

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

STATE OF NEW YORK *ex rel.*  
Attorney General ANDREW M. CUOMO, *et al.*,

Plaintiffs,

v.

MICROSOFT CORPORATION,

Defendant.

Civil Action No. 98-1233 (CKK)

**MEMORANDUM OF THE MOVING PLAINTIFF STATES IN REPLY TO THE  
COURT’S JANUARY 8, 2008 ORDER AND IN FURTHER SUPPORT OF  
THEIR MOTIONS TO EXTEND THE FINAL JUDGMENT**

The two groups of moving Plaintiff States (the “Moving States”) submit this joint memorandum pursuant to the Court’s January 8, 2008 Order. As we demonstrate below, Microsoft’s cramped reading of Section III.E would impair the Final Judgment’s ability to promote competition.

**I**

**SECTION III.E LIMITS MICROSOFT’S DISCLOSURE OBLIGATIONS,  
NOT HOW LICENSEES MAY DEVELOP THEIR OWN PRODUCTS**

As the Court noted in its Minute Order, § III.E of the Final Judgment calls for Microsoft to disclose Communications Protocols (“CPs”) “used to interoperate, or communicate, natively (i.e., without the addition of software code to the client operating system) with a Microsoft server operating system product.” This limitation on the CPs covered by § III.E defines the scope of Microsoft’s own affirmative obligation under the Final Judgment. The element of “native communication” refers to what Microsoft includes in Windows – and not, of course, to how an

ISV may develop a product. Quite simply, Microsoft is not required to disclose protocols for software that Microsoft adds to a Windows client, such as the protocols that are added when a user installs Microsoft's Office suite. *See Massachusetts v. Microsoft Corp.*, 373 F.3d 1199, 1224 (D.C. Cir. 2004) (Microsoft does not have to disclose protocols for Microsoft Exchange). *See id.* at 1223 (bearing in mind the liability facts proven, "Microsoft need not disclose communications protocols used to interoperate non-natively"); U.S. Resp. to Comments ¶ 337 at 168 (explaining that "natively" would not include new Microsoft protocols that "would have to be distributed with other products or reach the desktop in some fashion other than by inclusion in a Windows Operating System Product").

But this part of § III.E does not entitle Microsoft to hobble the products that MCPP licensees may develop, or to straitjacket MCPP licensees by restricting them to delivering features the way that Microsoft does. Indeed, responding to the argument that the "native communication" element unduly limited § III.E's ability to promote interoperability, the Court of Appeals expressed concern that the provision not impair *Microsoft's* ability to innovate: "when the district court undertakes to block the untraveled roads by adopting a forward-looking provision, its discretion is necessarily less broad because, without liability findings to mark the way, it is in danger of imposing restrictions that prevent the defendant from forging new routes to serve consumers." *Massachusetts v. Microsoft Corp.*, 373 F.3d at 1223-24. Microsoft, however, would turn this consideration on its head by attempting to use § III.E's language to prevent MCPP licensees from forging new routes to serve consumers, including developing products with both server-side and client-side elements that require the full array of § III protections.

## II

### THE DEVELOPMENT OF CLIENT-SIDE PRODUCTS IS WITHIN THE SCOPE OF SECTION III.E

Section III.E does not prohibit an MCPP licensee from itself adding client-side software as part of its product, provided that the Technical Documentation (“TD”) is not used other than “for the sole purpose of interoperating or communicating with a Windows Operating System Product . . . .” Final Judgment, § III.E. The Court clearly understood this point in its Remedies Opinion:

By using communications protocols supported in Windows, *or other communications protocols that developers can add to Windows, via the installation of software*, information can be exchanged between Windows-based PCs and computers running other operating systems.

*New York v. Microsoft Corp.*, 224 F.Supp.2d 76, 233-34 (D.D.C. 2002) (emphasis added; citing Gates ¶ 102). An MCPP licensee simply is not prohibited from *independently* developing a client-side product that interoperates from the client with a non-Microsoft server – or, indeed, with a Microsoft server as well.<sup>1</sup>

Microsoft’s assertion that “the development of client-side products [is] well beyond the scope of Section III.E” ignores the difference between a client-side *product* and a client *implementation* developed under the MCPP. *See* Minute Order, quoting Microsoft’s Dec. 28 Opp. Mem. at 6. The prohibition against a client implementation of the CPs assures that a competing operating system developer cannot use an MCPP license to create a Windows clone.

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<sup>1</sup> Moreover, in the EC proceedings, Microsoft has agreed to enlarge the scope and use of the equivalent WSPP technical documentation. On December 20, 2007, Microsoft entered into a WSPP license with the Protocol Freedom Information Foundation, which permits Windows protocols to be used in open source implementations. Very briefly, Microsoft is offering a form of WSPP license that does not restrict use beyond prohibiting disclosure of the TD itself. *See* <http://samba.org/samba/PFIF/>, accessed January 8, 2008. Insofar as the MCPP will be harmonized with WSPP, that should ease the ISV product development process in the server/client space relevant here.

The restriction, however, has nothing to do with an MCPP licensee adding software to the Windows desktop itself. A licensee does not need to create a Windows client implementation of the CPs because Microsoft has already put them into Windows.<sup>2</sup>

Moreover, there is a clear interdependency between § III.E. and the remaining provisions of § III: a licensee's client software must use documented Windows APIs in order to facilitate communication with a licensee's server. Thus, licensees depend on § III.D's API disclosure provision as well as on § III.E's protocol disclosure. In fact, MCPP licensees already ship software for the Windows client. Laplink, for example, sells client-side products that use the Windows CPs by calling Windows APIs available to all ISVs, including those who take an MCPP license. Nothing in the Final Judgment prevents licensees from writing both server and client software, as they already do today. The Moving States' discussion, in our December 18<sup>th</sup> brief, of possible scenarios that involve developing a server product and corresponding client-side software, illustrates the complementary nature of § III's provisions. This interrelationship is what matters for purposes of these motions.

Microsoft further contends that “[o]nce software is added to the client, the server and the application can communicate directly without the need for the proprietary protocols supported in the Windows client.” Minute Order, dated January 8, 2008, quoting Microsoft's December 28 Opp. Mem. at 5, n. 4. But Microsoft's argument skirts the point. The decision concerning how best to achieve the ISV's desired product functions and features need not be an “either/or” proposition – Microsoft's proprietary protocols or others entirely – simply because that is how

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<sup>2</sup> In a recently issued white paper, Microsoft states that “there is no need for a vendor to license or modify Microsoft protocols as they are already included within the Microsoft products.” See “Microsoft's Intellectual Property Licensing Program Boosts Customer Choice,” *available at* [http://i.cmpnet.com/ddj/ddj/images/resources/MPP\\_IP\\_WhitePaper-Dec07.pdf](http://i.cmpnet.com/ddj/ddj/images/resources/MPP_IP_WhitePaper-Dec07.pdf), at 7.

Microsoft chooses to define product development. An ISV will evaluate whether the opportunity to develop the server-side implementation under the MCPP, together with a client-side application, offers sufficient potential value to its product that program participation is justified.

### III

#### **SECTION III.E HAS THE POTENTIAL TO PRODUCE DIFFERENTIATED, COMPETITIVE PRODUCTS THAT REQUIRE THE FULL PROTECTION OF SECTION III ONCE MICROSOFT PRODUCES ADEQUATE TECHNICAL DOCUMENTATION**

We demonstrated in our December 18th brief that industry participants may offer products using a server-client model, which requires not only server interoperability, but also the introduction of software to the client. Developing a product in this way allows an MCPP licensee to distinguish its offering by including functionality or features that go beyond those defined solely by Microsoft through its CPs. Put another way, the licensee's product could offer more or different features than those available through a purely server-side MCPP implementation alone. This is the very essence of innovation – which the Final Judgment was intended to foster, not deter.

Microsoft does not deny that the server-client scenario is a viable product model. Nor can it dispute that this model is capable of stimulating industry competition. Companies such as Google, Yahoo and Apple already offer attractive products today utilizing this approach, albeit without calling on Microsoft's proprietary protocols. The on-going migration of services to the server level, which Microsoft similarly does not dispute, affords continuing opportunities for industry players to develop attractive products that exploit server-client interoperability. Indeed, as we have noted, Craig Mundie, Microsoft's chief research and strategy officer, has stated that:

[W]hen people today earlier also talked about is the platform evolving, is the old platform model really going away, I would argue that the answer is no, the one we knew is not really going away . . . .

[W]hat is happening is that there will be new ways of using the network to make it easier to buy, deliver, install, and maintain software . . . .

[W]hat we're looking at is essentially a persistent hybrid model.

Craig Mundie, *New Software Industry Conference*, available at <http://www.microsoft.com/Presspass/exec/craig/04-30-2007SiliconValley.msp> (Apr. 30, 2007).

For example, an ISV could develop a product or suite of products that builds upon the Microsoft proprietary protocols. The ISV could use the Microsoft protocols as they are, but provide what it believes is a more efficient or enhanced server-side implementation by adding non-Microsoft protocols, coupled with a differentiated client component. Microsoft is incorrect in asserting that there is no “potential licensee” for which a server-client model could have appeal. Microsoft has itself identified such a company to us that, according to Microsoft, is expected to take a license soon. *See* Moving States Dec. 18 Mem. at 4, n. 3 (non-public, unredacted version).

The Final Judgment seeks to encourage innovation that can unleash the competitive forces necessary to challenge the Windows desktop monopoly. Toward that end, MCPP participants may use their licenses not only to interoperate using Microsoft's trodden path, but also more broadly to create opportunities going beyond the path Microsoft has defined by blending non-Microsoft approaches with those that § III.E enables. This vision of the Final Judgment maximizes the competitive opportunities to innovate, and promotes the objective of providing choice to users. Thus, the other provisions of § III.E that protect opportunities on the client desktop and resort to the OEM distribution channel need to be preserved while the MCPP continues to develop. *See New York v. Microsoft Corp.*, 224 F.Supp.2d at 129-30 (because server operating systems provide a platform that competes with Windows “to host applications

for the PC . . . the Court’s remedy affords vendors of server operating systems some protection from retaliatory action by Microsoft,” and “provides similar protection against Microsoft retaliation for software vendors who write software which runs ‘on’ server operating systems ‘for’ use on a PC”).

#### IV

#### CONCLUSION

In its Tunney Act ruling, this Court wrote that, in the absence of the Final Judgment’s forward-looking provisions – § III.D (covering API disclosure) and § III.E – “it is quite possible that the core of the decree would prove prematurely obsolete.” *United States v. Microsoft Corp.*, 231 F. Supp. 2d 144, 192 (D.D.C. 2002). This is the very risk now faced.

To date, the software produced by § III.E licenses has largely been complementary to Windows, rather than the middleware-like products that § III.E was intended to encourage. Microsoft’s protracted inability to provide complete and accurate TDs has deprived § III.E of a fair test to demonstrate what it can accomplish. Accordingly, the expected forward-looking impact envisioned for § III.E has not materialized. At the same time, the five-year clock for the remaining parts of § III has ticked away. To permit § III’s provisions protecting access to the desktop and the OEM distribution channel to lapse before MCPP licensees have had the opportunity to develop innovative products with the benefits of complete and accurate TD would be tantamount to rendering these parts of the Final Judgment “prematurely obsolete.”

The Moving States’ motions should be granted.

Dated: January 11, 2008

Respectfully submitted,

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CONNECTICUT, IOWA, KANSAS,  
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AND THE DISTRICT OF COLUMBIA

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