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WHITE PAPER

"Microsoft's Plans to Condition the Sale of Media Player on the Sale of Windows XP is Just the Latest Example of a Pattern of Continued Violations by Microsoft of both the 1995 Microsoft Consent Decree and the Sherman Act."

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I. Overview

On July 15, 1994, the United States filed a civil antitrust Complaint to prevent and restrain Microsoft Corporation from using exclusionary and anticompetitive contracts to market its personal computer operating system software, in violation of Sections 1 and 2 of the Sherman Act. To avoid litigation Microsoft and the Department of Justice chose to settle the case and a Final Judgment was entered on August 21, 1995.[1] In 1998 the Court of Appeals for the D.C. Circuit interpreted this Consent Decree, and there has now been a trial (with the appeal pending) regarding additional anticompetitive by Microsoft.

What prompts this White Paper is Microsoft's announcement of April 24, 2001 that it intended to sell its Media Player, Windows Media Player 8, only to those consumers who purchase its Windows XP Operating System. This is yet the latest example of how Microsoft has routinely used "bolting" practices both to violate the Consent Decree it agreed to in 1995, as well as both Sections 1 and 2 of the Sherman Act.

If the "browser war" is at all instructive, it is apparent that Microsoft will be successful in eliminating both Real Network's Real Player and Apple's QuickTime Player as competitive threats in the niche applications market for streaming audio and video -- thus chalking up another once-vibrant and competitive applications market to its ever-expanding monopoly. Equally at risk are any number of other applications for which Microsoft is following the same strategy, such as instant messaging, email, video editing, and conferencing software, to name but a few.

We will also detail in this paper some additional actions which we believe constitute clear violations of both the Consent Decree and the Sherman Act. We believe that these issues are exceedingly germane to any subsequent consideration of remedies in *U.S. v. Microsoft.* We believe subsequent proceedings must take into account not only Microsoft's past and continuing Sherman Act violations, but also the fact that Microsoft continues to disregard the provisions of the existing Decree. The relevant question is this: can any set of behavioral remedies imposed against a defendant with a track record of blatantly ignoring behavioral restrictions be effective – that is, will the remedy restore competition to monopolized markets and will it prevent future anticompetitive conduct?

II. Legal Overview

A. The 1995 Consent Decree

1. Terms of the Decree

The Decree shall "expire on the seventy eighth month after its entry," and is therefore currently in force.

[1] The settlement of the 1994 antitrust litigation was, in fact, controversial and numerous parties under the review provisions of the Tunney Act challenged the terms of the decree on the grounds it would be ineffective.

2. Definition of License Agreement and Covered Products.

The Decree provides that a "License Agreement" applies to OEM licenses for "any covered product" [Section II(4)].

The Decree further defines "[C]overed products" to include DOS, Windows 3.1, and Windows 95 then "code-named 'Chicago'" and "successor versions of *or products marketed as replacements for*" Windows 95 or its predecessors "*whether or not such successor versions or replacement products could also be characterized as successor versions or replacement products of other Microsoft Operating System Software products* [emphasis added]" [Section II(1).]

3. Definition of Operating System Software.

The Decree also provides a clear definition of "Operating System Software." In the Undertaking, Microsoft agreed that:

> "'Operating System Software means any set of instructions, codes, and ancillary information that controls the operation of a personal computer system and manages the interaction between the computer's memory and attached devices such as keyboards, display screens, disk drives, and printers." Section II(14).[2]

4. Prohibition on Conditioning the Sale of "Other" Products on the Sale of Windows.

The Decree between Microsoft and the Department of Justice contains a clear restriction on Microsoft's ability to tie software applications to its client operating systems. Section IV(E) of the Undertaking provides:

> "Microsoft shall not enter into any License Agreement in which the terms of that agreement are expressly or impliedly conditioned upon:
>
> (1) the licensing of any other Covered Product, Operating System Software product *or other product* (provided, however, that this provision in and of itself shall not be construed to prohibit Microsoft from developing integrated products); [emphasis added]"

5. The Court of Appeals' Interpretation of Section IV(E)

In 1998, a panel of the D.C. Circuit Court of Appeals considered the meaning of "integrated products" in Section IV(E) of the Decree. The Court of Appeals noted that "integration"

[2] Despite its agreement with the United States Department of Justice that this was the correct definition of an operating system, Microsoft seems to now flatly disavow the definition in the context of ongoing inquiries before the courts. We do not intend to reexamine – or debate – the question of what is the appropriate scope of operating system software in today's market. We only wish to alert enforcement authorities to the definition that *Microsoft agreed to* in the context of the DoJ Consent Decree.

"suggests a degree of unity," and that "if an OEM or end user" could "buy separate products and combine them himself to produce the 'integrated product,' then the integration looks like a sham." The Court of Appeals accordingly adopted a two-part test that Microsoft must satisfy to come within the "integration" exception to Section IV(E).

First, "the combination offered by the manufacturer must be different from what the purchaser could create from the separate products on his own"; the concept of integration "should exclude a case where the manufacturer has done nothing more than to metaphorically 'bolt' two products together." The Court of Appeals observed that "the commingling of code alone is not sufficient evidence of true integration": "commingling for an anticompetitive purpose (or for no purpose at all" is what we refer to as 'bolting.'"

Second, the integration not only must be different from what an OEM or consumer could do, and not done for an anticompetitive purpose: "it must also be better in some respect; there should be some technological value to integration." In other words, there must be a plausible argument that the combination not only is *different*, but *better*, than what an OEM or consumer could achieve in combining the products.

B. The Sherman Act

Microsoft not only must comply with the 1995 Consent Decree, to which it voluntarily agreed, but also the requirements of Section 1 and Section 2 of the Sherman Act. The Sherman Act prohibits the illegal "tying" of the sale of two products. A tying arrangement is an agreement by a party to sell or license one product only on condition that the buyer also purchase a different product from the seller.

Under the decisions of the United States Supreme Court, tying arrangements violate Section 2 of the Sherman Act if a company has monopoly power and uses such arrangements in a way that "tends to impair the opportunities of rivals," and "either does not further competition on the merits or does so in an unnecessarily restrictive way."

The Supreme Court also has held that a tying arrangement is illegal *per se* under Section 1 of the Sherman Act if (1) the tying and the tied product are separate and distinct products; (2) the seller "conditions" the sale or licensing of the tying product on the sale or license of another product; (3) the seller has market power in the market for the tying product, and (4) the tie affects a substantial amount of commerce in the tied product. In deciding whether products are "separate," the Supreme Court has held that the critical test is one of consumer demand: as the Supreme Court put it in its *Jefferson Parish* decision, "the answer to the question whether one or two products are involved turns not on the functional relation between them, but rather on the character of the demand for the two items." If there is sufficient consumer demand to make it efficient to offer one product separate from another, the products are separate for Sherman Act purposes.

Under such circumstances, it is illegal for a company to use its market power in the tying product (for example, Windows) "to force the buyer into the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms.

When such 'forcing' is present, competition on the merits of the market for the tied item is restrained and the Sherman Act is violated."

III. Operating System Releases Since August 1995: Windows 98 SE, Windows Me, and Windows 2000 Professional

Microsoft's three current products -- Windows 98 Second Edition (SE); Windows Millennium Edition (ME); and Windows 2000 Professional[3] -- show Microsoft's diregard for its own binding legal commitments (the 1995 Consent Decree) as well as the most basic tenets of the Sherman Act (both Sections 1 and 2). Indeed, Microsoft's actions reflect that it has not deviated in the slightest from its claim that it can use its monopoly power in Windows to force OEMs and consumers to purchase *anything* that Microsoft chooses, up to and including a "ham sandwich." The latest "ham sandwiches" that Microsoft has forced consumers to take with Windows include, for example, Microsoft's interactive television service, and Microsoft's product for editing videos.

The following is a representative list of products that Microsoft has forced OEMs and consumers to take by bolting them to Windows, regardless of the fact that in many instances there is no benefit whatsoever from this "bolting"; in many other instances the purpose of the "bolting" plainly is anticompetitive; and in all instances involves products for which there manifestly is separate consumer demand.

A. Windows 98 SE (Second Edition).

Windows 98 SE was released in May 1999. Windows 98 SE is bundled with the following Microsoft software products, which OEMs have no option but to take:

i. WebTV for Windows

> WebTV for Windows is the client software for Microsoft's interactive television service. (This product should not be confused with Microsoft's television set-top box product, WebTV.)

ii. Outlook Express

> Outlook Express is an e-mail client that provides basic e-mail functionality. Greater functionality is provided with Outlook, which is bundled with Office, Small Business Server and BackOffice Server. Both Outlook Express and Outlook compete with Eudora Mail, Pegasus Mail, Netscape Messenger, America Online, Banyan BeyondMail, Compuserve Mail, and Lotus Mail.

iii. FrontPage Express

[3] For the purposes of this White Paper we do not go into any great detail of any of the bundled products. We generally applied three tests: 1) Is the product new to Windows? 2) Is or was the product offered separately by Microsoft? 3) Is there a separate market and separate competitors for the given product?

FrontPage Express is Microsoft's Web page editor. FrontPage Express competes with Netscape Composer, Macromedia Dreamweaver, among others.

iv. Windows Media Player

Windows Media Player is Microsoft's client software for a range of streaming multimedia services. Windows Media Player competes with Apple Quicktime and Real Networks Real Player.

v. Microsoft NetMeeting

Microsoft NetMeeting is Internet conferencing client software, allowing audio-video conferencing, chat and file sharing. NetMeeting competes with Lotus QuickPlace, Searchlight Software Spinnaker, CUseeME Networks, CuseeME Pro.

B. Windows Me (Millennium Edition)

Windows Me (Millennium Edition) was released in June 2000. Windows Me is bundled with (and OEMs have no choice but to take) the following Microsoft software products:

i. Windows Movie Maker

Windows Movie Maker is a video-editing product. Windows Movie Maker competes with Adobe Premiere and Pinnacle Systems Commotion.

ii. MSN Messenger Service

MSN Messenger Service is an instant messaging service that is "integrated with the new MSN.com Message Center, so you can now use your Internet start page to manage all of your online communication." It competes with ICQ, AOL Instant Messenger, Yahoo! Messenger, Unimobile, and Infoseek Instant Messaging.

iii. Outlook Express

iv. Windows Media Player

v. Microsoft NetMeeting

C. Windows 2000 Professional

As a condition of the Licensing Agreement, Windows 2000 Professional is bundled with the following software products in addition to most of those listed above:

i. Internet Information Services (IIS) 5.0.

IIS is a Web server that includes Web and FTP server support, as well as support for FrontPage transactions, Active Server Pages, and database connections. IIS is not even installed with Windows 2000 Professional, although OEMs must license it as a condition of the Windows 2000 Professional License Agreement. IIS is resident on the hard drive of new computers shipped with Windows 2000 Professional and may be installed by the user.

IV. Operating Systems Announced and to be Released Soon: Windows XP Professional and Home Edition

Microsoft has shown no intent of slowing its use of Windows to force OEMs to take additional Microsoft products. To the contrary, it has continued to bolt new products to its two forthcoming products, Windows XP Home Edition and Windows XP Professional (both successors to Windows Me and Windows 2000 Professional).[4]

Moreover, for previously-bundled products for which there is manifestly separate consumer demand -- such as Windows Media Player and MSN Messenger -- Microsoft has taken further steps to force consumers to use them. For example, Windows Media Player automatically installs with Windows XP, and cannot be uninstalled by the consumer. (Indeed, in current XP beta programs, efforts to "uninstall" Media Player result in it automatically regenerating within about 5 seconds.)

Nor is that Microsoft's only effort at forcing. According to recent published news reports, "Microsoft is requiring consumers who want to use the latest version of Windows Media Player to upgrade to the new Windows XP operating system--a move that is reminiscent of the company's controversial decision to tie the Internet Explorer browser with Windows. Windows Media Player 8 will be bundled with the forthcoming Windows XP--the upgrade to Windows 95, 98, Me and 2000. A similar "tying" of Internet Explorer with the OS in 1996 is credited with helping Microsoft win the browser war against Netscape's Navigator … However, with Windows Media Player 8, *Microsoft is going one step further than it did with Internet Explorer*: the newest version of the application will only be available to consumers who upgrade to Windows XP (Emphasis added)."[5]

According to Microsoft's current beta releases and website announcements, Windows XP Professional will be available only bundled with these software products[6]:

i. Microsoft Passport

[4] Our information about what *actually* will be bundled with these products is limited, as the beta versions available now most likely do not contain the full bundle.

[5] Wilcox, Joe, "MS Ties Media Player to Windows XP," *CNET News*, April 24, 2001

[6] It seems unlikely that Windows XP Home Edition will discard MovieMaker and WebTV for Windows, which were included in Windows ME, but those products are not described in the promotional Website for the beta version of Windows XP Home Edition.

According to press reports (though not currently reflected in XP beta releases), Windows XP Professional and Windows XP Home Edition will require users to log on using Passport. Passport is Microsoft's authentication service.

ii. My Pictures

MyPictures is Microsoft's software for loading and storing digital photographs.

iii. Windows Media Player

iv. MSN Messenger

v. Outlook Express

vi. NetMeeting

V. Microsoft's Bolting and Tying Practices Have No Limits

Microsoft's actions in bolting and tying of products to Windows make it plain that Microsoft's is an all-or-nothing proposition. For Microsoft, Windows is simply whatever Microsoft says it is, despite the complete absence of any "integration" (the uninstalled IIS 5.0; television service; applications such as video editing, web-page authoring, and email), and the forced elimination of competition in previously vigorous and competitive markets (the unremovable and otherwise unobtainable Media Player; the ever-more-tightly bolted MSN Messenger). Microsoft plainly has no intention of abiding by the law or its binding legal commitments.

A. Microsoft Cannot Even Plausibly Claim that its Actions Comply with the 1995 Decree.

Since the Decree was put into force, Microsoft's three "successors" to Windows 95 are clearly "covered products" under the plain meaning of the decree.

The Decree excluded Windows NT, and its successors, from the definition of a "covered product," but established a test to clarify whether future products were covered or not. The test is whether a successor to a "non-covered" product (i.e. Windows NT Workstation) is marketed against a "covered" product (i.e. Windows 95). Regarding Windows 2000 Professional, nothing could make this point clearer than the advertisement attached as Appendix 1.

Even though Windows 2000 Professional and Windows XP are built on the Windows NT code base, both are aggressively "marketed as replacement[s] for" Windows 95, Windows 98, and Windows ME, therefore they are "covered products" within the meaning of the Decree.

1. Purpose of Section IV(E).

By definition, consent decrees in antitrust cases are *meant to limit a firm's ability* to exercise its monopoly power. The Department of Justice filed a Competitive Impact Statement stating that

Section IV(E) was among a group of provisions intended "to ensure that Microsoft's future contracting practices — not challenged here because not yet used — do not unreasonably impede competition." 59 Fed. Reg. 42845, 42851 (1994).

Competition plainly has been affected by Microsoft's decision to transform "Windows" from a product into what amounts to a forced distribution channel. With the ubiquity of Windows, products included with the operating system are certain to achieve of levels of market share in direct proportion to the adoption rate of the new version of Windows.[7]

Microsoft understands this reality of the market place and continues to capture software product categories – once dominated by others -- after the product is included as a "feature" of Windows.[8] Not surprisingly, there are no long-term examples of competitive products that survived once a Microsoft offering is permanently bolted to Windows.

Both the U.S. Department of Justice and the European Commission[9] understood the importance of Windows as a distribution channel and therefore included Section IV(E) as a means to limit Microsoft's ability to force OEMs to license "other products" as a condition of its "license agreement" for Windows.[10]

2. Microsoft Cannot Escape Liability Under Section IV(E)

There can be little dispute that regardless of the provisions of Section IV(E) Microsoft has forced buyers of every successor version of Windows to purchase a range of applications that clearly are separate (or "other") products. Subsequent to Internet Explorer, Microsoft has bundled a set of products with Windows – as a condition of the License Agreement – that cannot be plausibly called part of the operating system and are not "integrated" into it.

Microsoft was able to claim Internet Explorer browser was used to deliver "help" information about the operating system to users, and to "view" files on the hard drive as well as on the

[7] This was made clear by the adoption rate of Microsoft's Internet Explorer browser. The market share of Internet Explorer rose in unison with the adoption rate of Windows 98, Windows 98 Second Edition, and Windows Me (operating system products which "included" Internet Explorer). By the same measure, Netscape Communicator's market share fell in unison with the drop in usage of Windows 95 (an operating system product that did not include Internet Explorer).

[8] "Microsoft Aims at Real Networks in Media-Player Software Duel,", Matt Richtel, *New York Times*, January 10, 2000, "They [analysts] note that Microsoft has begun calling its Media Player a 'key component' of the Windows operating system. …..'It's very similar behavior pattern' to the way Microsoft went after the Netscape market, said Rob Enderle, vice president and research leader at Giga Information Group…"

[9] DG IV of the European Commission was a party to the 1995 Consent Decree with Microsoft.

[10] There can be no question that overall thrust of the alleged anticompetitive conduct and the consent decree was to limit Microsoft's ability to force OEM's to distribute Microsoft's products. This was most clearly identified in so-called "per-processor" licensing, where Microsoft forced OEMs to pay license fees to Microsoft, regardless of whether or not a PC included the Microsoft operating system.

Internet.[11] But many of the applications currently bundled with various versions of Windows -- WebTV for Windows; Windows Movie Maker; Outlook Express, MSN Messenger -- perform no analogous functions related to the operating system.[12] Yet these products are plainly *included* as a condition of the license agreement for the Windows product.

Any effort to explain away the product bundling described above must rely on reasoning that would render Section IV(E) of the Consent Decree practically meaningless. Microsoft, for example, might claim that some of these programs are now "integrated" with Internet Explorer, which itself is "integrated" with the operating system (Outlook Express, for example). Indeed, the same reasoning Microsoft used before both the District Court and the Court of Appeals in *Microsoft II* would permit Microsoft to call the Microsoft Office personal productivity suite part of the operating system, because Microsoft Word can now save documents in HTML as a native format and contains an HTML editor that is available from within Internet Explorer. Moreover, Internet Explorer can now also be invoked easily from within any of the programs in the Office suite. Microsoft could simply claim that Office is integrated with Internet Explorer, which is integrated with the operating system, so that the Office suite in fact is part of the operating system as well. Indeed, evidence at the antitrust trial in the United States showed that Microsoft has contemplated taking exactly the position that Office is "part of the OS." US Gov't Exs. 1368, 1455 (at 155-156).

Even this far-fetched argument, moreover, could not save some of Microsoft's actions under the Consent Decree. If IIS does not install but comes on the hard drive of new computers with Windows 2000 Professional (because OEMs must take it as part of their 2000 Professional license), how is that different from the hypothetical given by the Court of Appeals of an obvious breach of the consent decree (where Microsoft "simply placed the disks for Windows 3.11 and MS-DOS in one package and covered it with a single license agreement")? And surely the bolting of WebTV television service to Windows is even more distant than bundling a mouse with Windows -- another example given by the Court of Appeals of what are plainly separate products.

B. Microsoft's Conduct Also Plainly Violates the Sherman Act.

Even if Microsoft's *reductum ad absurdum* could succeed in reducing the Consent Decree to a nullity, Microsoft's conduct plainly violates existing law under both Sections 1 and 2 of the Sherman Act. Indeed, Microsoft may be viewed as tacitly conceding as much, since it has taken the position that there should be a new "integrated products" exception to the Sherman Act. That is, having attempted to gut the Consent Decree of any meaning, Microsoft impliedly concedes that this meaningless standard is the only one under which its conduct could survive scrutiny under the Sherman Act.

[11] We note that this same functionality could have been achieved without conditioning the sale of Internet Explorer – in its entirety -- with the license of Windows.

[12] We note that software by definition is malleable. Merely combining files and code does not make a product integrated.

The wisdom of existing law is borne out by the anticompetitive, real-world consequences of Microsoft's ability to force OEMs, as a condition of their Windows license, to ship Microsoft applications. First, as a practical matter, these contracts impede OEMs from differentiating their products by creating diverse bundles of software products.[13] Second, they also foreclose applications competitors from the most important software distribution channel – personal computers and the Windows operating system. Third, Microsoft's practices deny consumers the benefits of innovation resulting from vigorous competition in adjacent niche applications software markets.

For example, in a competitive market Microsoft would compete with Real Networks and Apple at the OEM level for which media player would be included with a new PC. OEMs like Dell, Hewlett Packard, Compaq, IBM, Sony, Toshiba, Gateway and others would choose whether to ship Microsoft's Windows Media Player, Real Network's Real Player, or Apple's Quicktime on a competitive basis. However, with Windows Media Player bolted to the Windows operating system, the competition does not occur. Instead, Microsoft – not the OEM or consumer – makes the decision. The issue in the market is not whether consumers have to go without a media player on their PC but who along the supply chain will make that decision.

VI. Microsoft's Failure to Comply with the Consent Decree or the Sherman Act Directly Relate to Subsequent Remedy Discussions in *U.S. v. Microsoft*.

This White Paper raises serious issues regarding Microsoft's ongoing "bolting" practices that relate directly to the consideration of remedies in *U.S v. Microsoft*.

According to the Competitive Impact Statement filed in connection with the Consent Decree, "On July 15, 1994 the United States filed a civil antitrust Complaint to prevent and restrain Microsoft Corporation from using exclusionary and anticompetitive contracts to market its personal computer operating system software, in violation of Sections 1 and 2 of the Sherman Act." The Justice Department further stated, "the proposed Final Judgment will end Microsoft's unlawful practices that restrain trade and perpetuate its monopoly power in the market for PC operating systems." The first lesson from the 1995 Consent Decree is that it was obviously unsuccessful in restoring competition to the market for PC operating systems. This is evidenced by Microsoft's current market share and the entirety of the District Court's Findings of Fact in the subsequent antitrust lawsuit in *U.S. v. Microsoft*.

The second lesson from the 1995 Consent Decree – and the subject of this White Paper – goes to Microsoft's compliance. At any point over the past six years, Microsoft was free to petition the Court for relief from the 1995 Decree if it thought it had outrun its usefulness. Of course, as we believe we demonstrated from this White Paper, Microsoft chose instead to ignore it. These violations directly contributed to Microsoft's current, enhanced market power.

[13] There is no reason why all integration decisions need to be made by Microsoft. Competing OEMs can differentiate their products – and act as a systems integrator – by choosing alternatives on the market.

Third, we learned from the 1997 Contempt proceedings that Microsoft was simply disinclined to comply with the agreement in the first place -- a fact borne out by Microsoft's continued flouting of the Decree with "bolting" practices that plainly fail the D.C. Circuit's standard. These three points are germane to any subsequent remedies proceeding in *U.S. v. Microsoft* because any remedy in this case must, of course, be effective. History now tells us that narrow consent decrees will not be effective; provisions with teeth will be ignored; and Microsoft apparently has no misgivings about misleading or otherwise evading the Courts.

Microsoft thus has made it clear that it will continue to gobble up applications markets unless and until an effective structural remedy is imposed. Consent decrees will be distorted and, if inconvenient, simply ignored. The lesson is clear: Courts should not be timid about imposing the structural relief which has been ordered. The only real question is how many more many markets will Microsoft monopolize before an effective structural remedy is imposed.

A. Violations Have Further Entrenched Microsoft's Monopoly.

The bundling of a number of distinct and separate products with Microsoft's client operating system has a profound impact on Microsoft's ability to *both extend and protect* its monopoly in desktop operating systems. As experience has shown, *no* competitive product survives once Microsoft bundles a similar product with its monopoly Windows product.

Moreover, in order for a competing operating system to achieve any viable chance in the marketplace against Windows, it would not only have to compete with Microsoft on the basis of operating system functionality, but also on the basis of instant messaging, web authoring, e-mail, and so forth. This -- now insurmountable -- challenge is precisely what the 1995 Consent Decree was intended to prevent.

B. Violations Have Perpetuated the Applications Barrier to Entry.

In *U.S. v. Microsoft*, the District Court correctly found that an "applications barrier to entry" perpetuates Microsoft's monopoly[14] The Court further found that the nearly 70,000 applications currently running on Windows plus the costs to Independent Software Vendors (ISVs) of porting applications to alternative operating systems "prevents Intel-compatible PC operating systems other than Windows from attracting significant consumer demand, and it would continue to do so even if Microsoft held its prices substantially above the competitive level."[15]

While we completely agree with the Court's findings, we believe the real analysis of the applications barrier to entry is far simpler because Microsoft is the *most important* developer for applications for PCs. Although not before the Court, it is manifestly the case that the application barrier to entry is actually perpetuated by Microsoft, itself, and is not reliant on *other* ISVs porting its applications to alternative operating systems. This is because Microsoft also has monopolies in many of the *most important* PC applications.

[14] See generally, *U.S. v. Microsoft* Findings of Fact, paragraphs 35-52.

[15] *U.S. v. Microsoft* Findings of Fact, paragraph 36.

These applications are found in Microsoft's Office Suite, which enjoys a 96 percent market share. Microsoft Office includes Word, for word processing; Excel, for spreadsheet analysis; PowerPoint, for presentation graphics; Access, for database management; Outlook, for both e-mail and calendar and address management; FrontPage, for authoring web pages; Publisher, for desktop publishing; and PhotoDraw, for creating graphics. The applications included in the Office Suite are critical to maintaining the applications barrier to entry. Not surprisingly, Microsoft has not yet "ported" the Office suite to alternative operating systems.[16]

Microsoft's illegal Windows bundling practices exacerbate Microsoft's applications power by enabling Microsoft progressively to monopolize applications like streaming media, instant messaging, e-mail, and web authoring. In fact, anytime a new *important – or* "killer" – application (like media players and instant messaging) enters the market, Microsoft has a pattern of bundling the Microsoft version with one of its two monopoly products, Windows or Office.[17]

C. Violations Have Enabled Microsoft to Extend its Market Power.

Microsoft's bundling strategy with the Windows operating system goes well beyond a desire to increase market share or revenue for any particular desktop application. More often, Microsoft bundles products with its monopoly operating system in order to achieve advantage in an adjacent market Microsoft does not yet control, for example network servers.

Three examples of this – by way of illustration -- are Outlook Express, Windows Media Player, and Microsoft Internet Information Server.

i. Outlook Express -----→Exchange Server & Windows 2000 Server

Outlook Express is a slimmed down version of Outlook, Microsoft's e-mail program and personal information management program. The e-mail portion competes with Eudora Mail, Lotus Notes, and Netscape Messenger; the personal information management component competes with Lotus Calendar, ACT and others. The inclusion of the Outlook Express e-mail client with Windows helps drive sales and use of the full-version of Outlook, which is included with Microsoft Office. In turn, this drives adoption of Microsoft's e-mail server, Exchange, because the full functionality of Outlook depends on being coupled with Exchange.
Moreover, the use of Exchange requires the use of Windows 2000 Server.

ii. Windows Media Player ----→Windows Media Server

[16] The one exception to this is the Macintosh Platform. As part of a patent settlement agreement, Apple agreed to support Microsoft's Internet Explorer and Microsoft agreed to invest $150 million in Apple and support the Macintosh platform by developing Microsoft Office for the Macintosh for a period of five years.

[17] Real Networks and Apple Computer brought streaming audio and video to market. Like so many other applications, Microsoft came to the market late and now intends to eliminate the competition by tying Windows Media Player to Windows XP. Media Players are currently one of the key applications driving personal computer sales.

Streaming media is one of the new technologies driving PC adoption. Microsoft's streaming media product in Windows Media Player, which competes with Real Network's Real Audio / Video Player and Apple's Quicktime. Microsoft has seriously impeded competition in this market by bundling Windows Media Player with the Windows operating system. Now, with Windows Media Player bundled with its monopoly operating, Microsoft can drive the adoption of Windows Media Server on the backend. Windows Media Server is also bundled with Windows 2000 Server.

iii. Internet Information Server

In our view, Internet Information Server (IIS) provides one of the clearest violations of the Consent Decree. As noted previously, IIS is not even installed with Windows 2000 Professional, although OEMs must license it as a condition of the Windows 2000 Professional License Agreement. IIS is resident on the hard drive of new computers shipped with Windows 2000 Professional and may be installed by the user. IIS is also installed automatically for those upgrading from versions of Windows with Personal Web Server installed. In addition, IIS is required on Windows 2000 Professional machines if the user hopes to use other Microsoft products, such as the Office 2000 Server Extensions.

D. Violations Provide Microsoft The Unique Opportunity to Monopolize Future Markets.

It is readily apparent that Microsoft views the Windows bundle of products – as opposed to the operating system – as a key distribution channel to drive the adoption of its technologies. Moreover, we have demonstrated that Microsoft includes products to achieve strategic advantage in other markets.

Windows XP provides two current examples of this practice. As part of Microsoft's .NET and HailStorm initiatives, Microsoft is tying Microsoft Messenger (Instant Messaging) and Microsoft Passport (for authentication) to Windows XP.[18] Both of these products will be exclusive to Windows, despite intense competition in both product categories. These applications provide the critical anchor for Microsoft's .NET Internet platform initiative.

We believe a key part of Microsoft's strategy with both .NET and Hailstorm is to bundle products into its desktop operating system; create technological and contractual dependencies between the client and the server; limit interoperability; and make up the loss of revenue through increased server sales and transaction fees for .NET services.

VIII. Conclusion

Microsoft's "bolting" practices harm competition because they have allowed, Microsoft to expand the scope of its monopoly to encompass new markets, ending competition and innovation in those sectors while further reducing the ability of challengers to mount serious competitive threats.

[18] HailStorm and .NET are Microsoft's new Internet initiatives.

The latest (but far from the only) example of this occurred with Windows Media Player 8 and Windows XP. By Microsoft conditioning the sale of Windows Media Player 8 on the sale of Windows XP, Microsoft is violating both the Sherman Act and the 1995 Consent Decree. In the process it is able to both extend its monopoly into a new niche applications market and protect its Windows monopoly by fortifying the applications barrier to entry.

Since at least 1994, the issue of Microsoft's monopoly and its impact on software markets has been before the Courts and antitrust authorities. It is apparent that the 1995 Consent Decree – even if enforced – was not sufficient to deal with the conduct in question. We believe antitrust authorities must take notice of the violations outlined in this White Paper as it moves forward with its litigation and remedy in *U.S. v. Microsoft.*

Appendix 1. Microsoft Advertisement

Appendix 2. Product Logos

In our view, products cannot be *both* "integrated" into the Windows operating system to escape violation of the 1995 Consent Decree *and* be offered *either* separate from the Windows operating system *or* offered on other non-Windows platforms.

In the case of Internet Explorer, Internet Explorer is marketed separately from Windows as shown in Logo 1. Internet Explorer is also marketed and available for both Macintosh and Unix platforms as shown in Logo 2 & 3. Logo 4 shows Windows Media Player for the Macintosh platform and Logo 5 shows Outlook Express for the Macintosh platform.

Logo 1. Internet Explorer Marketed Separately From Windows.

Logo 2. Internet Explorer for Macintosh.

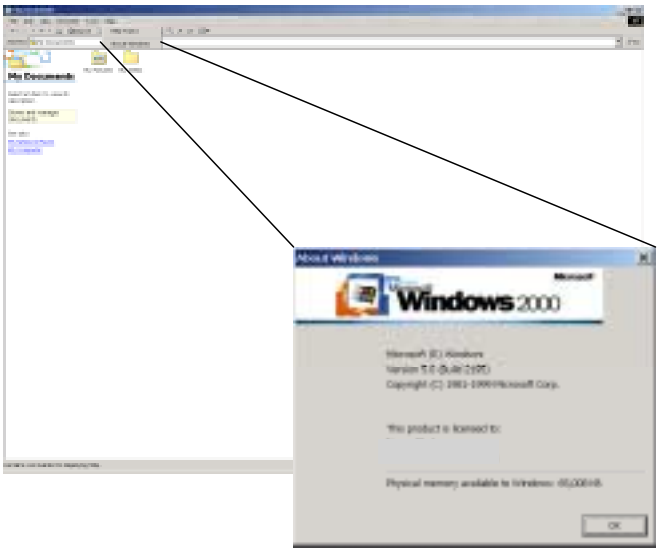
Logo 3. Internet Explorer for Unix (Sun and HP-UX)

Logo 4. Windows Media Player for Macintosh

Logo 5. Outlook Express for Macintosh

Appendix 3. Internet Explorer Still Identified As Separate Even Within Windows 2000

Microsoft Windows 2000 Professional



Searching Documents
In Windows 2000

Searching the Internet
In Windows 2000