional, and successors to the foregoing” In general terms, the term refers to Microsoft’s line of “desktop” operating systems, as opposed to its server or other operating systems. Windows Operating System Product applies to software marketed under the listed names and anything marketed as their successors, regardless of how that software code is distributed, whether the software code is installed all at once or in pieces, or whether different license(s) apply.

1. Microsoft’s Discretion

121. Various comments address the final sentence of Definition U, which reads: “The software code that comprises a Windows Operating System Product shall be determined by Microsoft in its sole discretion.” Some of the comments assert, incorrectly, that permitting Microsoft the discretion to determine what package of software is labeled as a “Windows Operating System Product” for purposes of the RPFJ will allow Microsoft to re-label as part of the “Windows Operating System Product” code that would otherwise be middleware and thereby avoid having that code constitute “Microsoft Middleware” or provide the functionality of a “Microsoft Middleware Product” under the RPFJ.¹²⁶ Microsoft could, these commentators

¹²⁶AOL 20 n.19; CCIA 53; Harris 12; KDE 12; Litan 43-44; ProComp 7; SBC 42; SIA 26; TRAC 8.

hypothesize, essentially “decide for purposes of the decree obligations where the OS stops and where middleware begins,”¹²⁷ and thereby evade the decree’s technical provisions, including the disclosure provisions of Section III.D¹²⁸ or the removal provisions of Section III.H.

122. These comments are incorrect. Microsoft’s discretion under Definition U as to its packaging decisions (i.e., what it chooses to ship labeled as “Windows”) does not give it the ability to exclude software code from the application of any other relevant definition of the RPFJ. Thus, nothing in Definition U alters the fact that, under the RPFJ, software code that Microsoft ships labeled as “Windows” can also constitute “Microsoft Middleware” or a “Microsoft Middleware Product.” So long as software code or the functionality it provides meets the requirements of any other definition(s) in the RPFJ, Microsoft’s “discretion” under Definition U to call it part of a Windows Operating System Product will not change the result.¹²⁹ Thus, for example, Internet Explorer is both a Microsoft Middleware Product and part of a Windows Operating System Product.

123. A number of commentators also assert that the final sentence of Definition U might be read to transform what otherwise would be two separate products for antitrust purposes into one,

¹²⁷CCIA 53.

¹²⁸Litan 9, 43; RealNetworks 11; SIIA 25-27.

¹²⁹Indeed, this sentence in Definition U merely confirms what Microsoft already had the power to do — label the package of what it calls its own operating system products. The sentence does not narrow or alter the operative provisions of the RPFJ; those provisions principally rely on other definitions, such as Microsoft Middleware Product, regardless of how Microsoft labels its operating system.

or somehow to immunize Microsoft from potential liability for illegal tying.¹³⁰ Such a reading is untenable. Nothing in this provision, or in the RPFJ as a whole, purports to, or could, alter the application of the antitrust laws to Microsoft's conduct or its products. In particular, the RPFJ does not grant Microsoft any new rights or any immunity under the antitrust laws with respect to otherwise illegal tying or product integration. Similarly, Microsoft's decision to distribute certain software code as part of a Windows Operating System Product for purposes of this definition does not in any way affect the status or characterization of such code under the antitrust laws or the application of those laws to such code — e.g., whether software Microsoft says is part of the package it distributes as its "Windows Operating System Product" is or is not a separate "product" for antitrust purposes.

2. Prior Windows Versions

124. A few commentators¹³¹ suggest that Definition U. also should include — in addition to the software code Microsoft distributes as Windows 2000 Professional, Windows XP Home and Professional, and their successors — prior versions of Windows, including Windows 9x (Windows 95, Windows 98, Windows 98 Second Edition, and Windows ME) and Windows NT 4.0. These Microsoft operating systems were not included in the RPFJ's definition of Windows Operating System Product because their current commercial and competitive significance is significantly more limited than the operating systems included in the definition. For example, Windows 95, as its name suggests, was first shipped by Microsoft some seven years ago and is no longer actively distributed by Microsoft, while Windows 98 and 98 Second Edition will soon

¹³⁰AAI 29; CCIA 53; RealNetworks 11.

¹³¹Giannandrea 1-2; NetAction 2, 6-8; Pantin 36.

enter a phase of restricted availability.¹³² Windows Millennium Edition (ME), though much more recent, has enjoyed only limited success and already has been supplanted as Microsoft's primary OS by Windows 2000 and Windows XP, both of which are covered by Definition U.

125. The OEM-related provisions of the RPFJ, including Sections III.A, III.B, III.C, and III.H, apply primarily to OEMs' ongoing shipments of Microsoft operating systems with their new PCs, not to the installed base, and the great majority of those shipments today and going forward will be Windows 2000, Windows XP, and successors. Further, the provisions of Sections III.D and III.H, which require certain technical or design changes by Microsoft to its Windows Operating System Products, are relevant largely to OEM and consumer choices regarding operating systems that will be shipped under the RPFJ, rather than the installed base of operating systems that have already been distributed. Finally, the disclosure provisions of Section III.D are likely to have the greatest competitive significance for Windows 2000 and Windows XP and their successors, because those operating systems represent the versions of Windows to which the great majority of developers are likely to write middleware or applications. Going forward, developers are unlikely to write middleware or applications to any significant degree to the older, 9x operating systems, because those versions are built on a different code base than that underlying Windows 2000, Windows XP, and future versions of Windows.

¹³²Microsoft's product website indicates that Windows 95 was designated as being in the "Non-Supported phase" (where licenses may no longer be available and support is limited) on November 30, 2001; Windows 98, Windows 98 SE, and Windows 4.0 will all enter the "Extended" phase (where licenses may no longer be available to consumers and support is somewhat limited) on June 30, 2002. *See* <<http://www.microsoft.com/windows/lifecycleconsumer.asp>>.

3. Operating Systems for Other Devices

126. Finally, a few commentators suggest that Definition U should be broadened to include operating systems for non-desktop PCs and non-PC devices, such as tablet PCs and handheld devices,¹³³ and even operating systems used in “an extensive set of devices,” most with little or no similarity to PCs, including, among others, smart phones, digital cameras, retail point of sale devices, automobile computing systems, industrial control devices, and smart cards.¹³⁴

127. There is no basis in the Court of Appeals’ opinion for such a sweeping definition and the sweeping scope of coverage of the RPFJ that would follow from it. Plaintiffs’ case focused on Microsoft’s anticompetitive use of its PC operating system monopoly to thwart emerging middleware threats to the applications barrier to entry into the PC OS market that protected that monopoly. The Court of Appeals affirmed the District Court’s finding that Microsoft possessed a monopoly in a market for PC operating systems, and that it engaged in a variety of illegal actions to maintain that monopoly. Extending, as these commentators urge, each of the provisions of the RPFJ to a wide variety of non-PC devices — all of them outside of the relevant market proved at trial and upheld on appeal — is unwarranted and unrelated to any proper remedial goal in this case.

¹³³Kegel 6; SBC 42-43.

¹³⁴SBC 43.

IV. OEM PROVISIONS

A. Overreliance On OEMs

128. Several commentators suggest that the RPFJ burdens OEMs with the responsibility of injecting competition into the operating system market, a burden that, in the view of these commentators, the OEMs are not financially or technically capable of bearing. Under this view, the low margins and fierce price competition in the OEM business will deter OEMs from undertaking the costs and risks of exercising their new flexibility, guaranteed by RPFJ Section III.H, to replace access to Microsoft Middleware Products with access to Non-Microsoft Middleware Products.¹³⁵ To correct this perceived problem in the RPFJ, one commentator proposes to require Microsoft to license the binary code of its Windows Operating Systems Products to ISVs and system integrators at the lowest license fee that Microsoft charges to any OEM or other customer; the ISVs or system integrators would be allowed to repackage Windows with non-Microsoft middleware and applications and license the new package to interested OEMs or other consumers.¹³⁶

129. The argument that competitive pressures constrain OEMs, and so will make them unwilling to load non-Microsoft middleware, ignores the fact that the OEMs will respond to competitive pressures in choosing what software to offer consumers. The low margins and fierce competition in the OEM industry make OEMs *more* sensitive to consumer preferences, not less. If an OEM believes it can attract more customers by replacing a Microsoft product with a non-Microsoft product, it will do so; if not, it will not. And, indeed, this is precisely the way that a

¹³⁵ProComp 56-57; CCIA 58-59; CCIA, Stiglitz & Furman 32-33; SIA 56-60.

¹³⁶SIA 56-60.

market should work. Thus, the success of the RPFJ in ensuring competitive conditions should not be judged by which choices OEMs make; rather it should be judged by whether OEMs have the opportunity to make those choices, free from contractual restrictions and fear of retaliation.

130. Similarly, the likely competitive impact of the RPFJ cannot be evaluated by looking at how OEMs have responded to the limited freedom to replace Microsoft's desktop icons in Windows XP that Microsoft voluntarily offered to OEMs in a letter dated July 11, 2001. Several commentators leap from the observation that no OEM has so far chosen to remove Internet Explorer from the desktop to the assertion that therefore the RPFJ's provisions permitting the removal of end-user access to Microsoft Middleware Products will have no competitive effect.¹³⁷

131. Such a leap is unwarranted for several reasons. *First*, the RPFJ will grant OEMs significantly greater flexibility to customize Windows compared to Microsoft's voluntary offer. An OEM's "experience" under Microsoft's July 11 letter does not equate to experience under the RPFJ. The United States believes that it is quite possible that OEMs will choose to take advantage of the RPFJ's flexibility even if they have not taken advantage of the very limited flexibility Microsoft has offered them so far. In fact, at least one OEM recently showed that it will replace Microsoft middleware when it believes other options are more profitable: Compaq announced, on December 12, 2001, that its main consumer line of PCs will ship with RealNetworks' RealOne Player, rather than Microsoft's Windows Media Player, set as the default media player.¹³⁸ *Second*, other OEMs may have been reluctant to start customizing their

¹³⁷SIIA 16; CCIA 54-55; AOL 15-16; ProComp 60.

¹³⁸See Compaq Press Release, Dec. 12, 2001, <<http://www.compaq.com/newsroom/pr/2001/pr2001121204.html>>.

systems until a final judgment is in place and they know the precise contours of their options.

Third, as explained above, even if an OEM chooses not to replace Microsoft products with non-Microsoft products, that does not detract from the value of providing the OEM with the flexibility to do so. The RPFJ is intended to protect the competitive process, not to impose particular competitive outcomes.

132. More broadly, the emphasis in the RPFJ on provisions to free OEMs' choices is entirely appropriate, given their importance in the case. The Court of Appeals found that OEM preinstallation was "one of the two most cost-effective methods by far" of distributing browsers, and that Microsoft used various license restrictions on OEMs to "prevent[] OEMs from taking actions that could increase rivals' share of usage." *Microsoft*, 253 F.3d at 60, 62. The RPFJ's provisions reflect that preventing Microsoft from defeating future middleware threats through restrictions and pressure on the OEM channel is essential to ensuring that there are no practices likely to result in monopolization in the future.

B. Non-Retaliation (RPFJ § III.A)

133. Section III.A of the RPFJ prohibits a broad range of retaliatory conduct by Microsoft. Specifically, Microsoft may not retaliate against an OEM based upon the OEM's contemplated or actual decision to support certain non-Microsoft software. This section assures OEMs the freedom to make decisions about middleware or other operating systems without fear of reprisal.

134. Commentors express several concerns about Section III.A.¹³⁹ Although some commentors congratulate the United States for provisions that are procompetitive, represent real benefits to consumers, and take the club out of Microsoft's hand,¹⁴⁰ others believe that this section is not broad enough. Some commentors propose, for example, that the section be expanded to cover: (1) all software, including Microsoft Office;¹⁴¹ (2) entities other than OEMs;¹⁴² (3) threats of retaliation;¹⁴³ (4) all forms of retaliation;¹⁴⁴ (5) retaliation for any lawful acts undertaken by an OEM;¹⁴⁵ (6) existing forms of non-monetary consideration and all monetary consideration;¹⁴⁶ and (7) shipping PCs without an operating system.¹⁴⁷ One commentor seeks to eliminate from Section III.A Microsoft's ability to enforce its intellectual property rights

¹³⁹RealNetworks 24-25; AAI 25-34; SBC 91-100; Harris 4; Bast 2-3; Thomas 2-3; Red Hat 11-13, 16-18, 22-23; Alexander 2; KDE 13-14; CFA 88-89, 93-95; CompTIA 5; PFF 19; ProComp 55-60; Pantin 4-7; Palm 14-15; CCIA 85-87, and Stiglitz & Furman 31-32; AOL 34-38; AOL, Klain 2-3; Nader/Love 1-6; Maddux ¶¶ 2-4; Sen. Kohl 4; Lococo 1.

¹⁴⁰Nader/Love 2; CompTIA 5.

¹⁴¹SBC 97; Sen. Kohl 3-4; Nader/Love 2; AOL, Klain 2; Pantin 4-7; ProComp 59; PFF 19; AAI 31-33.

¹⁴²SBC 95-96, 99; Schulken 1; McBride 1 (should apply to Xbox).

¹⁴³Palm 14; Red Hat 22-23; ACT 27.

¹⁴⁴Sen. Kohl 4; Pantin 4-7; ProComp 59; CFA 88-89; Young 1.

¹⁴⁵Pantin 6-7.

¹⁴⁶RealNetworks 24-25; AOL, Klain 3.

¹⁴⁷Pantin 4-7; Harris 4; Alexander 2; Godshall 1 (shipping PCs with a single non-Windows operating system); Miller 2; Hafermalz 1; Scala 1; Schulze 2; Peterson 3; Burke 2.

through patent infringement suits.¹⁴⁸ Commentors also believe that the Section does not protect OEMs from arbitrary termination of their Windows licenses.¹⁴⁹ Commentors further claim that the standard contained in Section III.A. of subjective, actual knowledge is too hard to meet,¹⁵⁰ and that Microsoft's ability to offer Consideration is too broad.¹⁵¹ Finally, some commentors object to the RPFJ's failure to define "retaliation."¹⁵²

1. Section III.A Is Sufficiently Broad

135. Section III.A is designed to prevent Microsoft from undertaking actions against OEMs that have the purpose and effect of impairing an OEM's ability freely to choose to distribute and support middleware that may threaten Microsoft's operating system monopoly.¹⁵³ *See also* CIS at 25. The Section is logically limited to retaliation against OEMs,¹⁵⁴ as no evidence was presented at trial to show that entities other than OEMs, ISVs, and IHVs have been subject to retaliation in the past, or that other entities are so dependent upon commercial relations with Microsoft (or Microsoft's Consideration) that they are susceptible to retaliation.

¹⁴⁸Red Hat 11-13, 16-18, 22-23.

¹⁴⁹AOL, Klain 3; CCIA 85-86; Pantin 6-7; Harris 4.

¹⁵⁰SBC 97; ProComp 59; KDE 13.

¹⁵¹Maddux ¶ 5; AOL, Klain 3.

¹⁵²SBC 96; Red Hat 16-17.

¹⁵³Levy 1 (settlement adequate). This would include linking the price or terms of Office to the promotion of rival middleware. Doing so would represent an alteration in Microsoft's commercial relationship with that OEM because of that OEM's promotion of middleware.

¹⁵⁴Section III.F addresses retaliation against ISVs and IHVs.

136. Comments suggesting that Section III.A is deficient because it fails to address threats of retaliation similarly are misplaced. Section III.A ensures that Microsoft cannot retaliate based upon the OEM's contemplated or actual decision to support certain non-Microsoft software. Threats of retaliation are empty when Microsoft cannot follow through on them.

137. Some commentators contend that Microsoft should be prohibited from all forms of retaliation, noting that Section III.A does not prohibit retaliation that is unrelated to middleware. Commentors urge the Court to expand Section III.A. to prohibit retaliation for any lawful act by an OEM. This position, however, misapprehends the case. This case dealt with Microsoft's actions with respect to middleware threats to Microsoft's operating system. The RPFJ prohibits Microsoft both from repeating those actions found to be illegal, and from undertaking other, similar acts that may protect its operating system monopoly from middleware threats.

138. The provision of Section III.A covering non-monetary Consideration¹⁵⁵ also drew comments. Commentors suggest that the provision be re-written to include monetary Consideration. In fact, Section III.A. already covers existing and successor forms of monetary Consideration, as Microsoft is expressly prohibited from retaliating by "altering . . . commercial relations with [an] OEM . . ." Dropping or changing monetary Consideration would alter commercial relations. Section III.A, however, does not prohibit Microsoft from competing by, for example, offering to pay OEMs for desktop placement. But Section III.A would prohibit Microsoft, in this example, from retaliating by altering its commercial relations with, or

¹⁵⁵"Consideration" is defined in Section VI.C. Briefly, Consideration includes such things as preferential licensing terms, support, product information, certifications, and permission to display trademarks, icons, or logos.

withholding non-monetary Consideration from, OEMs that choose to accept a third party's offer in lieu of Microsoft's.

139. Certain commentators also argue that limiting retaliation to withholding "newly introduced" forms of non-monetary Consideration somehow exempts existing forms of such Consideration from the reach of Section III.A. This is incorrect. As noted in the CIS (at 26), this clause specifically applies to "successor versions of existing forms of Consideration."

140. Finally, certain comments recommend that this Section expressly permit shipping a computer without a Microsoft operating system or no operating system at all. The United States notes, however, that such machines are already available in the market¹⁵⁶ and sees no reason for the RPFJ to address the question.¹⁵⁷

2. Section III.A Properly Allows Microsoft To Enforce Intellectual Property Rights

141. Section III.A provides that nothing in the provision prohibits Microsoft from enforcing its intellectual property rights where doing so is not inconsistent with the RPFJ. A commentator suggests that Section III.A should, in fact, prohibit Microsoft from bringing or threatening lawsuits to enforce such rights. This suggestion is meritless. The commentator would force Microsoft to dedicate its intellectual property, effectively putting all of its patented and copyrighted material into the public domain. Although Microsoft's competitors would

¹⁵⁶The Internet site Yahoo! lists in its commercial directory a substantial number of retailers offering custom-built PCs, at least some of which will provide a computer without an operating system at a discounted price (for example, Discovery Computers). Many refurbished computers are offered without an operating system, as well. Moreover, component retailers offer replacement hard drives, also without an operating system.

¹⁵⁷See also RPFJ § III.C.

appreciate an ability to free-ride on Microsoft's investment in research and development, the antitrust laws do not require such a draconian remedy with its attendant destruction of incentives for innovation. The RPFJ seeks to draw a balance between preventing Microsoft from engaging in anticompetitive acts to protect its operating system monopoly while still encouraging it to compete and to innovate. Prohibiting Microsoft from enforcing its intellectual property rights would deter innovation unduly and encourage infringement without barring conduct found by the District Court and Court of Appeals to violate the antitrust laws.

3. Section III.A Protects OEMs From Arbitrary Termination Of Their Licenses

142. Commentors are simply incorrect in their assertions that the terms of the RPFJ permit arbitrary termination of Covered OEMs' Windows licenses.¹⁵⁸ The RPFJ states expressly that Microsoft may not terminate a Covered OEM's license without first providing a written notice and opportunity to cure. It is only if the OEM has failed to cure the violation after the two letters that Microsoft then may terminate the OEM's license. If the OEM cures the violation, Microsoft cannot terminate for that violation. Microsoft cannot reasonably be barred from ever terminating an OEM's license, because there may be legitimate reasons for doing so (e.g., an OEM's failure to pay).

143. Section III.A.3 also protects OEMs from losing their Windows license in retaliation for exercising any option provided for in the RPFJ. Pursuant to those provisions, for example, Microsoft may not terminate a Windows license because an OEM has removed end-user access to any Microsoft Middleware Product.

¹⁵⁸“Covered OEM” is defined in Section VI.D.

4. Requiring Proof Of Knowledge Is Necessary And Can Be Met

144. Certain commentators allege that requiring proof that Microsoft *knew* that an OEM was or was contemplating undertaking any of the enumerated actions before finding retaliation sets an impossible standard. In fact, such a requirement is reasonable because an inference of retaliation would be inappropriate unless Microsoft knows of the action that it is seeking to punish or prevent.

5. Microsoft's Permitted Use Of "Consideration" Is Appropriate

145. The RPFJ permits Microsoft to provide Consideration to an OEM with respect to a Microsoft product or service, but only where the level of Consideration is commensurate with the OEM's contribution to the development, distribution, promotion, or licensing that particular product or service. This portion of Section III.A is designed to address permissible collaborations between an OEM and Microsoft to promote Microsoft products and services. In exchange for the OEM's assistance, Microsoft may provide a different level of consideration commensurate with that OEM's contribution — so that, for example, an OEM that collaborates with Microsoft on developing a particular product through extensive testing, or offers advertising or other promotion, may be compensated for its greater role through a higher level of Consideration for that product than one that is not developing or supporting that product. Similarly, this provision would permit Microsoft to provide different levels of Consideration to those OEMs buying larger quantities of product. The OEM buying one million copies of a product may be offered greater support than the OEM buying five copies. Microsoft may, however, base the level of Consideration only on the OEM's support for the same Microsoft

product or service, and not on an OEM's agreement not to support or develop a competing product or to support or develop other Microsoft products.

6. The RPFJ Uses The Common Language Definition Of "Retaliate"

146. Commentors also complain that the RPFJ fails to define "retaliate." In fact, no separate definition for the term is needed. The RPFJ prohibits Microsoft from retaliating by altering commercial relations with, or withholding newly-introduced forms of non-Monetary Consideration from, an OEM. In this context, "retaliate" does not require further elaboration.

C. Uniform Terms (RPFJ § III.B)

147. To ensure that the twenty Covered OEMs will be free from the threat of Microsoft retaliation or coercion, Section III.B requires that Microsoft's Windows Operating System Product licenses with those OEMs contain uniform terms and conditions, including uniform royalties. These royalties must be established by Microsoft and published on a schedule that is available to Covered OEMs and the Plaintiffs.

148. Windows license royalties and terms are inherently complex and easy for Microsoft to use to affect OEMs' behavior, including what software the OEMs will offer to their customers. Section III.B is intended to eliminate any opportunity for Microsoft to set or modify a particular OEM's royalty, or its other license terms or conditions, in order to induce that OEM not to promote non-Microsoft software or to retaliate against that OEM for promoting competing software.¹⁵⁹ By removing any mechanism for Microsoft to use such leverage, this provision will further permit OEMs to make their own independent choices without fear of retribution.

¹⁵⁹Economides 12 ("this restriction can help avoid possible retaliation of Microsoft, so in the present context, it may be in the public interest.").

1. Top Twenty OEMs

149. Section III.B is limited to the twenty OEMs with the highest worldwide volume of licenses of Windows Operating System Products. Some commentators criticize this limitation, arguing that it leaves Microsoft free to retaliate against smaller OEMs, including regional “white box” OEMs.¹⁶⁰ The top twenty OEMs, however, together account for a substantial percentage, in excess of 75 percent in fiscal 2001, of all Windows licenses. Consequently, providing those key OEMs with the added guarantees of freedom to distribute and promote particular types of software that could erode Microsoft’s monopoly — the purpose of Section III.B — is of extreme competitive significance. In any event, *all* OEMs are protected from retaliation by Section III.A of the RPFJ. Section III.B is intended to provide an additional layer of protection for these twenty OEMs that are likely to be of great significance.

150. At least one commentator would go much further and seek to require Microsoft to offer uniform terms not only to the top twenty OEMs, but also to all of the hundreds of OEMs, whatever their size, and even further to “all third party licensees.”¹⁶¹ There is no rational basis for treating every licensee of Windows, from the largest OEM to the smallest corporation, equally with respect to their Windows royalties and all the terms and conditions of their licenses. Certainly the intent to prevent Microsoft from discriminating or retaliating in response to competitive activities cannot begin to justify such a broad provision. In fact, such a requirement would be enormously inefficient and disruptive and would ignore vast differences between differently situated types or groups of licensees.

¹⁶⁰Kegel 9; Schulze 2; Francis 1.

¹⁶¹SBC 136.

151. In any event, neither the antitrust laws generally, nor the Court of Appeals' decision specifically, require that even a monopolist like Microsoft treat all third parties equally. In fact, in many instances "unequal" treatment (e.g., collaboration between two companies that does not include other firms) evidences legitimate competition. Thus, Section III.B was crafted carefully to provide extra protection against improper rewards or retaliation involving the most significant OEMs, without precluding other conduct that could result in potentially procompetitive benefits.

2. MDAs Or Other Discounts

152. A number of commentators argue that Section III.B should forbid *all* market development allowances ("MDAs") or other discounts.¹⁶² This approach would be unnecessarily overbroad and would discourage efficient behavior that has little or no potential to be used by Microsoft for anticompetitive purposes. There are a range of business activities involving Microsoft and OEMs, having nothing to do with operating system or middleware competition, where MDAs or other discounts would be procompetitive.

153. At the same time, Section III.B carefully guards against Microsoft misusing MDAs or other discounts to reward or retaliate against particular OEMs for the choices they make about installing and promoting Non-Microsoft Middleware or Operating Systems or for any other purpose that is inconsistent with the provisions of the RPFJ.¹⁶³ To avoid the risk of Microsoft

¹⁶²SBC 101, 136; Herrmann 1; Timlin 3; Mitchell 2; Weiller 2; Clapes 5.

¹⁶³For example, several commentators raise the specter of Microsoft offering OEMs MDA discounts on Windows licenses based on the number of copies of Office shipped by the OEMs. Kegel 9; CFA 12. But such discounts would be barred by the final paragraph of Section III.A, which forbids Microsoft from paying consideration with respect to one product based on an OEM's distribution of a different Microsoft product. Section III.B.3 would then preclude an MDA for such a purpose, since it would be "otherwise inconsistent with any portion of this Final Judgment." Similarly, the AOL comment erroneously asserts that the MDA provision would

misusing MDAs or other discounts to reward or retaliate against OEMs for competitive middleware activities, Section III.B provides that, if Microsoft utilizes MDAs or similar discounts, they must be available and awarded uniformly to the ten largest OEMs on one discount scale and separately to the ten next largest on the same or another discount scale. In addition, the discounts must be based on objective, verifiable criteria, and those criteria must be applied uniformly to the relevant OEMs.

154. The RPFJ does prohibit Microsoft from using MDAs or other discounts if they are inconsistent with any other provision in the RPFJ. This would include, for example, retaliation against computer manufacturers for using non-Microsoft middleware that is implemented through incentive payments for faster "boot up."

3. OEMs Should Be Able To Negotiate

155. Several commentators argue that there should be a limited exception to the requirement of uniform license terms and conditions in Section III.B to permit OEMs to continue to negotiate with Microsoft concerning exceptions to certain intellectual property "non assertion covenants" or "non assertion of patents" provisions in their licenses with Microsoft.¹⁶⁴ In these covenants,

allow OEMs that promote Microsoft products to receive MDA discounts that are denied to OEMs that deal with Microsoft's rivals. AOL 35-36.

¹⁶⁴Sony 2, 4. *See also* Litigating States' Motion for Limited Participation in Light of the Deposition of Mr. Richard Fade, filed February 19, 2002, at 6-7, 19 ("Litigating States' Motion"). In their Motion, the Litigating States seek an order that would permit them to participate in this Tunney Act proceeding for the limited purpose of submitting portions of the transcript of a Microsoft employee, Richard Fade, purportedly relating to the issues of Section III.B, the non assertion of patent provisions, and Section III.I.5. The United States' Response to the Litigating States' Motion did not object to participation in this one instance solely for the narrow purpose identified — adding the proffered information to the Litigating States' public comment — but did object to any broader or continued participation. Microsoft filed its Response ("Microsoft Response") on February 22, 2002, in which it did not oppose the

which have been part of Windows license agreements with OEMs for years but which historically have been the subject of intense negotiation between Microsoft and OEMs, the OEMs agree not to assert certain patent claims against Microsoft.¹⁶⁵

156. According to these commentors, the uniform licensing terms provision of Section III.B of the RPFJ appears to be preventing Microsoft from negotiating with OEMs about the latest non assertion provisions.¹⁶⁶ One of the commentors, Sony, urges a modification or clarification of the RPFJ that would permit it and other OEMs to negotiate with Microsoft for more favorable non assertion provisions than those contained in Microsoft's uniform terms and conditions, with any new terms obtained then required to be offered to all Covered OEMs on a non-discriminatory basis; individual OEMs could choose to accept or decline.¹⁶⁷

157. The United States believes that such a modification is unnecessary. Currently, nothing in the RPFJ prevents Microsoft from negotiating with Covered OEMs prior to establishing its uniform terms and conditions. The RPFJ does not in any way require that Microsoft must unilaterally set those terms, without any advance negotiation with or input from the OEMs. Similarly, nothing in the RPFJ prevents Microsoft from agreeing with an OEM to provisions that depart from the uniform terms and conditions, so long as any term or condition resulting from that agreement then becomes the uniform term or condition, is included on the

participation and submission, and to which it attached a declaration of Richard Fade ("Fade Decl."). Because the Court has not yet ruled on the Motion, the United States will proceed to respond here to the substance of the information proffered in the Litigating States' Motion.

¹⁶⁵Sony 2; Litigating States' Motion 6-7; Microsoft Response 4-5; Fade Decl. ¶¶ 11-16.

¹⁶⁶Sony 4; Litigating States' Motion 7.

¹⁶⁷Sony 4.

required schedule, and is offered on a non-discriminatory basis to all Covered OEMs. And certainly nothing in the RPFJ specifies what terms or conditions ultimately will become the uniform terms and conditions. Those terms and conditions may be set at a variety of levels determined either by Microsoft itself or through advance discussion and negotiation with the OEMs; the RPFJ specifies neither the process nor the resulting level.

158. The Litigating States also assert that Microsoft's view is that it is authorized to insist on uniform, and uniformly onerous, non-assertion provisions by the terms of Section III.I.5. To the extent that anyone at Microsoft (or elsewhere) ever believed or conveyed to any OEM that Section III.I.5 of the RPFJ authorizes Microsoft to insist on broad patent non-assertion provisions, that belief was inaccurate. The cross-license provision in III.I.5 was extremely narrow and applied only in a particular, limited type of situation. In any event, in part in response to these comments, and to avoid any possibility that Section III.I.5 could be misinterpreted in a way that discourages any third party from taking advantage of options or alternatives offered under the RPFJ, the United States and Microsoft have agreed to delete Section III.I.5 from the SRPFJ. *See* Section VII(C)(3) below.

4. Volume Discounts

159. One commentator claims that the RPFJ should permit Microsoft to utilize volume discounts only if they are based on an independent determination of the actual volume of shipments, in order to avoid Microsoft manipulation of such discounts.¹⁶⁸ But such a regulatory mechanism is not necessary under the RPFJ. It requires that any volume discounts must be

¹⁶⁸SBC 102, 136.

“reasonable” and based on the “actual volume” of Windows licenses. The RPFJ’s enforcement mechanism will ensure that Microsoft does not misuse the calculation of such discounts.

5. Termination — Cause, Materiality, And Notice

160. Some commentators criticize Section III.B for not requiring Microsoft to demonstrate “good cause” before terminating a Covered OEM’s license, and for not requiring even more notices and opportunities to cure before termination.¹⁶⁹ The commentators argue that Microsoft could abuse the notice provision and then terminate a disfavored OEM without any opportunity to cure.

161. First, any abuse of the opportunity to cure or termination provisions by Microsoft — e.g., through sham notices — would be a serious breach of its obligations under the RPFJ. Second, if the process is not misused, two previous notices and opportunities to cure during a single license term should provide ample protection against retaliation for OEMs that are dealing with Microsoft in good faith and ample protection for Microsoft against OEMs that fail to comply with their contractual obligations. Finally, a requirement that any termination be for “good cause” is unnecessary and overly regulatory; once again, any sham termination by Microsoft for anticompetitive purposes would constitute a serious breach of the RPFJ.

6. Servers Or Office

162. Section III.B requires that Microsoft employ uniform license agreements and uniform terms and conditions for the top twenty OEMs only with regard to its licensing of Windows Operating System Products. The provision is limited to Windows licenses because the relevant market in which Microsoft was found to have a monopoly consists of PC operating systems, and

¹⁶⁹SBC 102-03; Drew 1.

because the various illegal actions in which Microsoft engaged were undertaken to protect that monopoly, not other products.

163. Some commentators argue that Microsoft can evade the restrictions of Section III.B simply by shifting its retaliatory price discrimination to other key Microsoft products such as Office or server operating systems.¹⁷⁰ To the extent the commentators intend to assert that this limitation in Section III.B leaves Microsoft free to use discriminatory licensing terms or conditions for Office or other important Microsoft products in order to reward or punish OEMs for their actions regarding Microsoft and non-Microsoft Middleware, that assertion is wrong. Although Section III.B is limited to Windows Operating System licenses, the general anti-retaliation provisions of Section III.A are not so limited. See Section IV(B) above. Any attempt by Microsoft to alter the terms of any (not just the top twenty) OEM's license for Office or any other product (or any other commercial relationship with that OEM) because that OEM is working with rival Platform Software or any product or service that distributes or promotes non-Microsoft middleware will be prohibited by § III.A.

7. Key License Terms

164. One commentator argues that the RPFJ should require Microsoft to provide OEMs and other licensees with equal access to "licensing terms, discounts, technical, marketing and sales support, product and technical information, information about future plans, developer tools or support, hardware certification and permission to display trademarks or logos."¹⁷¹ Otherwise, the commentator claims, Microsoft can keep such information secret and take advantage of licensees'

¹⁷⁰CCIA 87-88; Turk.

¹⁷¹SBC 101-02, 136-37 (describing Litigating States' § 2(b)).

ignorance about what terms are available.¹⁷² With respect to the top twenty Covered OEMs, however, Microsoft already is required by Section III.B to offer all license terms and conditions on a uniform and non-discriminatory basis.

8. Prohibition On Enforcing Agreements Inconsistent With The RPFJ

165. One commentator urges that Microsoft should be forbidden from enforcing any contract term or agreement that is inconsistent with the decree.¹⁷³ But such a provision is both unwarranted and unnecessary. To the extent that a contract term or agreement seeks to bar someone from doing something that is required or permitted under the RPFJ, or requires someone to do something that Microsoft is forbidden from offering, the RPFJ already would prevent such action. In certain key areas, the RPFJ does include a provision prohibiting Microsoft from retaliating against an OEM for exercising any of its options or alternatives under the RPFJ (Section III.A.3) or from basing MDAs on any requirements that are inconsistent with the RPFJ (Section III.B.3.c). In the latter case, the provision is necessary to make clear that, by affirmatively authorizing Microsoft to do something (offer MDAs or other discounts), the RPFJ is not authorizing Microsoft to base those discounts on inappropriate criteria.

D. Freedom Of OEMs To Configure Desktop (RPFJ § III.C)

166. Section III.C of the RPFJ prohibits Microsoft from restricting by agreement any OEM licensee from exercising certain options and alternatives. A few comments argue that Microsoft should be prohibited from restricting OEMs by “other means” as well as by

¹⁷²SBC 136-37.

¹⁷³SBC 136-37.

agreements.¹⁷⁴ The United States believes that the limitation to agreements is appropriate in this section.¹⁷⁵ The most obvious and effective means for Microsoft to restrict an OEM's conduct is by agreement, as reflected in the record in this case. In addition, as explained in the CIS, the RPFJ uses the term "agreement" broadly to include any contract, requirement, or understanding.¹⁷⁶ Use of other means by Microsoft to influence, limit, or reward the options of OEMs is appropriately covered in other provisions, such as Sections III.A, III.B, and III.G. Technical means of limiting the options of OEMs are addressed by Section III.H.

167. Looking at the products covered by this section, some comments argue that the provision should extend to any application, not just middleware, or at least to Microsoft Office.¹⁷⁷ The United States believes that the decree correctly focus on middleware, because that was the focus of Plaintiffs' case and of the courts' holdings. Section III.C provides broad protection for non-Microsoft Middleware as it is configured for use with Windows. Because this section focuses on OEM flexibility in configuring Windows Operating System Products, it would be illogical to consider products, such as Office, that are not part of the Windows Operating System Product.

168. It is important to remember that this section pertains to OEM configurations, and not to what users or Non-Microsoft Middleware itself can initiate if selected by a user. These

¹⁷⁴Pantin 8; Maddux ¶ 5.

¹⁷⁵Levy 1 (Section III.C adequately prohibits Microsoft from preventing OEMs and consumers from installing rival operating systems or removing Microsoft middleware products and installing rival middleware).

¹⁷⁶CIS at 29.

¹⁷⁷CFA 95; Nader/Love 2; Pantin III.13; Novell 8.

provisions, in essence, control how the configuration will appear the first time the user boots the computer. After that first time, the user may take many actions, such as clicking on icons, rearranging the desktop, or making other program choices, that drastically alter the configuration of the computer. A user launching a program by clicking on an icon may change many of the configuration options of the computer, including whether the program will subsequently launch automatically or be displayed in a certain size or be the default application. Thus, Section III.C governs only OEM configuration, but not any subsequent configurations based on user choices.

1. Section III.C.1

169. Several comments suggest that, under Section III.C.1, OEMs should be given greater flexibility in configuring Windows, extending to such things as taskbars, toolbars, links, and default pages and similar end user features in Internet Explorer; features of Windows XP such as the My Photos, My Music, and similar operating system folders; and elimination or alteration of the Start Menu.¹⁷⁸

170. Subsection III.C.1 strikes an appropriate balance between the interests of Microsoft and OEMs in order to allow promotion and installation of Non-Microsoft Middleware. In fact, the provision covers some of the features requested by commentators, such as quick launch bars and the Start Menu. As discussed in the CIS (at 30), “a list of icons, shortcuts or menu entries” includes a wide variety of access points in Windows Operating System Products, including the system tray, “right-click” lists, “open with” lists, lists that appear based on an action or event, such as connecting hardware or inserting an audio CD, and even lists within folders such as MyMusic or MyPhotos. This flexibility must be balanced against Microsoft’s interest in

¹⁷⁸SIIA 22-23, Pantin 9.

presenting a user interface on its Windows products that has been well tested and is simple and intuitive for users. Windows is, after all, Microsoft's product. The United States believes that the provision allows for many opportunities for promotion and installation of Non-Microsoft Middleware without going so far as to allow OEMs to make drastic changes to Microsoft's user interface. *Cf. Microsoft*, 253 F.3d at 63 (Microsoft's restrictions on OEM reconfiguration of user interface did not violate Section 2).

171. Another commentator argues that the RPFJ merely codifies Microsoft's existing practices regarding flexibility of configuration and serves almost no remedial purpose.¹⁷⁹ To the contrary, Section III.C gives OEMs much greater flexibility than they have ever had. Even as late as summer 2001, Microsoft still was restricting the placement of icons in Windows. The flexibility OEMs receive under Section III.C, combined with the ability to remove access to Microsoft Middleware Products under Section III.H, will allow OEMs to offer many different configurations and promote Non-Microsoft Middleware in a variety of ways. That Microsoft voluntarily provides certain flexibility does not eliminate the need for relief requiring that flexibility, as the Court of Appeals' decision mandates.

172. Commentors also note that the term "functionality" (*see* Section III.C.1) is not defined, that Microsoft is free to decide what categories qualify for display, and that Microsoft could exclude Non-Microsoft Middleware for which no Microsoft counterpart exists or otherwise restrict the meaning of functionality.¹⁸⁰ As explained in the CIS (at 30), "functionality" is

¹⁷⁹ProComp 10, 67.

¹⁸⁰SBC 51, 138-39; Maddux ¶ 6; Pantin 9-11; Litigating States, Ex. A 10; Elhauge 8-9; Clapes 5-6; PFF 20.

intended to capture broad categories of products, and not to be used to discriminate against Non-Microsoft Middleware. Thus, for example, Microsoft may reserve a particular list for multimedia players, but cannot specify either that the listed player be its own Windows Media Player, or that the player be capable of supporting a particular proprietary Microsoft data format. Such non-generic specification, which would have the effect of restricting the display of competing Non-Microsoft Middleware, would not be non-discriminatory. Microsoft cannot prescribe the functionality so narrowly that it becomes, in effect, discriminatory.

173. Moreover, Microsoft cannot completely forbid the promotion or display of a particular Non-Microsoft Middleware Product on the ground that Microsoft does not have a competing product itself. To do so would be discriminatory; there must always be (and there always has been) a place for applications generally to be listed or their icons displayed. Without this functionality limitation, developers of Non-Microsoft Middleware with media player functionality could insist that it wants to be displayed with instant messaging services, making groupings of supposedly competitive products with the same or similar functionality meaningless and hopelessly chaotic for the user.

2. Section III.C.2

174. A few commentators argue that, under Section III.C.2, Microsoft has control over what non-Microsoft products may be promoted by an OEM because Microsoft could define what “impair[s] the functionality of the user interface.”¹⁸¹ Section III.C.2 applies only to shortcuts, but it allows those shortcuts to be of any size and shape. Potentially, these shortcuts could be so large as to cover key portions of the Windows user interface (for example, the Start Menu). As

¹⁸¹SBC 52; CCIA 56; Maddux ¶ 7; Miller 2; Hofmeister 2.

the Court of Appeals found, Microsoft has an interest in preventing unjustified drastic alterations of its copyrighted work. *Microsoft*, 253 F.3d at 63. The limitation preventing shortcuts from impairing the functionality of the user interface was designed to respect this interest, while still giving OEMs considerable freedom to promote Non-Microsoft Middleware.

3. Section III.C.3

175. There are many comments related to Section III.C.3. Some comments argue that this subsection gives Microsoft design control because Microsoft could set parameters for competition and user interface design via the limitation on “similar size and shape,” which then leaves competing applications to conform to Microsoft’s “look and feel.”¹⁸² This is not the intent or effect of this provision. *See* CIS at 31-32. For programs that are configured by the OEM to launch automatically, either in place of, or in addition to, Microsoft Middleware Products, the restriction limits whether applications can launch with their full user interface, no interface, or appear in the system tray or similar location. Thus, this provision addresses Microsoft’s interest in preventing unjustified drastic alterations to its copyrighted work, as recognized by the Court of Appeals. *See* 253 F.3d at 63.

176. Some commentators argue that Microsoft retains control of desktop innovation because it can prevent OEMs from installing or displaying icons or other shortcuts to Non-Microsoft software or services if Microsoft does not provide the same software or service.¹⁸³ Others say

¹⁸²AOL 37; AOL, Klain 4; CFA 95; RealNetworks 23; Henderson 8-9; Litigating States, Ex. A 10; ProComp 64; CCIA, Stiglitz & Furman 28; Maddux ¶ 8; Pantin 9-11; Alexander 2-3; Giannandrea 3; Miller 2; Thiel 2; Schneider 2.

¹⁸³Palm 14; AOL 37; AOL, Klain 4; CCIA 60; PFF 20; Pantin 9-11; RealNetworks 22; SBC 140; Waldman 3, 8; CCIA 59-60; Clapes 5; Schneider 1.

that the middleware icon provisions of III.C.1 and III.C.3 apply only when Microsoft has a competing product, and Microsoft can limit the OEMs' ability to promote competing programs.¹⁸⁴ Still others criticize that Section III.C.3 limits automatic launches to the boot-up sequence or when the user connects to the Internet, thus limiting the options of OEMs.¹⁸⁵

177. The majority of these comments are misplaced. Section III.C.1 does not prevent OEMs from installing or promoting Non-Microsoft Middleware, regardless of whether Microsoft has a competing product. At a minimum, Section III.C.2 allows for any Non-Microsoft Middleware to be installed and displayed on the desktop with a shortcut, completely independent of the existence or characteristics of any Microsoft product. The only issue is where *else* in the Windows interface the Non-Microsoft Middleware will be promoted. As discussed above (*see* Section IV(D)(1)), Microsoft has a valid interest in presenting an orderly user interface such that, for example, lists of what are supposed to be word processors do not clutter lists of media players. If the Windows interface has a space for listing, for example, Internet applications, then any Internet application can go there regardless of whether Microsoft has a competing application. If the Windows interface has no listing for a particular new category of application, then there will be, and always has been, a general place where applications can be listed, such as the desktop.

178. It is correct that, under Section III.C.3, Non-Microsoft Middleware cannot be configured to launch automatically unless a Microsoft Middleware Product would have otherwise

¹⁸⁴Litan 46, 50; CFA 95; SBC 52; Litigating States, Ex. A 10; ProComp 64; CCIA, Stiglitz & Furman 28; Giannandrea 3; Waldman 3; Hammett 2.

¹⁸⁵ProComp 64; Pantin 9-11; Giannandrea 3; Rovero 3.

launched. However, this governs only the original OEM configuration. If the user clicks on an icon or otherwise runs the Non-Microsoft Middleware, that application can itself set up to launch automatically on subsequent boot sequences, or at any number of other times, including but not limited to connections to the Internet. Section III.C.3's approach is a reasonable compromise with Microsoft's interest in having the computer boot up quickly the first time it is turned on, a characteristic that users value.

179. A few commentators believe it is inappropriate that Microsoft be allowed to decide what forms the user interface, e.g., a desktop with icons, may take.¹⁸⁶ The United States disagrees. Microsoft has a valid interest in developing its products, which some users actually prefer on the merits, and in preventing unjustified drastic alterations to its copyrighted work. The purpose of the remedy is not to strip Microsoft of the ability to design operating systems or compete on the merits.

4. Section III.C.4

180. Some commentators argue that Section III.C.4 does not prohibit Microsoft from deleting or interfering with competing boot loaders, does not allow OEMs to ship machines without any operating system, and otherwise does not assist the OEMs' ability to promote non-Microsoft operating systems.¹⁸⁷ The United States partially agrees and partially disagrees with these comments. Section III.C.4 provides for the option of launching other operating systems and prohibits Microsoft from attempting to delete or interfere with competing boot loaders that

¹⁸⁶SBC 52, 140; Godshall 1; Schneider 1-2.

¹⁸⁷KDE 14; Pantin 11-14; Harris 5, CFA 89; CompTIA 5 (supports); Akin 2; Hafermalz 1; Young 1.

accomplish this task. This subsection does not enable OEMs to sell machines without an operating system, as that would not promote Non-Microsoft Middleware. However, Microsoft would run afoul of Section III.A if it attempted to restrict OEMs from shipping PCs with rival operating systems.

5. Section III.C.5

181. Some comments criticize Section III.C.5 for providing promotional flexibility only for IAP offerings, and even then only for an OEM's "own" IAP offer but not for other products.¹⁸⁸ At least one commentator notes that the Windows XP initial boot sequence offers a wide range of Microsoft products and services, including Passport, Hotmail, Instant Messenger, and Internet telephony.¹⁸⁹ Some commentators predict that Microsoft will use the "reasonable technical specifications" to unreasonably exclude competitors.¹⁹⁰

182. Section III.C.5 permits OEMs to create and display a customized offer for the user to choose an IAP during the initial boot sequence. A user's IAP can be an important source of choices about a wide variety of Non-Microsoft Middleware. It is the OEM's "own" IAP in the sense that the OEM selects it, not necessarily that the OEM is itself an IAP. Microsoft is not permitted unreasonably to exclude competitors via the technical specifications for IAP offers. Microsoft previously and understandably has given such reasonable technical specifications to OEMs, and the United States does not expect Microsoft to deviate from its prior standards as to

¹⁸⁸AOL 37-38, Klain 4; CCIA, Stiglitz & Furman 27.

¹⁸⁹SBC 53; Akin 2.

¹⁹⁰Maddux ¶ 9; SBC 52, 141; NetAction 10, 14; Schneider 2.

what is reasonable. After all, Microsoft has an interest in offering OEMs an operating system that works, and absent reasonable technical standards, performance might be degraded.

183. At least one commentator argues that there should be a provision allowing OEMs to replace the Windows desktop, and sees no explanation in the CIS as to why this provision, which the United States advocated before the District Court and on appeal, has been removed.¹⁹¹ The simple answer to this question is that the Court of Appeals reversed the finding of liability on this point (*see Microsoft*, 253 F.3d at 63), and to provide for such a remedy would be inappropriate in this case.

6. Comparison To Litigating States' Proposal

184. Several commentators argue that the Litigating States' Provision 2.c ("OEM and Third-Party Licensee Flexibility in Product Configuration") should replace RPFJ Section III.C.¹⁹² The United States believes that Provision 2.c is overbroad and largely unrelated to middleware competition that could threaten Microsoft's desktop operating system monopoly. Additionally, the Litigating States' Proposal appears to ignore the Court of Appeals' decision that Microsoft is entitled to prevent an unjustified drastic alteration of its copyrighted work, and to prohibit OEMs from substituting a different user interface automatically upon completion of the initial boot sequence. *Microsoft*, 253 F.3d at 63. Regardless of how broadly one reads this portion of the Court of Appeals decision, Provision 2.c would appear to allow an OEM to make the very "drastic alteration[s] [to] Microsoft's copyrighted work" that the Court of Appeals found Microsoft lawfully could prohibit. *See id.*

¹⁹¹SBC 53, 138.

¹⁹²SBC 137.

185. Provision 2.c essentially provides that Microsoft cannot restrict by contract, technical, or any other means a licensee from modifying any aspect of a Windows Operating System Product.¹⁹³ The breadth of this provision appears to require that Microsoft allow, and provide the information to accomplish, any modification to any portion of a Windows Operating System Product, no matter how unrelated to middleware. For example, this provision appears to allow licensees to change the manner in which Windows implements disk compression, the TCP/IP protocol, the calculator program, and the Windows Help system. These modifications apparently could be at any level of granularity, including very small segments of code.

186. Although Provision 2.c also identifies specific types of modifications — e.g., the boot sequence, desktop, or start page — these types of modifications are not limiting because the provision clearly allows for modification of any “other aspect of a Windows Operating System Product (including any aspect of any Middleware in that product).” Provision 2.c also provides five examples (§§ 2.c.i-v), but these are given “[b]y way of example, and not limitation.” This Proposal thus appears to allow any and all modifications.

187. These types of broad modifications are not necessary to allow for vigorous competition in the middleware market. Indeed, it appears that the vast majority of these modifications have very little, if anything, to do with middleware and therefore are beyond the scope of the liability findings in this case.

¹⁹³Litigating States’ Provision 4 additionally requires that Microsoft disclose all the necessary APIs, Communications Protocols and Technical Information to accomplish such modifications.

E. Microsoft's Obligations To Provide Add/Remove Functionality And Automatic Invocations (RPFJ § III.H)

1. Obligation To Provide Add/Remove Functionality

188. Some commentators argue that Section III.H.1 allows Microsoft to force Non-Microsoft Middleware Products into an Add/Remove utility.¹⁹⁴ The United States believes that one of the primary goals of the RPFJ is to enable users to make choices on the merits about Microsoft and Non-Microsoft Middleware Products. In the current Add/Remove utilities available in Windows Operating System Products, Microsoft Middleware Products are often not present at all, or are presented as Windows components in a separate window. Non-Microsoft Middleware Products, which currently routinely add themselves into the Add/Remove utility upon installation, are in a different Add/Remove window. Without the RPFJ, there is no easy way for the user to realize that something labeled as a Windows system component can be replaced with a Non-Microsoft Middleware Product. This provision will alter Microsoft's current practice of creating an artificial distinction between these Non-Microsoft Middleware Products and Microsoft Middleware Products.

189. Other commentators point out that exclusivity cannot be provided to Non-Microsoft Middleware Products, that Microsoft does not have to compensate an OEM for the presence of its icons on the desktop, and that every computer shipped represents an expense to the non-Microsoft software and income via the Windows license to Microsoft.¹⁹⁵ It is incorrect that exclusivity, at least as to icons and other visible means of end-user access, cannot be provided to

¹⁹⁴Palm 15; AOL, Klain 6; SBC 58; Thomas 6-7.

¹⁹⁵SIIA 24; ProComp 62; Schneider 2.

Non-Microsoft Middleware Products. Non-Microsoft Middleware Products can have exclusive agreements with OEMs covering all the most significant means of promoting their products - through desktop icons, the Start Menu, and being set as the defaults. The only exception to this exclusivity of visible means of end-user access would be a listing of the non-Microsoft Middleware Products in the Add/Remove utility, which has never been Microsoft's means of promoting usage.

190. Furthermore, should Microsoft wish to promote its Microsoft Middleware Products, it is constrained by other provisions in the decree, particularly provisions regarding exclusive or fixed percentage agreements with OEMs. *See* discussion of Section III.G. As an example, Microsoft could not reach an agreement with an OEM that required the OEM to set the Microsoft product as the default on 100 percent of the OEM's machines. Non-Microsoft Middleware Products do not face this constraint. Additionally, because OEMs are free to remove Microsoft icons and free to negotiate exclusivity agreements with competitors, Microsoft will have to compensate OEMs for any promotional agreements regarding its icons, in addition to conforming its agreements with the other provisions of the RPFJ.

191. A few commentators raise concerns that "particular types of functionality" and "non-discriminatory" are not defined and could be used by Microsoft to unreasonably exclude competitors.¹⁹⁶ Functionality is intended only to capture broad categories of products and not to be used to discriminate against Non-Microsoft Middleware Products. Thus, for example, Microsoft may reserve a particular list for multimedia players, but cannot specify either that the listed player be its own Windows Media Player, or that the player be capable of supporting a

¹⁹⁶CFA 98; Maddux ¶ 23; Clapes 9.

particular proprietary Microsoft data format. Such a non-generic specification, which would have the effect of restricting the display of competing Non-Microsoft Middleware Products, would not be non-discriminatory and therefore would be prohibited under Section III.H.1.

192. Commentors also suggest that the portion of Section III.H.1 that requires Microsoft to offer “an unbiased choice with respect to enabling or removing access” would nevertheless permit Microsoft to include derogatory comments about competing products when offering such a choice.¹⁹⁷ This is incorrect. The concept of non-discriminatory includes the concept of non-derogatory; Microsoft cannot present a choice that is derogatory toward the Non-Microsoft Middleware Products without also by definition discriminating against that Product.

2. Obligation To Provide Automatic Invocations And Exceptions

a. Obligations To Provide Automatic Invocations

193. Section III.H.2 addresses situations where Microsoft must create the ability to designate programs for automatic invocation, commonly referred to as default settings. Many commentors point out that there will be few situations where Microsoft is obligated to provide a default setting. They say that Microsoft easily will be able to evade this provision,¹⁹⁸ simply by embedding its Microsoft Middleware Products in other portions of the Windows Operating System Product or other Microsoft Middleware Products. Similarly, some commentors suggest that Microsoft could engineer its middleware to launch without using all of the “Top-Level Window” components or with making the slightest variation on the user interface, and not have

¹⁹⁷Maddux ¶ 24.

¹⁹⁸AOL 49; AOL, Klain 6; Litigating States, Ex. A 10; Pantin III.24; RealNetworks 14, 17, 23; CCIA 55; KDE 14-15.

to create any defaults. Commentors further argue that the existence of defaults should not depend on the existence or behavior of Microsoft's Middleware Products.

194. Additionally, some commentors point out that OEMs will be required to support the Microsoft Middleware Products regardless of whether they have end-user access removed, because Microsoft is allowed to hard-wire their products in some cases.¹⁹⁹ More specifically, these commentors argue that this situation will create an insurmountable disparity between the Microsoft and Non-Microsoft Middleware Products, because the Microsoft product will always be available and will always launch in some situations, whether the end user has selected them or not or is even aware that the product is installed.

195. The Court of Appeals' decision must be the starting point for any discussion of default settings and of the ability of Microsoft to override user choices. There were no instances in which the Court of Appeals found that Microsoft's overriding of user choice was unlawful. *Microsoft*, 253 F.3d at 67. Thus, the Court of Appeals' decision does not require that Microsoft respect user's default choices in all circumstances. The issue of whether Microsoft simply could have no default settings at all was, however, not before the Court and accordingly the Court did not address it.

196. Section III.H.2 of the RPFJ nevertheless requires Microsoft to implement and respect default settings in some circumstances. These circumstances are limited to situations where the Microsoft Middleware Product would launch in a separate Top-Level Window and display either (i) all of the user interface elements, or (ii) the Trademark of the Microsoft Middleware Product. These limitations are tied to the Court of Appeals' opinion, which supported Microsoft's position

¹⁹⁹Litan 45; ProComp 57-58; CCIA 55; AAI 15; Litigating States 10.

that it did not have to respect default settings where Windows functionality enabled users to move seamlessly from one function to another in the same window. *Microsoft*, 253 F.3d at 67.

197. Moreover, these limitations are designed to ensure that access to defaults exists whenever the alternative Microsoft product would be launched as the full “product” (e.g., Internet Explorer as the Internet browser), rather than when just a portion of the product’s underlying functionality is launched to perform functions in Windows itself (such as code also used by Internet Explorer being used to display part of the Windows user interface), or otherwise where the end user might not necessarily be aware that he or she is using a specific Microsoft Middleware Product.

198. One of the most important functions of this Section III.H.2 is to provide certainty and a bright line regarding when Microsoft is obligated to provide and respect a default setting. Previously, Microsoft was under no obligation to provide for automatic invocations of competing products in any circumstances; Microsoft at its option provided for automatic invocations in some circumstances and not in others. Although commentators allege that there are numerous cases where Microsoft will not have to provide a default setting, the RPFJ does provide a clear line and a requirement, that did not exist before, that in some cases defaults must exist and must be respected.

199. Several commentators allege that Non-Microsoft Middleware Products are subject to a requirement that the end-user confirm his/her choice, but the Microsoft Middleware Product is not, making it effectively harder for users to choose Non-Microsoft Middleware Products.²⁰⁰

²⁰⁰ AOL, Klain 6; CFA 98-99 (“consumer must choose the Non-Microsoft product twice to make it the preferred option”); RealNetworks 18; Miller 3; Clapes 9-10.

This is incorrect. Section III.H.1 clearly states that Microsoft must give end users “a separate and unbiased choice” with respect to altering default invocations in Section III.H.2. Section III.H.2 of the RPFJ provides that Microsoft shall “[a]llow . . . Non-Microsoft Middleware Products (via a mechanism which may, at Microsoft’s option, require confirmation from the end user) to designate a Non-Microsoft Middleware Product to be invoked in place of that Microsoft Middleware Product (*or vice versa*).” The parenthetical “or vice versa” applies to the entire phrase, meaning any mechanism which requires confirmation when switching in one direction will also require it in the other direction.

200. To respond to the concerns raised by commentors and to clarify that Microsoft must be unbiased with respect to Microsoft and Non-Microsoft products under Section III.H.2, this provision was revised to expressly state that such mechanisms and confirmation messages must be unbiased. The revised language of Section III.H.2 in the SRPFJ provides:

Allow end users (via an *unbiased* mechanism readily available from the desktop or Start menu), OEMs (via standard OEM preinstallation kits), and Non-Microsoft Middleware Products (via a mechanism which may, at Microsoft’s option, require confirmation from the end user in an *unbiased* manner) to designate a Non-Microsoft Middleware Product to be invoked in place of that Microsoft Middleware Product (or vice versa) . . . [Emphasis added]

This modification makes clear the parties’ intention that the mechanism available to end users, as well as any confirmation message to the end user, must be unbiased with respect to Microsoft and non-Microsoft products.

201. This modification also addresses any concern that the phrase “at Microsoft’s option” could be read to allow Microsoft to take biased action against competing products. Further, it

addresses concerns that Microsoft's presentation of the confirmation message could include derogatory comments about competing products.²⁰¹

b. Exceptions To The Obligation To Provide Automatic Invocations

202. In addition, the SRPFJ's two exceptions to Section III.H.2, which were previously listed after Section III.H.3 and numbered "1" and "2," but which by their plain language unmistakably modified Section III.H.2 ("Notwithstanding the foregoing, Section III.H.2 . . ."), have been moved to Section III.H.2 for clarification and have been renumbered (a) and (b).

203. Exception (a) allows a Windows Operating System Product to invoke a Microsoft Middleware Product when it would be invoked solely for use with a server maintained by Microsoft outside the context of general web browsing. Commentors allege that Microsoft can use the exception to communicate directly with its own competing middleware in the form of web based services such as Passport, MSN, .Net and Hotmail and to override the explicit choices made by consumers and OEMs.²⁰² At least one commentator misreads this exception to infer that any web server running Microsoft software is covered.²⁰³

204. Turning again to the Court of Appeals decision, this exception stems from the holding that the Windows Help system was allowed to override a user's browser choice. *Microsoft*, 253 F.3d at 67. The current Windows Help system, as well as other parts of the Windows interface, rely on interoperating with servers maintained by Microsoft. The "maintained by Microsoft" language in exception (a) is specifically designed to catch servers

²⁰¹Maddux ¶ 25; Pantin III.24.

²⁰²RealNetworks 17-18; CCIA 56; Maddux ¶ 27; Giannandrea 2; Gifford 4.

²⁰³SBC 58; Harris 7, 8.

actually under Microsoft's control, and not to include servers that are merely running a Microsoft product, such as Internet Information Server (IIS). Microsoft is only allowed to use this exception outside the context of general web browsing, such as the Windows Help system or similar systems, not in situations where a user has knowingly launched a browser to view web pages. This exception is similar to the limitations in the main paragraph of Section III.H.2 that limit automatic invocation to those situations where a user has launched, in essence, the "full product."

205. Exception (b) allows a Windows Operating System Product to invoke a Microsoft Middleware Product when a designated Non-Microsoft Middleware Product fails to implement a reasonable technical requirement that is necessary for valid technical reasons to supply the end user with functionality consistent with a Windows Operating System Product. Several commentators argue that Microsoft will have exclusive control over when it must respect defaults through manipulation of the "reasonable technical requirement" clause.²⁰⁴ Concern also is raised that Microsoft is not required to document the "reasonable technical requirement" in advance in MSDN.²⁰⁵ Several commentators predict extreme and drastic results from the example of ActiveX.²⁰⁶

206. Again, this exception appears in the RPFJ because the Court of Appeals held that Microsoft was allowed to override a user's choice when it had "valid technical reasons."

²⁰⁴NetAction 14; Maddux ¶ 27; Gifford 4, Giebel 1; Miller 3; Akin 3; Hammett 2; Youngman 4.

²⁰⁵Pantin III.26.

²⁰⁶SBC 59; CCIA 56; Schneider 2.

Microsoft, 253 F.3d at 67. The Court of Appeals pointed to three specific examples where features of a Windows Operating System Product depended on functionality not implemented by Navigator, and Microsoft was permitted to override Navigator in those cases. The Court of Appeals did not find any violation associated with these actions, including no violation regarding whether information was disclosed to Navigator to allow it to implement the functionality. Given this holding, the inclusion of an exception that permits Microsoft to override a user's choice when it has "valid technical reasons" was appropriate.

3. Microsoft's Ability To Change Configurations

207. Many commentators have significant concerns about Microsoft's ability to offer to alter a user's or OEM's configuration, as described in Section III.H.3.²⁰⁷ Some commentators argue that Microsoft should not be able to "encourage" users to switch back to Microsoft Middleware that has been replaced by a third-party application. Concerns also are raised that Microsoft's presentation of the choice could include derogatory comments about competing products, and that the RPFJ contains no requirement that the request to the user be objective or non-discriminatory, or that the function not delete non-Microsoft code or change user defaults. Commentors express the view that a significant number of users likely would switch just to get rid of the annoying messages. Others suggest that the fact that Microsoft is permitted to seek confirmation from the end user for an automatic alteration of the OEM configuration after 14 days significantly devalues the desktop. At least one commentator argues that OEMs do the

²⁰⁷Litan 45; RealNetworks 16; Henderson 9; CCIA 57; CCIA, Stiglitz & Furman 28; KDE 16; AAI 17-18; Maddux ¶ 26; AOL, Klain 6; CFA 99; SBC 56; Litigating States, Ex. A 10; ProComp 63; SIIA 18; Pantin III.25; Gifford 4; Giannandrea 3.

“initial boot” before shipping a PC and hence the 14-day period could have largely expired by the time the user boots the PC for the first time.

208. In response to some of the concerns raised regarding Section III.H.3, the RPFJ has been modified. The following additional sentence now appears in SRPFJ Section III.H.3: “Any such automatic alteration and confirmation shall be unbiased with respect to Microsoft Middleware Products and Non-Microsoft Middleware.” This sentence clarifies the parties’ intention in drafting the RPFJ that Microsoft may not alter a configuration based on whether the products are Microsoft or Non-Microsoft products. Nor may Microsoft present a biased confirmation message, for instance a message that is derogatory with respect to Non-Microsoft products. Similarly, automatic alterations may not be based on a trigger or rule that is biased against Non-Microsoft Middleware or in favor of Microsoft Middleware Products.

209. Several commentors were confused regarding the “Clean Desktop Wizard,” referenced in the CIS (at 48), and its relation to Section III.H.3. The “Clean Desktop Wizard” is a utility in Windows XP that offers users the ability to move unused or infrequently-used desktop icons into a folder on the desktop. The “Clean Desktop Wizard” is the only function in Windows XP that performs an automatic alteration of a configuration of icons, shortcuts or menu entries. Furthermore, Section III.H.3 forbids Microsoft from altering how a Windows Operating System Product performs automatic alterations except in a new version of a Windows Operating System Product. Thus, the “Clean Desktop Wizard” is the only functionality that currently falls under Section III.H.3, and it must remain the only such functionality until a new version of a Windows Operating System Product. The “Clean Desktop Wizard” only affects icons on the desktop, is unbiased with respect to Microsoft and Non-Microsoft icons, and is unbiased with regard to the

messages presented to the user. It takes no action without confirmation from the user, and it can be turned completely off by the user so that it never runs again.

210. Microsoft designed this utility because it believed some users prefer a less cluttered desktop and would appreciate a utility that would monitor which icons have been recently used, and offer to move the unused icons into a folder. The United States agrees that some users would appreciate this utility. The United States also believes, however, that some users would not. To offer choices to users and to remove the potential for significant anticompetitive effects, Section III.H.3 was designed always to require confirmation from the user, and to be unbiased with regard to Microsoft and Non-Microsoft products. The United States does not agree with the commentators who argue that Microsoft should be prohibited from ever offering this kind of utility as part of its operating system.²⁰⁸

211. A number of comments criticize the 14-day delay.²⁰⁹ The 14-day delay, after a new personal computer is booted up before any automatic alternation may occur, was determined to be a reasonable compromise between the need to use desktop icons to promote Non-Microsoft Middleware, and the needs of users who would prefer to be presented with the choice of moving unused icons to a folder. A significant factor in this analysis is that there are many ways of promoting Non-Microsoft Middleware, of which the desktop is only one. Non-Microsoft Middleware may be installed in the Start Menu, for instance, or in the quick launch bar or system tray. It may also be set as a default and automatically invoked in certain instances. It may be promoted in the initial boot sequence or set to launch automatically on connection or

²⁰⁸SBC 57.

²⁰⁹Drew 1; Thiel 2; Miller 3.

disconnection to the Internet. And, of course, should the user click on the desktop icon, the “Clean Desktop Wizard” would not consider it an unused icon and it would not be affected. Or, should the user respond that it does not want the “Clean Desktop Wizard” to move unused icons into a folder, they will not be moved. Finally, even if the user responds affirmatively to the “Clean Desktop Wizard”’s prompt, the icons merely will be moved into a folder, not removed.

212. One commentator argues that Microsoft frequently could create “new versions” of its Windows Operating System Products for the sole purpose of creating new mechanisms to remove competing icons.²¹⁰ The United States finds it unlikely that Microsoft would go to the lengths required to release a new version of its operating system just to remove icons, given that any such mechanism must be unbiased with regard to Microsoft and Non-Microsoft products. Historically, Microsoft has released versions of its operating systems on the order of years apart, and at much longer intervals than its releases of middleware.

4. Timing Issues

213. Some commentators argue that the 12-month delay before Microsoft has to implement Section III.H simply allows Microsoft more time to cement its control over the operating system.²¹¹ Some commentators compare the 12-month delay to the less than 2 months it took Microsoft to remove the icons for Internet Explorer after the Court of Appeals’ decision.²¹²

²¹⁰AAI 18.

²¹¹Litan 47; CCIA, Stiglitz & Furman 28; Maddux ¶ 21 (suggests 3 months); Giannandrea 1-2.

²¹²ProComp 65; CCIA, Stiglitz & Furman 28.

214. Section III.H takes effect with the earlier of the release of Service Pack 1 for Windows XP, currently scheduled for August 2002, or November 6, 2002. The reason for this delay was to allow Microsoft sufficient time to modify its Windows Operating System Products to be in compliance with the specific provisions of Section III.H. Section III.H requires Microsoft to make numerous changes to Windows 2000 and Windows XP. For instance, a mechanism must be created that allows end users and OEMs to enable and remove end-user access to Microsoft and Non-Microsoft Middleware Products that is non-discriminatory with regard to those products and that presents a separate and unbiased choice. As noted above, the current Add/Remove utility in Windows XP is biased: it lists the Microsoft Middleware Products in a separate window labeled as system components. Moreover, the current Add/Remove utility includes only a subset of the Microsoft Middleware Products and does not remove all of the required means of end-user access, but only some limited subset of icons.

215. Additionally, in accordance with Section III.H.2, Microsoft must evaluate every invocation of a Microsoft Middleware Product and determine if it falls under Section III.H.2, whether it falls under exception (a) or (b), and whether there is already a default setting. If there is not a default setting, or if in some cases the Windows Operating System Product does not respect the default, then the Windows Operating System Product must be altered.

216. Commentors who point to the relatively small amount of time between the Court of Appeals' decision and Microsoft's limited allowance of flexibility as evidence that the delay in Section III.H is excessive are comparing very different situations. Microsoft made an extremely limited offer to OEMs to alter end-user access to Internet Explorer in the summer of 2001. Similarly, Microsoft's addition of Internet Explorer to the Add/Remove utility was not complete

and did not remove many of the means of end-user access. To comply with the RPFJ, both in terms of the required means of end-user access and the number of Microsoft Middleware Products at issue, requires considerably more effort. In addition, Microsoft's offer in the summer of 2001 did not contain any changes regarding automatic invocations, which can require considerably more work than the creation of a revised Add/Remove utility.

217. Another commentator argues that Microsoft has no incentive to offer the Windows XP Service Pack until December 2002, that the 12-month delay renders the provision meaningless for a fifth of the lifespan of the decree, and that the provision is therefore meaningless as a vehicle for restoring competition.²¹³ The same commentator argues that, in contrast, the interim conduct provisions in the IFJ were superior because they required the removal of end-user access within six months of the entry of the Final Judgment.²¹⁴

218. Many aspects of this comment are erroneous. First, the deadline for compliance is November 6, 2002, not December. Moreover, Microsoft has a strong incentive to release Service Pack 1 for Windows XP, because it is well-known in the industry that the first Service Pack to an operating system release fixes many of the bugs in the original release. More specifically, many corporations do not consider upgrading until the first Service Pack is released. Windows XP, based on the NT code base and being the upgrade to Windows 2000, is aimed directly at corporations as well as consumers, unlike releases such as Windows Millennium and other operating systems based on the "9x" code. In order to serve the corporate audience at which Windows XP is at least partially directed, release of the first Service Pack is critical. Thus, the

²¹³SBC 60.

²¹⁴SBC 61-62.

United States remains convinced that Microsoft has a strong incentive to release the first Service Pack for XP as quickly as possible. The United States is aware, however, that the Service Pack has slipped from a planned late spring release to an August 2002 release.

219. Additionally, it is important to realize that the 12-month period started on November 6, 2001, and the five-year life span of the decree begins when the decree is entered, which will be at some point after March 6, 2002. Thus, even if the Court enters the decree on March 6, 2002, the maximum amount of time the delay can “cut into the life of the decree” is eight months, not twelve. If the Court waits to enter the decree, the overlap decreases. For example, should the Court enter the decree on May 6, 2002, then the provision will become effective no later than six months after the entry of the decree (precisely the same time period contained in the IFJ).

220. The possibility that the provision will become effective six months after the decree is entered is identical to the timing in the IFJ, which required that the removal of end-user access would occur six months after entry. Moreover, the IFJ had no provisions at all regarding the creation and respect for default settings. Thus, the IFJ would have possibly required less with the same amount of delay.

221. Finally, to argue that the timing of the Litigating States’ proposals is superior is to ignore the reality of the litigation schedule. Even assuming the shorter of the two proposed litigation schedules, the Litigating States’ trial will not end before June 2002. Assuming that the Court issues its ruling immediately, which is highly unlikely given the complexities of the case, the earliest the Litigating States’ provision on removing end-user access would be applicable is December 2002. To argue that the RPFJ is “meaningless as a vehicle for restoring competition” because of the timing of Section III.H when, in fact, the RPFJ will with absolute certainty be in

effect before the Litigating States' remedy, is to argue that there is no possibility of an effective remedy. That argument simply is wrong.

222. Other commentators allege that the requirement that the Microsoft Middleware Products must exist seven months before the last beta test version of a Windows Operating System Product is a loophole easily exploited by Microsoft.²¹⁵ These commentators suggest that specific products, such as Windows Media Player 8, were not in existence at the requisite time and therefore are not subject to Section III.H. At least one commentator proposes that the whole timing paragraph be deleted.²¹⁶

223. The timing paragraph is necessary to give Microsoft sufficient time to design, implement and test the Windows Operating System Product, particularly the requirement for automatic invocations, in order to comply with the decree. Without the timing requirement, Microsoft conceivably could be required to redesign its products constantly. Moreover, it is important to understand how the requirement for automatic invocations will work in practice. Seven months before the last beta test release of a Windows Operating System Product, in every place where a Microsoft Middleware Product is invoked so as to require a default setting under Section III.H.2, the Windows Operating System Product will be modified so as to create and respect the default setting. However, once that setting is created, for instance for a default browser or a default media player, any competing product may register itself for the default. Moreover, if any version of a Microsoft Middleware Product can be invoked, then the setting must be created and respected. To be specific, if seven months prior to the last beta test release

²¹⁵RealNetworks 16-17; Henderson 6; CCLA 56; PFF 21; Harris 7-8; Schulze 2.

²¹⁶Pantin III.27.

of Windows XP, Windows Media Player 8 does not exist, but *Windows Media Player 7 exists*, and the Windows Operating System Product can invoke version 7 as well as version 8, then the default must be created. Thus as a practical matter, when a default setting is created for media player, it is created for the whole category of media players, not just specific versions.

224. One commentator maintains that Section III.H.3 requires vendors of competing middleware to meet “reasonable technical requirements” seven months prior to new releases of Windows, yet it does not require Microsoft to disclose those requirements in advance.²¹⁷ This comment incorrectly commingles the seven-month timing requirement with exception (b) to Section III.H.2. The seven-month timing requirement relates solely to the issue of which Microsoft Middleware Products exist at a certain time; it does not have anything to do with whether any Non-Microsoft Middleware Products meet certain technical requirements. The seven-month timing requirement determines when a default setting is required to exist; exception (b) concerns the limited circumstances where, given that the default setting exists, the Windows Operating System Product may nevertheless ignore a designated Non-Microsoft Middleware Product.

F. Commingling Of Operating System Code And Middleware Code

225. Sections III.C and III.H of the RPFJ remedy Microsoft’s anticompetitive commingling of browser and Windows operating system code by requiring Microsoft to redesign its Windows Operating System Products to permit OEMs and end users effectively to remove access to Microsoft Middleware Products (Section III.H.1) and to allow competing middleware to be featured in its place (Section III.C). Section III.H also requires Microsoft to create a

²¹⁷Kegel 5.

mechanism that permits rival middleware products to take on a default status that will, if the consumer chooses, override middleware functions Microsoft has included in the operating system in many cases (Section III.H.2).

226. A number of commentators assert that, in spite of these provisions, the RPFJ is deficient because it does not contain an express prohibition on Microsoft “commingling” the code of Middleware Products in the same files as the code for the operating system.²¹⁸ They note that the Court of Appeals upheld the District Court’s liability determinations regarding both Microsoft’s elimination of the Add/Remove capability for its browser and its commingling of browser code and operating system code. But the Court of Appeals did not hold that commingling of code alone, without regard to any anticompetitive effects it might have in a particular case, is anticompetitive or illegal. In fact, the United States challenged, and the Court condemned, Microsoft’s practice of commingling operating system and Internet Explorer browser code for a specific reason: because the commingling in that instance had the purpose and effect of preventing OEMs and end users from removing access to the browser from Windows.

227. Some comments suggest that the lack of a ban on commingling in the RPFJ retreats from the position on commingling that the United States took in the prior remedy proceeding and that the District Court adopted in the IFJ. These commentators assert that the IFJ actually prohibited Microsoft from commingling code for middleware with code for the operating system.²¹⁹ In fact, however, the IFJ’s anti-binding provision, Section 3.g, only required that

²¹⁸AAI 13-14; AOL 2-3, 17-24; CCIA 45-46; Sen. Kohl 4; Litan 42-45; ProComp 31-33; RealNetworks 20-21; SBC 46; TRAC 9.

²¹⁹AOL 17, 20; SBC 45.

Microsoft make available a version of Windows in which “*all means of end-user access*” to Microsoft Middleware Products could be removed by OEMs or end users. IFJ § 3.g.i (emphasis added).²²⁰

228. The United States has, throughout the remedy phases of this case (including before the District Court in June 2000), stated consistently that it did not seek to require Microsoft to remove commingled code from Windows. The United States’ remedy briefs in the June, 2000 proceeding made clear our view that the competitive problems created by Microsoft’s bundling of middleware would be addressed adequately by ensuring the ability to remove end-user access, and not the ability actually to remove code:

Microsoft suggests that Section 3.g.'s requirement of removal of "end user access" dramatically increases the scope of what is a "Middleware Product." But only if a product first meets the definition of "Middleware Product" is Microsoft required to provide the means of removing access to it. . . . Similarly, Microsoft's statement that features like the user interface, HTML Help, and Windows Update would be "precluded" because they "are dependent on Internet Explorer" is erroneous. *Section 3.g. requires that OEMs and end users be able to remove access only to the middleware product -- in this case the browser -- not to APIs or code.* See Felten Declaration ¶¶ 92, 94; Findings ¶¶ 183-185.²²¹

²²⁰Some commentators suggest the reason the IFJ did not require actual removal of middleware code from Windows was because the IFJ’s conduct restrictions were intended to be merely transitional, until the breakup of Microsoft could be effectuated. As a result, the argument appears to go, the anti-binding provision did not need to be as extensive or invasive as it would have been in the absence of a structural remedy. But the commentators cite no support in the Plaintiffs’ prior remedy submissions or the IFJ itself for this claim. In fact, the need to remedy Microsoft’s integration of middleware in Windows in a non-removable way was just as strong during the interim conduct remedy period of the IFJ as it is under the RPFJ.

²²¹Professor Felten stated in part in the cited remedy declaration:

To comply with the product Binding provision, Microsoft’s future Windows Operating System Products must allow OEMs and end users *ready means for removing End-User Access* to any Middleware Product. I will use the term ‘Unbinding’ to refer to the development of the means of removing End-User

Plaintiffs' Reply Memorandum In Support of Proposed Final Judgment at 62 (filed May 17, 2000) (emphasis added).²²²

229. The reason for the United States' consistent position is that, under the facts proven at trial in this case, the competitive significance of Microsoft's commingling is the exclusion of competing middleware products caused by the visible presence and usage of Microsoft's Middleware Product, not by the mere presence of the underlying code. The Court of Appeals concluded that Microsoft's commingling had an anticompetitive effect and constituted exclusionary conduct because commingling "deters OEMs from pre-installing rival browsers, thereby reducing the rivals' usage share and, hence, developers' interest in rivals' APIs as an alternative to the API set exposed by Microsoft's operating system." *Microsoft*, 253 F.3d at 66. The Court of Appeals relied upon and upheld the District Court's findings, which reflect a

Access to a Bound product.

Declaration of Edward Felten ("Felten Decl.") ¶ 92 (filed April 28, 2000) (emphasis added).

²²²Various commentators also seek to draw contrasts between the RPFJ and the so-called "Mediator's Draft #18" from the Spring 2000 mediation process with Judge Posner. *See, e.g.*, AOL 17 & n.14. Such attempts at comparison or contrast are fundamentally flawed and therefore of no value in assessing the RPFJ. First, that mediation process was and remains confidential; there has been no authentication of any of the documents now available publicly that purport to represent mediation drafts. Second, the draft in question is itself styled as a "Mediator's Draft;" there is no basis on which to conclude, other than unsubstantiated newspaper articles cited in the comments, that it reflects an actual proposal approved or submitted by any party or that any party ever was willing to agree to it. Third, purported settlement positions from early 2000 indicate nothing about the adequacy of the RPFJ today. The litigation was at a fundamentally different stage. The District Court had issued extensive Findings of Fact that highly favored the United States' presentation of evidence, but the District Court had not yet issued its Conclusions of Law, let alone had the Court of Appeals reviewed and modified the District Court's liability determination.

concern primarily with the confusion and exclusion caused by the visible presence of Microsoft's middleware and rival middleware.²²³ For example, in describing Microsoft's initial commingling in Windows 95, the District Court found:

Although users were not able to remove all of the routines that provided Web browsing from OSR 2 and successive versions of Windows 95, Microsoft still provided them with the ability to uninstall Internet Explorer by using the "Add/Remove" panel, which was accessible from the Windows 95 desktop. The Add/Remove function did not delete all of the files that contain browsing specific code, nor did it remove browsing-specific code that is used by other programs. The Add/Remove function did, however, remove the functionalities that were provided to the user by Internet Explorer, including the means of launching the Web browser. Accordingly, *from the user's perspective, uninstalling Internet Explorer in this way was equivalent to removing the Internet Explorer program from Windows 95.*

Findings of Fact, ¶ 159 (emphasis added). The District Court went on to find that, even with commingling of code, "[i]f OEMs removed the most visible means of invoking Internet Explorer, and preinstalled Navigator with facile methods of access, Microsoft's purpose in forcing OEMs to take Internet Explorer — capturing browser usage share from Netscape — would be subverted." *Id.* ¶ 203.

230. In spite of this clear basis for the District Court's and Court of Appeals' conclusions, some commentators assert that the mere fact of commingling itself deters OEMs from installing rival middleware.²²⁴ Other commentators ignore the basis of the courts' commingling analyses and argue that the competitively significant component of Microsoft's integration is the resulting

²²³ See, e.g., *Findings of Fact*, ¶ 159 ("the inability to remove Internet Explorer made OEMs less disposed to pre-install Navigator . . . Pre-installing more than one product in a given category . . . can significantly increase an OEM's support costs, for the redundancy can lead to confusion among novice users. In addition, pre-installing a second product in a given software category can increase an OEM's product testing costs.").

²²⁴ AOL 22-23; Litan 45.

presence of middleware APIs on every PC on which Windows is installed, whether or not end-user access to the middleware product has been removed and, from the user's standpoint, that product is no longer present.²²⁵ They argue that Microsoft's ability to obtain, through integration of middleware into Windows, ubiquitous distribution of its APIs without regard to the presence or absence of access to the product, will be competitively determinative, and that no rival middleware producer can overcome Microsoft's advantage and persuade developers to write to its products.²²⁶ Usage is only a means to an end, they argue, with the end being the widespread presence of APIs on PCs.

231. These theories of competitive harm advanced by the commentators are not based on the facts proven by plaintiffs at trial, reflected in the District Court's findings, and upheld by the Court of Appeals. The basis for commingling liability, and remedy, in this case is the presence, from the user's perspective, of the product, and consequent confusion and other deterrents to installation of additional, rival middleware products; the mere presence of APIs is not enough. Indeed, although Microsoft argued vigorously in its defense during the liability phase that removing end-user access amounted to no more than "hiding" the middleware, an act of no competitive significance, that argument was never accepted.

232. Thus, a ban on commingling without regard to its competitive significance, as many commentators appear to seek, would impose a wholly unnecessary and artificial constraint on

²²⁵Litan 44; RealNetworks 20-21.

²²⁶AAI 14-15; AOL 21-22; CCIA 49-51; Litan 44; ProComp 61-62.

software design that could have adverse implications for consumers.²²⁷ Moreover, changes to the operating system that would be required to implement such a blanket prohibition likely would have adverse effects not only upon Microsoft and its customers but also upon third parties that already have designed software to rely on the present operating system code. A flat prohibition on commingling in this particular case, without due regard to the competitive impact of that commingling, therefore likely would be harmful, not helpful.

233. Some commentators point out that, even if end-user access to a Microsoft Middleware Product has been removed by an OEM or end user pursuant to Section III.H.1, that product may still launch in certain default situations addressed by Section III.H.2 of the RPFJ, and therefore unacceptable end-user confusion will persist even after the access-removal remedy.²²⁸ But this argument overlooks the Court of Appeals' decision, which held that certain instances of Microsoft's "hard-wiring" its browser so that it would launch in particular situations even where the user had designated another browser as the default were not unjustifiably anticompetitive. *Microsoft*, 253 F.3d at 67.

234. A number of commentators argue that, even with the ability to remove access to Microsoft Middleware, commingling Middleware code with Windows in a way that is non-removable actually diminishes the value and worsens the performance of Microsoft's products,

²²⁷Some comments correctly note that a flat ban on commingling might prevent Microsoft from adding new, innovative features to Windows, a result that would not be in the public interest. Economides 9; Johnson 3-4.

²²⁸AAI 15-16.

by causing decreased reliability or increased susceptibility to security risks.²²⁹ As one commentator correctly notes, however, this impact of commingling on the quality of Microsoft's products was not an apparent basis for the Court of Appeals' sustaining the liability determination for this conduct.²³⁰ Rather, the exclusionary character of commingling in a non-removable fashion formed the basis for the court's ruling. *Microsoft*, 253 F.3d at 66.²³¹

235. In arguing for complete removal of middleware code from the operating system, some commentators seek to extend the findings on commingling to a more direct attack upon Microsoft's practice of providing middleware functions in the Windows operating system. That practice was the subject of the tying claim and was part of the attempted monopolization claim, neither of which was sustained by the Court of Appeals. Requiring Microsoft completely to disintegrate middleware functions from the operating system might have been a more appropriate remedy for those claims, had they been sustained, than for the more limited claim of commingling of the browser and operating system code. In that sense, these commentators seek relief that exceeds the bounds of the monopoly maintenance finding that is the sole basis for relief at this stage of the case. Consistent with its position throughout the remedy phase of this

²²⁹CCC 22; Elhauge 1-2; Sen. Kohl 4.

²³⁰Elhauge 6.

²³¹Moreover, as Professor Felten testified in his prior remedy declaration, requiring that end users and OEMs be able to remove end-user access to Microsoft Middleware Products would itself result in improvements in the efficiency and reliability of Windows. Felten Decl. ¶ 97 (“Section 3.g would require Microsoft to undo the illegal product Binding in which it has already engaged, and to refrain from further Binding of Middleware Products to Operating Systems. This will lead to improvements in the efficiency and reliability of Windows.”).

litigation, the United States' concern with commingling is appropriately and fully addressed by the remedies proposed in the RPFJ.

236. Finally, at least one commentator complains that the RPFJ is deficient because it does not require Microsoft to license to OEMs versions of Windows from which the means of end-user access have been removed at lower royalty rates than the version of Windows that includes full access to Microsoft Middleware Products.²³² There is no basis for such a provision under the Court of Appeals' ruling in this particular case. First, the Court of Appeals indicated that the question of whether Microsoft price bundled, that is, charged more for Windows and IE together than it would have charged for Windows alone, has not yet been answered.²³³ Second, the Court of Appeals noted that it had "no warrant to condemn Microsoft for offering either IE or the IEAK [Internet Explorer Administration Kit] free of charge or even at a negative price."²³⁴

V. RETALIATION AGAINST ISVs OR IHVs (RPFJ § III.F)

237. Section III.F of the RPFJ prohibits Microsoft from retaliating against an ISV or IHV, or entering into agreements that condition the grant of consideration to an ISV, based on the firm's refraining from developing or other involvement with software that competes with Microsoft Platform Software or software that runs on such a competing platform. The provision provides limited exceptions.

²³²SBC 48-49. SBC notes that IFJ § 3.g.ii contained a such a provision. *Id.*

²³³253 F.3d at 96.

²³⁴*Id.* at 68.

A. Comments On Section III.F.1

238. Section III.F.1 prohibits Microsoft from retaliating against any ISV or IHV because of its development, usage, distribution, promotion, or support of any software that competes with a Windows Operating System Product or a Microsoft Middleware Product or software that runs on any such competitive software.

239. Some commentators question the appropriateness of any anti-retaliation provision. One expresses skepticism that any injunctive provision can effectively constrain Microsoft's behavior and recommends the imposition instead of a structural remedy.²³⁵ The United States believes that an injunction against retaliation effectively can deter Microsoft from anticompetitive behavior of the kinds found illegal by the Court of Appeals. The United States continues to believe that its decision not to seek structural relief in the current proceeding is appropriate in light of that appellate ruling.²³⁶ Injunctive relief cannot turn back the clock, but it can meet the relevant remedial goal of restoring competitive conditions in the market.²³⁷

240. One commentator objects to the language used in Section III.F.1. It contends that "retaliate" is left undefined and that the RPFJ addresses only retaliation that occurs "because of" a firm's acts with competing software, leaving Microsoft free to argue in the future that some given act does not qualify as retaliation and was not caused by the other firm's acts.²³⁸ But

²³⁵Relpromax 17-18; Economides 12 (disagrees with this concern).

²³⁶ACT 25, 29 (Section III.F adequately forbids retaliation against ISVs and IHVs).

²³⁷Sun 15-16.

²³⁸SBC 96-97; CCIA 87 (addressing only specific type of retaliation, e.g., Microsoft's threat to discontinue porting Office to Mac OS unless Apple stopped supporting Netscape).

retaliation is not an unfamiliar, ambiguous, or technical term. It carries the clear meaning of taking adverse actions that the commentor recommends. Moreover, the commentor's preferred alternative to "because of" — "based directly or indirectly," the language used in IFJ § 3(d) and in the Litigating States' Proposal § 8 — puts the same, appropriate, obligation to show that some adverse action by Microsoft toward an ISV or IHV was spurred by the ISV's or IHV's prior behavior. Indeed, without an obligation to show such adverse action, retaliation could be improperly read to cover withholding any benefit in response to an undesired action. For example, if Microsoft decided for valid business reasons that it no longer wanted to engage in a particular transaction, it could be accused of retaliating.

241. Commentors suggest several increases to the breadth of Section III.F.1's prohibition against retaliation. First, commentors contend that the ban should cover threats of retaliation by Microsoft rather than only acts of retaliation.²³⁹ But because the RPFJ prohibits retaliation itself, any threat of retaliation is necessarily empty — and, if anything, likely to encourage reporting of perceived and ambiguous "threats." The United States therefore believes that prohibiting threats is unnecessary. In a related vein, one commentor contends that the ban should cover "coercion short of an agreement," apparently meaning instances in which firms undertake voluntary actions to prevent Microsoft from becoming displeased.²⁴⁰ Such a provision would be inappropriately vague, making the legality of Microsoft's actions dependent in part on the perceptions of the "coerced" ISV or IHV.

²³⁹Palm 14; ProComp 34.

²⁴⁰ProComp 34.