Testimony of

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Introduction

Mr. Chairman, Senator Hatch, and other members of the Committee, thank you for the chance to speak on this critical topic. The Proposed Final Judgment is woefully inadequate. It is a backward-looking document that fails to prevent Microsoft from abusing its monopoly position to increase costs and stifle new technologies -- not just for personal computers, but also for new technologies like digital televisions, cellular phones, game consoles, and personal digital assistants.

Microsoft has already announced its intent to expand its dominance beyond PC operating systems, servers, and applications to new devices and even personal information via its "eHome" and "Passport" initiatives. According to comments made by Microsoft President Steve Ballmer just last week, Microsoft is pursuing a "broader concept" for its client devices like the xBox and set-top box software. In his words, "[T]here's a bigger play we hope to get over time" by annexing all of these devices into the Microsoft empire. Microsoft's own demos and white papers show that it plans to establish its operating system as the software that would collect information streaming into the home and distribute it to each new device.

Microsoft has used and will continue to use its monopoly over desktop operating systems to deny competition in each new computing market as it evolves: first desktop applications, then internet browsers and servers, and now alternative devices ranging from smart phones to television set-top boxes.

By dealing only with a narrow category of Windows products, and failing even there to impose any significant restrictions, the Proposed Final Judgment fails to check Microsoft's demonstrated willingness to exploit its power over the operating system in order to dominate other market segments.

Background

By way of personal background, I am the CEO of Liberate Technologies, a company making middleware software that enables interactive and enhanced television. Before joining Liberate, I was chairman and CEO of Sybase, then one of the world's ten largest independent software companies, founder and CEO of Powersoft, an enterprise software company, and chairman of both the American Electronics Association and the Massachusetts Software Council. I am also currently a director of CNET, Handspring, and TechNet.

Throughout my career, I have both partnered with and competed against Microsoft. I have been impressed by the power of its dominant platforms, but also concerned about the abuses that resulted from that dominance. I have seen Microsoft consistently use its power to block

competition in new markets through at least three types of misconduct that the PFJ does nothing to deter: (1) Preventing original equipment manufacturers from supporting new technologies; (2) Tying commercial restrictions to investments; and (3) Blocking non-Windows-based industry standards.

(1) Preventing Original Equipment Manufacturers from Supporting New Technologies

My current company, Liberate, was originally Network Computer Incorporated, promoting computers and software that would operate via a network to significantly reduce the cost of computing. This model, like the Netscape browser, threatened the dominance of the Windows platform. But because the manufacturers of many new devices also manufacture desktop PCs, Microsoft was able to exploit its desktop OEM relationships to discourage competition. For example, Network Computer had an active relationship with Digital Equipment Corporation to develop a device running our software. Microsoft and Mr. Gates simply threatened the CEO of DEC that they would port Microsoft's NT operating system to DEC hardware only if DEC stopped development of a network computer, an offer DEC couldn't refuse. It's clear, and the courts have reaffirmed, that a monopoly simply cannot engage in this kind of conduct.

Such tactics forced us to exit this business, and the price of PC operating systems and applications remains as high as ever when all other computing costs have plummeted.

The Proposed Final Judgment focuses only on Windows products for desktop PCs and includes broad and ambiguous exceptions to its limits on retaliation. These loopholes would apparently let Microsoft get away with the kind of misconduct it perpetrated against Network Computer. The result would be to block or delay the development of new competitive devices and technologies. The remedy proposed by the non-settling states would, on the other hand, prevent Microsoft from engaging in this type of retaliation and unfairly extending its desktop monopoly to a wider array of software and devices.

(2) Tying Commercial Restrictions to Investments

Second, in investing the considerable proceeds of its desktop monopoly in new markets, Microsoft has extracted, or attempted to extract, exclusive or near-exclusive commercial distribution arrangements to block out competitors. In the interactive television industry alone, Microsoft has invested billions of dollars with leading cable and satellite networks. As recently as this week, Microsoft has again aggressively pursued this strategy with leading operators both here and in Europe. The strings attached to these investments often require networks to buy Microsoft's middleware, making it difficult or impossible for them to buy competitive products.

Microsoft's money is a heavy thumb on the scale, biasing choices of future technologies in its favor. As new-generation computers and small consumer devices often rely on networks for their interconnections, these investments in network companies set the stage for continued dominance of these new platforms as they evolve.

Again, the PFJ fails to even address the issue of such restrictive dealings outside the scope of desktop products. In contrast, the remedies filed last week by the non-settling states, while not

barring new investments, would at least require that Microsoft give 60 days notice to permit a review of anti-competitive effects.

(3) Refusing to Support Non-Windows-Based Industry Standards

Microsoft has also abused its monopoly position by blocking industry-wide standards essential to the evolution of a new generation of network-based devices. In our industry, Microsoft has undermined Java as a standard for digital television, lobbying heavily to prevent U.S. and European standards bodies from standardizing on Java. As you know, Java lets developers "write once, run anywhere", permitting content to run across a wide variety of platforms rather than just on Microsoft's proprietary code.

As a second prong of this strategy to block, co-opt, or "embrace and extend" standards, Microsoft has refused to join with other technology companies in pooling its intellectual property, instead indicating that it will sue to block the implementation of standards wherever it can find a violation of one of its patents. Microsoft certainly has the right not to support a standard. However, they are exploiting their dominance in the PC market to distort standards elsewhere.

Third, by removing the Java Virtual Machine from its PC operating systems while the JVM is common elsewhere, Microsoft discourages developers from creating new "write-once, run-anywhere" content, undermines support for uniform standards, and drives developers to write to proprietary Microsoft platforms.

It is clear that Microsoft's foot-dragging and affirmative interference has slowed the deployment of digital television in the United States. Cable companies and television manufacturers both say that a gating issue has been the lack of a definitive standard for digital television, a standard that Microsoft's tactics have delayed and undermined. Microsoft's approach stands in direct opposition to the clearly expressed will of Congress and the interests of all Americans interested in richer and more varied television programming.

Yet again, the PFJ would do nothing to prevent these abuses. The remedies recently filed by the non-settling states -- by making available Microsoft APIs and certain types of code, opening access to the personal identification data captured by Microsoft Passport, and requiring the distribution of the Java Virtual Machine -- would promote technology interoperability and the development of universally beneficial standards while maintaining relatively open alternatives to Microsoft software and services.

Conclusion

The PFJ is a disappointment. Disappointing because it is weaker than the facts and the law of the case support, and disappointing because it will not limit Microsoft's plans to dominate new markets in the same way it has dominated operating systems, applications, and servers in the past.

I welcome this hearing, and hope that this Committee will continue to exercise vigorous oversight of this case to assure that the final outcome is in the best interests of American consumers.