Testimony of

Dr. Mark N. Cooper

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Mr. Chairman and Members of the Committee,
My name is Dr. Mark Cooper. I am Director of Research of the Consumer Federation of America. The Consumer Federation of America is the nation's largest consumer advocacy group, composed of two hundred and seventy state and local affiliates representing consumer, senior citizen, low-income, labor, farm, public power, and cooperative organizations, with more than fifty million individual members.
I greatly appreciate the opportunity to appear before you today. This hearing on "The Microsoft Settlement: A Look To the Future" focuses public policy attention on exactly the right questions. What should the software market look like? Does the Court of Appeals' ruling provide an adequate legal foundation for creating that market? Is it worth the effort? What specific remedies are necessary to get the job done?
Our analysis of the Microsoft case over four years leads us to clear answers.
· We reject the claim that consumers must accept monopoly in the software industry. Real competition can work in the software market, but it will never get a chance if Microsoft is not forced to abandon the pervasive pattern of anticompetitive practices it has used to dominate product line after product line.

· The antitrust case has revealed a massive violation of the antitrust laws. A unanimous decision of the Appeals Court points the way to restoring competition.

· The public interest demands that we try.

· The proposed Microsoft-Department of Justice settlement is far too weak to accomplish that goal. The litigating states' remedial proposals are now the only chance that consumers have of enjoying the benefits of competition in the industry.
Real Competition In The Software Industry Is The Goal

The defenders of the Microsoft monopoly say that consumers cannot hope for competition within software markets because this is a winner-take-all, new economy industry. In this product space companies always win the whole market or most of it, so anything goes. In fact, Microsoft's expert witness has written in a scholarly journal that:
With "winner take most" markets... [If] there can be only one healthy survivor, the incumbent market leader must exclude its competition or die... There is no useful non-exclusion baseline, which the traditional test for predation requires...

As to intent, in a struggle for survival that will have only one winner, any firm must exclude rivals to survive.... In a winner take most market, evidence that A intends to kill B merely confirms A's desire to survive.

By that standard, if a monopolist burned down the facilities of a potential competitor, it might be guilty of arson and other civil crimes, but it would not be guilty of violating the antitrust laws. Consumers should be thankful that both the trial court and the Appeals Court flatly rejected this theory of the inevitability of monopoly and upheld the century old standard of competition.

In fact, the products against which Microsoft has directed its most violent anticompetitive attacks represent the best form of traditional competition - compatible products that operate on top of existing platforms seeking to gain market share by enhancing functionality and expanding consumer choice. Microsoft fears these products and seeks to destroy them, not compete against them, precisely because they represent uncontrolled compatibility, rampant interoperability and, over the long-term, potential alternatives to the Windows operating system.

That is why we concluded over three years ago that this case is not about new high tech industries in which you have to live with a monopoly, it is about old dirty business practices that drive up prices, deny consumers choice and slow innovation by allowing the monopolist to control the pace of product development. If a monopoly were really the natural state of affairs in this market, then Microsoft would not have had to engage in so many unnatural acts to preserve it.

More importantly, we concluded that consumers need not fear real competition in the software industry. We can expect a competitive market to be far more efficient and consumer friendly than the Microsoft monopoly. There are a variety of very real consumer costs associated with the Windows operating system monopoly - from product complexity and PC homogeneity to viruses, privacy threats and an endless cycle of costly upgrades - even apart from the substantial overcharges Microsoft has for years imposed on consumers. There is every reason to believe that consumers would receive better products at lower prices if the anticompetitive practices were eliminated. The ability of developers to create products that are compatible, but driven out of the market by Microsoft's anticompetitive tactics, undermines the claim and lays to rest any fears that competition will cause computing to become more difficult or confusing.

An Effective Remedy is Fully Supported and is Required by the Trial Record

The claim by Microsoft and others that the court record will not support a strong remedy is simply wrong. The Court of Appeals not only reaffirmed our belief in real competition, but it pointed the way to competition by using the strongest terms possible to describe what the remedy must do.

The Supreme Court has explained that a remedies decree in an antitrust case must seek to 'unfetter a market from anticompetitive conduct,' Ford Motor Co., 405 U.S. at 577, to 'terminate the illegal monopoly, deny to the defendant the fruits of its statutory violation, and ensure that there remain no practices likely to result in monopolization in the future,' United States v. United Shoe Mach. Corp., 391 U.S. 244, 250 (1968); see also United States v. Grinnell Corp., 384 U.S. 563, 577 (1966).

A unanimous en banc Court of Appeals upheld the charge of monopolization. It explicitly affirmed Microsoft's liability under Section 2 of the Sherman Act, the vast bulk of the specific conduct challenged by the Department of Justice, and nearly every one of the trial court's hundreds of factual findings. As a result, it held a broad array of anticompetitive Microsoft practices to be illegal, constituting a massive violation of the antitrust law. Table 1 identifies those anticompetitive practices that were directly linked to the violations of law.

Soon after the district court's Conclusions of Law were released, we considered possible

remedies. While we preferred a break up, we also identified a series of conduct remedies that would address the anticompetitive problems. The litigating states have risen to the task admirably. As described in Table 2, the litigating states' remedial proposals link each relief measure directly to a finding of fact and a conclusion of law. They included virtually every measure we deemed necessary.

An Effective Remedy is Well Worth Fighting For

Based on the record of the lower court and the ruling of the D.C. Circuit, this case demands a strong remedy. Claims that a weak remedy sooner is better than a strong remedy later, or that the cost of pursuing a strong remedy are too great, are absurd.

Our analysis leads us to conclude that an unfettered software market will produce a flowering of innovations and consumer-friendly products that are well worth waiting for. More importantly, we have estimated that monopoly pricing by Microsoft has cost consumers between $10 and $20 billion. An amicus brief filed with the court put the figure at $25 to $30 billion.

Of equal importance are the non-economic and indirect ways in which Microsoft's anticompetitive practices become burdens on the consumer. The trial record demonstrates, with extensive evidence, repeated instances in which Microsoft's anticompetitive practices have the effect of denying consumers choice, impairing quality, and slowing innovation.

Microsoft forces computer manufacturers to buy one bundle with all of its programs preloaded. It biases the screen location, start sequences and default options making it difficult if not impossible to choose non-Microsoft products. Products tailored to meet individual consumer needs (consumer friendly configurations and small bundles) are unavailable. Because of Microsoft's leveraging of the operating system, superior products are delayed or driven from the marketplace. Existing libraries of content (documents, movies, audio files) are rendered obsolete. Resources are denied, investment in competing products is chilled, and technology is slowed. Valuable products never get to market because of the barriers erected by Microsoft and eventually competing products disappear from the market.

Past overcharges cannot be recovered in the Federal case nor can innovations that were slowed or stopped, but future abuse must be prevented. We are convinced that an effective remedy will trigger an explosion of innovation and economic activity from thousands of companies that have been shackled by the fear of retribution or expropriation by Microsoft. Unleashing these companies to innovate in a vigorously competitive market is the best way to stimulate economic activity and to put this industry on a solid long-term growth path. Settling for a short term fix, in the name of economic stimulus, that fails to address the underlying problem will create a chronic condition of underperformance, leaving the industry far short of achieving it true potential.

We are also certain that the Microsoft-DOJ settlement will not do the job but make matters worse. Our review of Windows XP, from a competitive point of view, confirms our conclusion from four years ago that "the threat to the public has grown with each subsequent conquest of a market."

There is no doubt that effective law enforcement is definitely in the consumer's best interest and that the Microsoft-Department of Justice settlement is not. Based on the legal record, the weakness of the remedy, and the stakes for consumers, the court must find that the proposed Microsoft-Department of Justice settlement is not in the public interest. The court should certainly not reach any conclusion about the remedy that would best serve the public before the litigating states' remedial proposal has been fully vetted through the trial process.

Anticompetitive Practices Must Be Rooted Out At All Stages Of the Software Value Chain - Creation, Distribution And Use

To describe what must be done in practical terms, I like to use the business school concept of the value chain. To unfetter the market from anticompetitive conduct, terminate the illegal monopoly and ensure that there remain no practices likely to result in monopolization in the future, the remedy must address the creation, distribution and use of software. In order for new software to have a fair chance to compete the remedy must

· create an environment in which independent software vendors and alternative platform developers are free to develop products that compete with Windows and with other Microsoft products,

· free computer manufacturers to install these products without fear of retaliation, and

· enable consumers to choose among them with equal ease as with Microsoft products.

The Microsoft-Department of Justice settlement is an abysmal failure at all three levels. Under the proposed Microsoft-Department of Justice settlement, Microsoft will be undeterred from continuing its anticompetitive business practices.

Independent software vendors and competing platform developers will get little relief from Microsoft's continual practice of hiding and manipulating interfaces. Microsoft has the unreviewable ability under the proposed settlement to define Windows itself, and, therefore to control whether and how independent software developers will be able to write programs that run on top of the operating system. The definitions of software products and functionalities and the decisions about how to configure applications programming interfaces are left in the hands of Microsoft to such an extent that it will be encouraged to embed the critical technical specifications deeply into the operating system and thereby prevent independent software developers from seeing them. To the extent that Microsoft would actually be required to reveal anything, it would be so late in the product development cycle that independent software developers would never be able to catch up to Microsoft's favored developers. Furthermore, the Court of Appeals recognized that the Microsoft monopoly is protected by a large barrier to entry, because many crucial applications are available only for Windows. The proposed settlement does nothing to undermine this "applications barrier to entry," for instance by requiring the porting of Microsoft Office to other PC platforms. Thus, the DOJ proposal won't restore competition; it all but legalizes Microsoft's previous anticompetitive strategy and, in reality, institutionalizes the Windows monopoly

Computer manufacturers will not be shielded from retaliation by Microsoft. The restriction on retaliation against computer manufacturers leaves so many loopholes that any OEM who actually went against Microsoft's wishes would be committing commercial suicide. Microsoft is given free reign to favor some, at the expense of others through incentives and joint ventures. It is free to withhold access to its other two monopolies (the browser and Office) as an inducement to favor the applications that Microsoft is targeting at new markets, which invites a repeat of the fiasco in the browser wars. Retaliation in any way, shape, fit, form, or fashion should be illegal. The prohibition on retaliation must specifically identify price and non-price discrimination and apply to all monopoly products.

Consumer sovereignty is not restored by the settlement. Because the settlement does not require

removal of applications, only the hiding of icons, Microsoft preserves the ability to neuter consumer choice. The boot screen and desktop remain entirely tilted against competition. Microsoft still is allowed to be the pervasive default option and allowed to harass consumers who switch to non-Microsoft applications and still gets to sweep those applications off the desktop, forcing consumers to choose them over and over.

Given Microsoft's Past Behavior, Enforcement Must Be Swift and Punishment for non-Compliance Must be Substantial

After the court identifies remedies that can address these problems, it must enforce them swiftly and aggressively. Microsoft has shown through a decade of investigations, consent decrees and litigation that it will not be easily deterred from defending and extending its monopoly. It behaves as though it believes its expert witness and has the right to do whatever it wants to kills off its competition. Every one of the illegal acts that led to the District Court findings and the unanimous appeals court ruling of liability took place after Microsoft signed the last consent decree.

With three monopolies to use against its potential competitors (the Windows operating system, the Internet Explorer browser, and Office in desktop applications), enforcement must be swift and sure, or competition will never have a chance to take root. The proposed settlement offers virtually nothing in this regard. The technical committee that is set up to (maybe) hear complaints can be easily tied up in knots by Microsoft because of the vague language of the settlement. If Microsoft violates the settlement nothing happens to the company, except that it must "endure" the annoyance of putting up with this weak settlement for a couple more years.

The Future of Effective Antitrust Demands A Strong Remedy

I pointed out several months before the Court of Appeals ruled that we fully support a rule of reason for tying in the software industry, as long as the rules are reasonable. The Microsoft-Department of Justice settlement is not worthy of the thoughtful ruling of the Court of Appeals. Indeed, this committee should be deeply troubled by the proposed settlement. By proposing such a weak remedy for such a strong case and well-articulated ruling, it could do permanent damage to the antitrust laws. Why bother to bring a case if law enforcement is going to drop the ball at the last moment?

I greatly appreciate the opportunity to appear before you today. I look forward to coming back after the trial court hands down a serious remedy based on the proposal laid before it by the litigating Attorneys General. I am confident that the court will reject the Microsoft-Department of Justice settlement because it does not do justice to competition, consumers or the clear and insightful conclusions of the Court of Appeals Court - in short it is not in the public interest.

TABLE 1

ABUSIVE BUSINESS PRACTICES IDENTIFIED IN THE FINDINGS OF FACT AND CONCLUSIONS OF LAW UPHELD BY THE APPEALS COURT

ANTICOMPETITIVE CONDITIONS/PRACTICES	FINDINGS OF FACT (Paragraph No.)	CONCLUSIONS OF LAW (Page No.)	LITIGATING STATES' REMEDIAL PROPOSALS (Paragraph No.)
Monopoly Position	18-21,33-35	4,5	
Barriers To Entry			

TABLE 2
CONDUCT REMEDIES FOR PRACTICES THAT VIOLATE LAW

PRACTICE REMEDY LITIGATING STATES'
REMEDIAL PROPOSALS
UNDER THE TABLE Liability Under Law 1, 11, 15, 20
APPLICATIONS BARRIER Port office to competing OS 14
TO ENTRY Remedy applies to 1, 3
"Windows Family"
Applications
Distribution channels

ISVs
CONTRACT
Exclusive/Preferential Ban exclusives 6
Prohibition on discrimination 2, 7
Price
Functionality
Support
Testing
Marketing
Other "inducements"
Ban NDAs 15
Indirect Sales/Hidden Price Transparent prices 2
QUALITY IMPAIRMENT
Resource Denial Prohibition on discrimination 2
Incompatibility/Integration Access to source code 4, 5
Disabling API disclosure 4, 5
Neutral warning message
Desupporting Support older OS 3, 16
Provide training 4
BUNDLING
OS Tying Spin off browser 12, 13
Imitation Separate sale requirement 1
PRICE ABUSE
Discrimination/Secret Price Transparent prices 1, 2
Cross-subsidy/Predation Transparent prices, separate sale 1, 2
Upgrade Policy Restrict old OS price increase
Backward compatibility
Excessive functionality Support older OS versions 3
Backward compatibility 3
CONSUMER HARM
Impairing Non-Microsoft API disclosure, 4
Thwarting Responses Boot screen, start sequence 2, 10
freedom
Forcing Inefficient Acquisition Ban exclusives 6
Prohibition on discrimination 8, 9