Lessons for International Comity and the Extraterritorial Application of the Antitrust Laws From a Decade of Multi-Jurisdictional Proceedings Involving Microsoft's Windows Operating System Technology

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Introduction

International norms of comity are an important means of mitigating the problems that arise from the uncoordinated and unrestrained extraterritorial application of laws. This is especially true in the field of international antitrust enforcement. States often have good intentions, but the practical implementation of comity has often been lacking. For example, according to a 1998 European Commission report, the EU-US Positive Comity Agreement "create[s] a presumption that when anticompetitive activities occur in the whole or in a substantial part of the territory of one of the parties and affect the interests of the other party, the latter will normally defer or suspend its enforcement activities in favour of the former. This is expected to happen particularly when these anticompetitive activities do not have a direct, substantial and reasonably foreseeable impact on consumers in the territory of the party deferring or suspending its activities."[2]

The Microsoft case in the US and in Europe provides an example where the EU and US authorities have not reached agreement on how to harmonize their divergent approaches and remedies in respect of largely similar issues of law and fact in the application of their antitrust laws on unilateral conduct. As a result of increased globalization, antitrust decisions and remedies against multinational companies in global industries increasingly are not confined to the State or region in which they are taken. This is especially true in the information technology sector. The IT sector is an important proving ground for the principles of international law since computer hardware and especially software are the quintessentially global products, sold in global markets to customers who often operate around the world and who benefit from consistent technological and legal standards.

In particular, two salient features of the computer industry have drawn regulatory scrutiny with inconsistent results in the Microsoft case: (1) improvement of products through the integration of new features and the improvement of existing features, and (2) the ability of computer software and networks to interoperate by exchanging data and using it to perform tasks.

The competition law theories used to analyze these two issues have been tying/bundling and refusal to supply/essential facilities. As Mr. Pate (then Assistant Attorney General for Antitrust in the US Department of Justice) pointed out,

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[2] Commission Report to the Council and the European Parliament on the Application of the Agreement between the European Communities and the Government of the United States of America regarding the Application of their Competition Laws OJ L173/28 (13 September 1999), paragraph 3 (internal quotations omitted). Article IV of the Agreement provides: "Each Party shall consider important interests of the other Party in decisions as to whether or not to initiate an investigation or proceeding, the scope of an investigation or proceeding, the nature of the remedies or penalties sought, and in other ways, as appropriate." 1991 U.S.-EC Comity Agreement at art. IV.

"unilateral competitive conduct [is] the most ambiguous and controversial area of antitrust enforcement."[3] This is demonstrated by evolution of the Microsoft cases in the US and EU as well as the differences in assessment by the antitrust authorities at different stages of the proceedings and by differences between the appellate courts and the trial courts in the US.

We examine those differences in detail below but they can be briefly summarized: The European Commission issued three different statements of objections against Microsoft between 2000 and the March 2004 Decision in which it changed its objections (dropping some and adding others) and changed legal and factual theories and market definitions in response to Microsoft's submissions. In the US there were great differences regarding legal theories and proposed remedies at various points of the proceedings among the federal authorities and the nearly two dozen states that got involved. The US court of appeals reversed much of the trial court's decision and "drastically altered the District Court's conclusions on liability." The US proceedings concluded in 2002 after lengthy and complex proceedings involving multiple appellate and trial court decisions and a settlement between Microsoft and the federal government and about half of the State governments involved. The European Commission came very close to a negotiated settlement with Microsoft in early 2004 that would have been far more in synch with the US remedies than those imposed after the then-Commissioner responsible for Competition, Mario Monti,[4] pulled back from agreeing to the settlement, and the Commission issued its March 2004 decision. Then-Commissioner Monti noted that the European Commission simply disagreed with the US decisions and remedies regarding Microsoft and preferred its own approach.[5] Consistent with those public statements, the Commission's March 2004 Decision did not accommodate or coordinate with opposing US decisions on the same issues. Others would argue that the US resolution is worthy of some deference precisely because the US authorities and courts carefully considered all the issues and arrived at coordinated resolutions of the issues after exhaustive judicial scrutiny.[6]

The European courts are still in the early stages of grappling with the issues presented by the European Commission decisions. A major decision by the Court of First Instance is expected later in 2007. Thus, the current trans-Atlantic divergence in outcomes could still be harmonized by judicial decisions.

In order to shed some light on this disagreement, this section will summarize the complex histories of the US and EU proceedings and describe how the divergent outcomes and remedies arose.[7]

Origin and Focus of Microsoft's Global Antitrust Proceedings Beginning in the 1990s

By the late 1990s, antitrust agencies in the US began investigating Microsoft's software design and licensing at the urging of a variety of IT industry competitors such as Sun Microsystems, Real Networks, Novell, Netscape, and IBM. These

[3] Statement from R. Hewitt Pate, Assistant Attorney General for Antitrust, Department of Justice on the Commission's Microsoft decision, http://www.usdoj.gov/opa/pr/2004/March/04_at_184.htm.
[4] Microsoft Faces Antitrust Ruling After Negotiations with EU Fail, Paul Meller and John Markoff, The New York Times http://www-tech.mit.edu/V124/N14/14wn_long4.14w.html
[5] http://ec.europa.eu/comm/competition/speeches/text/sp2004_005_en.pdf

[7] The parallel proceedings in Korea will only be covered briefly where relevant.

complaints spawned protracted administrative and judicial proceedings in the US which were followed by similar proceedings in Europe and eventually in South Korea focusing on two main issues: (1) to what extent Microsoft can add new features or improve existing features in its Windows operating systems; and (2) what intellectual property must Microsoft license to competitors to improve their ability to interoperate with or create products that compete with Windows PC and server operating systems. The regulatory and judicial decisions on these questions in the US, EU and Korea have been inconsistent. This raises a number of issues not only for software design and licensing, but also for the extraterritorial application of antitrust laws and comity among jurisdictions attempting to simultaneously regulate global products in global markets.

The technology and products in question in the Microsoft cases are complex and innovative. Some of these products like the Windows PC operating systems and digital media software are part of people's daily lives all over the world. Other products like the Windows server operating systems and the communications protocols used by servers to communicate seem very remote from most people's daily lives although their computers rely on them constantly when connected to corporate networks or the Internet. The legal issues at stake and the procedural history are equally complex in the two main jurisdictions that we are considering in this chapter. The European Commission addressed these issues without any parallel or conflicting proceedings in the EU Member States, but the Commission itself changed its charges and legal theories significantly in response to Microsoft's responses to the three statements of objection in 2000, 2001 and 2003 and again in the 2004 Decision.

The US proceedings were also complicated and involved the risk of conflicting outcomes when a group of States led by California rejected the settlement negotiated by the federal government and a group of States led by New York. In the end, the US courts were able to consolidate and coordinate the different cases brought by the federal government and nearly two dozen States that had different priorities and agendas. Federal or quasi-federal legal systems have that advantage. Things are more difficult on the international stage between the US and EU which, despite having legal traditions with common origins, sometimes take a different view and a different approach to similar factual circumstances. The Microsoft litigation is an example of such a situation and its consequences.

I. The Litigation and Settlement of Microsoft's US Antitrust Proceedings

At the insistence of several US competitors who complained about Microsoft's software design and licensing of Windows, in May 1998, the US Department of Justice, twenty States and the District of Columbia filed an antitrust lawsuit against Microsoft, alleging violations of Sections 1 and 2 of the Sherman Antitrust Act and the analogous antitrust laws of the various States. Following a trial on the merits, appellate review reversing most of the first trial court's determinations, and a second trial as to the appropriate remedy, the US District Court for the District of Columbia handed down its final judgments against Microsoft on 1 November 2002. At the end of lengthy proceedings including two trials which lasted a number of months and two appeals to the federal courts in Washington, DC, the cases were resolved in a consistent manner that has been followed by regular judicial oversight of the settlements but no further enforcement action by the US authorities. The US courts found that there were significant consumer and software developer benefits that flowed from the integration and improvement of features in the Windows operating

system. Thus, the US courts ruled that the approach advocated by the federal government and the States led by New York, which did not require any removal of code from Windows, were in the public interest and that the "unbundling" remedies demanded by the States led by California would be detrimental to independent software vendors and consumers.

The US litigation raised a broad range of issues relating to the nature of competition in the software industry, Microsoft's role in the industry and specific practices that were alleged to be anticompetitive. Many of the issues were complex both factually and legally, particularly where questions of product design or interoperability among software products were involved. The complaints most prominently related to integration of web browsing features in Windows 98 that competed in certain respects with Netscape's market dominant Internet browser 'Netscape Navigator'. After a lengthy trial the District Court Judge, Thomas P. Jackson, found that Microsoft was liable under the Sherman antitrust statute for the tying of Web browsing software to Windows, the attempted monopolization of a putative market for Web browsing software, and the illegal maintenance of the legally acquired monopoly position in the market for PC operating systems.

After extensive appellate proceedings the US Court of Appeals for the District of Columbia Circuit issued lengthy rulings carefully analyzing the competition law issues. Seven judges of the *en banc* panel of the Court of Appeals reversed most of the District Court's conclusions and removed Judge Jackson from the case on grounds of misconduct. It affirmed, in part, Judge Jackson's conclusion that Microsoft unlawfully maintained a monopoly in PC operating system software. The Court of Appeals reversed other aspects of the District Court's judgment, notably the findings that Microsoft had or had attempted to maintain its monopoly, as well as the findings that Microsoft had tied Web browsing software, and thereby (in its words) "drastically altered the District Court's conclusions on liability."[8] It then remanded the case for further proceedings to the District Court where it was assigned to Judge Colleen Kollar-Kotelly who has been supervising compliance with the Final Judgments in the case up to the present day. Notably, following the first Court of Appeals decision, the plaintiffs elected to abandon the tying claims.

Contrasting Outcomes in the US, Europe and Korea: Two Key Issues

Technological Tying or Product Integration: The resolution of the tying claims regarding Web browsing functionality in Windows is particularly relevant in the international arena since both the European Commission and the Korean Fair Trade Commission (KFTC) brought similar tying claims involving the integration and improvement (or bundling as the EU and KFTC view it) of multimedia functionality in Windows. The findings of abuse for tying in Brussels and Seoul, that are still under appellate review, stand in sharp contrast to the resolution in Washington, DC. The US District Court for the District of Columbia (Judge Jackson) had ruled that Microsoft's design of Windows 98 constituted a *per se* unlawful tie under Section 1 of the Sherman Act without considering whether there are any pro-competitive justifications. However, the Court of Appeals unanimously reversed this point, citing the risk of "deterring welfare-enhancing innovation,"[9], the Court remanded the tying claim to the District Court, instructing it to analyze the Government's tying claim under a "rule of reason" analysis under which pro-competitive justifications for the

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[9] 253 F.3d at 90.

alleged tie would be considered.[10] Neither the US Government nor any of the State Attorneys General attempted to prove the tying claim under the rule of reason standard in a new trial. Instead, Microsoft and the US authorities entered into intensive, court-ordered negotiations mediated by a prominent federal appellate judge. After extensive negotiations the US Department of Justice, New York and eight other States settled the case with Microsoft on the basis of a broad court approved remedial decree that imposed obligations on Microsoft addressing several issues including some that did not arise from the conduct found by the Court of Appeals to violate the antitrust laws.

The remaining ten States led by California were not satisfied with the settlement. Based upon the partial affirmation of Section 2 monopoly maintenance liability, however, these States declined to join the settlement and demanded a variety of remedies related to software integration, resulting in the development of a full factual record on the subject and detailed findings by the District Court. Among other things, the California group of States proposed that Microsoft be required to develop versions of its operating systems from which the software for "middleware" features such as Internet Explorer or Windows Media Player could be removed without degrading the operating system. The California group also proposed that PC manufacturers ("OEMs") should be permitted to remove such software from Windows. These proposed remedies are similar to the unbundling remedy ordered by the European Commission in its March 2004 Decision.

The District Court (Kollar-Kotelly, J.) conducted a lengthy evidentiary trial on the proper scope of remedies, leading to the handing down of the final judgments on 1 November 2002. In a 324-page opinion, including detailed factual findings the District Court rejected the alternative remedies offered by the California group, finding that many of them would likely hinder rather than promote competition and harm the PC industry and consumers. The District Court rejected this "unbinding" relief for two primary reasons. First, the District Court observed that "the appellate court was unable to conclude that the two identified 'products' were, in fact, separate."[11] In this regard, the District Court identified a "dilemma that has existed since the inception of this suit, namely, whether certain functionalities can be identified as exclusive to the 'operating system,' while other functionalities are entirely unrelated to the operating system."[12] The District Court explained that portions of software code within any version of Windows typically provide functions to multiple parts of the operating system so that there is no clear dividing line among components.[13] The District Court concluded that "Plaintiffs have been unsuccessful at distinguishing the code which comprises an 'operating system' from the code which comprises a non-operating system 'Microsoft Middleware Product,' such as a browser."[14] As a result, the District Court found the proposed "unbinding" remedy to be "ambiguous" and so vague as to be "largely unenforceable."[15] The District Court further found that "unbinding" has "not been shown to be a reasonable option, as it would likely require the complete or substantial redesign of Windows."[16]

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[10] *id.* at 74.
[11] *Remedies Ruling,* slip op. at 128, n.64.
[12] *Id.* at 128.
[13] *Id.* at 288-99.
[14] *Id.* at 129.
[15] *Id.* at 293.
[16] *Id.* at 299.

Second, the District Court found that "the record is overwhelmed with significant unrebutted evidence that Plaintiffs' proposal of code removal would harm ISVs and consumers."[17] The District Court stated that removing software from Windows would "hinder, or even destroy, Microsoft's ability to provide a consistent API set," thereby "fragmenting" the Windows platform.[18]

The District Court issued a final judgment setting out the remedies agreed to in the settlement reached by Microsoft the US government and the New York group of states, but modified them in certain areas to impose some greater restrictions on Microsoft. This final judgment has been affirmed on appeal and has been successfully implemented. A three-person Technical Committee assisted by an engineering staff has monitored Microsoft's compliance together with lawyers from the US Department of Justice and the States who make joint status presentations with Microsoft to the District Court several times a year. The settlement has numerous detailed provisions but focuses on two main types of commitments:

- Remedy on Feature Integration and Improvement but No Code Removal: Despite the reversal of the tying claim by the Court of Appeals and the rejection of the unbundling remedy proposed by the California group the settlement allows OEMs and end users to remove access to "middleware" functionality (defined to include features including multimedia and Web browsing) in Windows. Significantly, however, this does not involve removing the relevant code from Windows so that other parts of the operating system and third party application software can still take advantage of the platform functionality offered by these components. This remedy addresses similar issues that the European Commission and the KFTC tried to address with its unbundling remedy except that instead of giving PC manufacturers and consumers the choice of disabling access they ordered Microsoft to produce a separate version of Windows for the European and Korean markets with specified media related software code and its corresponding functionality removed.

- PC-to-Server Interoperability IP Licensing Remedy: Microsoft agreed to draw up specifications for the communications protocols used by the Windows server operating system in order to communicate with Windows PC operating systems, and to license these specifications to third parties on defined terms. Compulsory licensing of communications protocols had not been part of the US government original case nor of Judge Jackson's original decision, but the DOJ and the New York group of States sought this IP licensing remedy in response to competitor requests and Microsoft agreed to it.[19] These competitors were also behind the EU compulsory licensing case and the EU remedy overlaps to a large extent with the US remedy but it is also very different in its application and scope, as will be discussed below.

As we turn to a more detailed analysis of the European legal proceedings it is important to keep these two differences in mind as well as the fact that over the seven

[17] *Id.* at 130.
[18] *Id.* at 300.
[19] William H. Page & Seldon J. Childers, Software Development as an Antitrust Remedy: Lessons from the Failure of the Microsoft Communications Protocol Licensing Program, forthcoming, manuscript on file with the author.

year evolution of the EU case the theories and remedies advanced have varied in terms of their degree of conflict with the US proceedings and remedies.

II. The Administrative and Judicial Proceedings in the European Cases

The European Commission's Investigation:

Sun's complaint: At the very beginning the European case did not conflict with or overlap with the US case. The European litigation against Microsoft was commenced in December 1998 following a complaint filed with the European Commission by Sun Microsystems, Inc. ("Sun"), a major US manufacturer of server computers that also supplies server operating systems for its servers. Sun's complaint was not limited to interoperability information (such as communications protocols or software interfaces exposed by Windows client operating systems), but extended to "integrated technologies" within the Windows server operating systems, which Sun asked that Microsoft be required to "*disclose and make available for use*". The issues that Sun raised in its complaint did not form part of the US government cases against Microsoft. The US cases focused on PC operating systems while the Sun complaint focused on server operating systems and their interactions with PC operating systems.

The First Statement of Objections: Based on Sun's complaint the Commission issued the first of three Statements of Objections ("First SO") in August 2000 in which it alleged that Microsoft had abused its dominant position in PC operating systems by depriving other server operating system vendors of the Microsoft technology they needed to enable their products to interoperate with those PC operating systems.[20] Microsoft responded to the First SO in November 2000 and provided evidence from experts and numerous major customers around Europe that there was no lack of interoperability between Windows PC operating systems and server operating systems offered by competitors.

The Second Statement of Objections: Instead of proceeding to an oral hearing or decision on the First SO, the Commission continued its investigation for another year and issued a Second Statement of Objections ("Second SO") in August 2001. In this Second SO the Commission ventured into the very integration/tying issues that were at the heart of the US cases. The Commission closed the case it had opened with the First SO, but included certain allegations it had made in the first case in the Second SO. The Second SO reiterated earlier allegations that Microsoft deprived other server operating system vendors of technology they needed to enable their products to interoperate with Windows client operating systems ("PC-to-server interoperability"). The Second SO also added two new allegations of abuse. First, it alleged that Microsoft deprived other server operating system vendors of technology they needed to enable their products to interoperate with the Windows server operating system ("server-to-server interoperability"). Secondly, based on complaints from Real Networks, another US competitor of Microsoft, it alleged that the design of the Windows 98 Second Edition to include improved media functionality amounted to an illegal tying in violation of Article 82(b) and (d) of the EC Treaty.[21] The issues of

[20] The Commission also alleged that Microsoft had abused its dominant position by engaging in discriminatory licensing practices with regard to server operating system technology. This claim was ultimately abandoned.

tying or feature integration regarding media functionality were very similar to the core issues in the US cases regarding Web browsing functionality.

Microsoft submitted its response in November 2001. Again Microsoft provided extensive evidence from experts and from major customers around Europe that they had no interoperability problems between Windows PC or server operating systems and competing products, and that the inclusion of improved media functionality in successive versions of Windows PC operating systems was consistent with industry practice, had pro-competitive effects and did not foreclose competitors. As with the First SO, the Commission did not issue a decision based on the Second SO.

The Third Statement of Objections: After two years of further investigation and consideration following the Second SO and Microsoft's responses the Commission issued a Third Statement of Objections ("Third SO") in August 2003. Claims made in the First SO and Second SO were reasserted, but with some substantive differences. The Commission said the principal purpose of the Third SO was to provide factual support for, and clarification of, the claims asserted in the Second SO, as well as to propose remedies. These changes did not alleviate the overlap with the US cases regarding feature integration or tying.

Changed Market Definition: The Commission also narrowed the market definition on which it based its claim that Microsoft was dominant in the supply of server operating systems. The Commission said that the relevant market was for "work group server operating systems" running on server computers costing less than $25,000 (as opposed to the $100,000 figure in the First and Second SO) and that are used to provide only two types of services to Windows PC operating systems: "file and print services" and "user and group administration services" (there were no such task-based limitations on the product market alleged in the First or Second SO). Microsoft responded in October 2003 that this new market definition did not reflect how customers or independent industry analysts such as IDC, saw the server market, and Windows server operating systems and its competitors are all capable of providing many more services and functionalities and run on hardware costing both more and less than the $25,000 cut off proposed by the Commission. Windows server operating systems are typically installed on servers costing less than $25,000 while many of the competitor operating systems such as the different versions of UNIX are more popular on more expensive server hardware.

Media Functionality: The Third SO continued to challenge the inclusion of media functionality in Windows PC operating systems, and alleged that the abuse began in 1999 when Microsoft added a streaming capability to Windows 98 Second Edition to augment media functionality already present in the prior versions of Windows. The Third SO claimed that including a streaming capability in Windows was exclusionary because content owners would choose at some indeterminate point in the future to encode their content in Windows Media formats rather than in competing formats, based on their judgment that the widespread distribution of Windows Media Player would enable content encoded in Windows Media formats to reach the largest possible audience. Microsoft responded that all PC operating systems have included this sort of media functionality for a number of years since consumers demand that PCs be able to play audio visual content, and that there is no foreclosure since competing media player software can be easily downloaded for free from the Internet,

that this happens with great frequency and that consumers and provider of digital media routinely use multiple media players and multiple formats.

Remedies: The Third SO was not definitive about which remedies the Commission wanted to impose. With regard to media functionality, the Third SO stated that Microsoft should be required to remove from Windows the software code that provides the media functionality concerned (or perhaps only the streaming capability). As an alternative, the Third SO stated that Microsoft should include some third-party media players in Windows, including those supplied by Apple and RealNetworks, despite the fact that both products already enjoyed broad distribution and the fact that dozens of other media playing applications were available in the market.

Microsoft responded to the Third SO on 17 October 2003. Microsoft's submissions provided further evidence from experts and major European Windows customers and media companies that there was no lack of interoperability or foreclosure caused by the abused alleged in the SOs and that Microsoft's product design and licensing policies had objective justifications and pro-competitive effects. The Commission held an oral hearing in November 2003 at which Microsoft and a number of its US competitors were heard.

The Commission's March 2004 Decision against Microsoft: On 24 March 2004, after five years of investigation and three Statements of Objections, the Commission issued a decision condemning Microsoft for leveraging its dominant position in the market for PC operating systems onto the markets it defined for "work group server operating systems" and for "streaming media players," and fined it the highest amount ever for an individual company in European antitrust history, EUR 497 million (about USD 630 million). According to the Commission, Microsoft had abused its dominant position on the market for PC operating systems in two ways: (1) by refusing to license certain "interoperability" information to its competitors so they could develop "work group server" operating systems which would compete directly with Microsoft's server operating systems (refusal to supply); and (2) by selling its media player software, Windows Media Player ("WMP"), as an integral part of its PC operating systems (product integration).

The EU Remedies Conflict with the US Remedies: To remedy the two alleged abuses, Microsoft was ordered to (1) make available versions of its Windows PC operating systems in the European Economic Area (EEA) from which the software code for certain designated media functionality had been removed; and (2) create and license to competitors "complete and accurate specifications" documenting large amounts of Windows server technology (mainly communications protocols) and license that IP to competitors to allow their servers to achieve what the Commission defined as "full interoperability" with Windows PCs and servers (a compulsory license). The first remedy conflicted directly with the results of the US cases where Microsoft was not found liable for integrating or improving features in Windows and where the District Court found that removing code from Windows as a remedy would injure consumers and software vendors who relied on the presence of that functionality. The second remedy overlapped to a significant degree with the US remedy on communications protocol licensing raising potential conflicts depending on how the two overlapping remedies would be implemented.

Geographic Scope of Remedies: De Facto & De Jure, Agreement or Unilateral

Given the global nature of the technology markets the geographical scope of the remedies is an important factor as to whether or not they are accepted by the market.

Compulsory IP Licensing: World-Wide Scope of Remedies by Agreement. The agreements on geographic scope of the intellectual property licensing remedies in the US and EU are examples of the cooperative approach between regulators and industry. The Commission does not have jurisdiction beyond the EEA. Nevertheless, Microsoft agreed, following pressure from the Commission, to extend the compulsory license to allow for world-wide development and distribution, in order to increase the attractiveness of the license for potential licensees and thereby making the remedy more attractive to competitors who market their products world-wide and who would not want to devote significant engineering work to produce a version only for distribution in Europe. In the US protocol licensing remedy that was part of the Consent Decree, Microsoft agreed to license its technology on a world-wide basis so that competitors can develop and distribute products incorporating that technology globally. That concession by Microsoft has helped the US remedy attract 27 licensee companies, about half of whom have incorporated the technology in their products and are distributing them on a global basis, paying royalties to Microsoft under the reasonable rates permitted under the settlement. By contrast, the EU compulsory licensing program has attracted only one licensee,[22] not for lack of world-wide scope, but largely because any potential licensee knows that the license could abruptly terminate if the Court of First Instance annuls the Commission's March 2004 Decision.[23]

Code Removal Remedy: Limited Jurisdiction and No Agreement on Global Scope. In contrast with the protocol licensing remedies, the EU media player remedy is limited to the EEA only and its Korean equivalent is limited to the South Korean market. This geographic limitation had the potential to create serious problems for consumers and independent software developers. If there had been any significant demand for these products with reduced functionality that could have Balkanized the global uniformity and reliability of the Windows platforms for consumers, media distributors and software developers who rely on the presence of that functionality in all copies of Windows. Various software applications and media content on the Web would not have worked with the reduced functionality versions and software developers would have had to incur significant additional costs to try to make their products work with the reduced functionality versions. However, that problem has not arisen since the market has clearly rejected these products designed and imposed by regulators in Brussels and Seoul (no single computer manufacturer has licensed these

[22] Agence France Presse, Microsoft licenses technology under European antitrust mandate 8 March 2007; New York Times, Microsoft in First Technology License Deal, By Thomas Crampton March 9, 2007, http://www.nytimes.com/2007/03/09/business/worldbusiness/09fobriefs-MICROSOFTINF_BRF.html?_r=1&oref=slogin

[23] By contrast the negotiated US remedy has a predictable termination provision. The Commission may also argue that the lack of licensees under its protocol licensing remedy is due to insufficient quality or scope of the technical documentation or unreasonable licensing terms. These issues are complex and are the subject of separate legal proceedings. In any event, it is unlikely that those are the determining factors since the quality and scope of the documentation as well as the licensing terms in the EU remedy were similar to the US remedy and if anything have been more favourable to licensees due to concessions Microsoft made in response to Commission demands. Furthermore, the Technical Committee monitoring the US settlement and the Commission appointed Trustee monitoring the EU remedy have demanded that Microsoft meet different and at times conflicting standards for how the technical documentation should be written.

products and consumer demand in the retail channel has been negligible both in Europe and in Korea).

The US "Tying" or "Feature Integration" Remedy: Global Scope by Agreement. As discussed above, the US remedy on integration or improvement of features like media player or Web browsing functionality required Microsoft to allow PC manufacturers and end users to change "default settings" that determine which of the multiple features get used by default and hide access to those features from end-users without removing the code from Windows that provides the functionality. The mechanisms that implement this Remedy have been made available in all major Windows versions world-wide, as part of the US settlement. That change was instituted in Windows XP globally since the release of Service Pack 2 and its successors including Windows Vista.[24] This remedy has been accepted by the market and has not caused problems for consumers or software makers.

EU Trade Secret Licensing Remedy: Unilateral Imposition of Remedies on a World-Wide Basis. In 2005 the Commission issued a new decision effectively imposing a unilateral and global open source licensing requirement on Microsoft in contrast to the US licensing remedy that protects trade secrets. Separately from discussions on the technical scope of the license, in June 2005 the Commission adopted a formal position ("the June 2005 decision") finding that Microsoft is also under an obligation to permit competitors who license the technology, to distribute to their customers— non-licensees — the software they develop on the basis of the Windows protocol specifications in source code form. Microsoft is only allowed to impose limitations on such distribution when the software in question includes an invention by Microsoft that satisfies the criteria of novelty and inventiveness, *i.e.,* a test akin to the test for granting patents. This provision was advocated by Microsoft's competitors who distribute open source products including Linux and SAMBA whose business model does not provide for per copy licensing royalty payments as is the case with commercial software such as Windows.

In other words, the June 2005 decision prohibits Microsoft from using standard contractual safeguards to protect the confidentiality of valuable trade secrets and forces Microsoft to allow licensees to disclose its trade secrets to the public thereby destroying the IP value of those trade secrets. This Decision is relevant to the topic of this study since it poses a direct challenge to the US settlement and could be seen as an effort by the EU to impose its view of the law of intellectual property and antitrust world-wide. Disregarding trade secret rights by compelling a company to reveal them in one jurisdiction inevitably means destroying them world-wide.

In August 2005 Microsoft appealed the Commission decision imposing open source licensing to the CFI, requesting the annulment of the decision. Microsoft pleaded that the approach to trade secrets taken in the June 2005 decision is at odds with standard industry practice and with the intellectual property regimes of every EU Member State, the US, Japan, all of which recognize and protect trade secrets. In its appeal,

[24]All of the US, EU and Korean remedies regarding feature integration have also been applied to the recently released Windows Vista products with similar results as with Windows XP.

Microsoft also argues that the June 2005 decision constitutes an illegal extraterritorial application of the EU's jurisdiction.[25]

Conclusion: Lessons to be drawn from the Conflicting EU and US Remedies

The Microsoft remedies are commercially and legally highly significant because they raise fundamental issues which go far beyond Microsoft's individual situation and highlight the difficulties of multiple jurisdictions imposing inconsistent remedies on global markets. When does a firm with a dominant position have a legal duty to license its proprietary technology and intellectual property rights to its competitors so that they can incorporate that very same technology into their own directly competing products? When is it unlawful for a dominant firm in the software industry or other industries to integrate new features or improve existing features in its finished product?

This raises two sets of problems regarding international comity: First, it is clear that in some situations remedies are not effective if they are limited to one part of the world. This is especially the case where the markets demand a globally uniform product. Secondly, it is *de facto* difficult to confine a given remedy to one jurisdiction when the products are distributed and used on a global basis, with multinational organizations and other customers benefiting from consistency in the products they use world-wide. Different remedies in different jurisdictions are, therefore, likely to lead to either artificial trade barriers or the indirect imposition of the most intrusive remedy upon other jurisdictions that have chosen less sweeping remedies. The first outcome is fundamentally contrary to the idea of competition in a free market – one of the central aims of antitrust law. The latter outcome is problematic, where the other jurisdiction itself has assessed the case but has come to a different conclusion. This is especially problematic in a situation, such as Microsoft, where one jurisdiction imposes remedies which have already been exhaustively considered and rejected as inappropriate and harmful to consumers and competition by the government and courts in another jurisdiction. Conflicting remedies in the second jurisdiction could be seen as inappropriate when the first jurisdiction is the home country of the target of the enforcement action and of all the major complainants against it and where no consumer harm is shown or there is no unique or different consumer harm in the second jurisdiction. Although the facts before the US and EU competition authorities were largely similar, the Commission did not consider that the US settlement and judgments resolved its concerns. The Commission's decision goes significantly beyond the US settlement in certain respects, a fact that gave rise to significant trans-Atlantic tension.

To mitigate the problems that arise from the extraterritorial application of laws, international norms of comity are an important instrument and provide helpful guiding principles. This is especially true in the field of international antitrust enforcement of unilateral laws in an increasingly global economy. For example, according to a 1998 European Commission report, the EU-US Positive Comity Agreement "create[s] a presumption that when anticompetitive activities occur in the whole or in a substantial part of the territory of one of the parties and affect the interests of the other party, the latter will normally defer or suspend its enforcement activities in favour of the former. This is expected to happen particularly when these

anticompetitive activities do not have a direct, substantial and reasonably foreseeable impact on consumers in the territory of the party deferring or suspending its activities."[26]

Increased co-operation between the US and Europe is necessary to avoid creating different sets of rules on each side of the Atlantic in markets that could have *de facto* global effect. Three major points of conflict have arisen from the extraterritorial application of competition law regarding the unilateral conduct of Microsoft that could benefit from greater comity.

First, the Importance of a Uniform Platform in a Global Market: like many other technology products, Microsoft's Windows has a global market, which requires a globally consistent approach to regulation of product design and licensing. A large part of the value of Windows derives from its uniformity and predictability for end users, PC makers and software developers. If different governments were to require different versions of Windows to be designed and exclusively distributed in their jurisdictions, then customers, PC makers and independent software vendors whose products rely on Windows could face considerable inefficiencies and higher costs since they would have to train users and redesign software applications for the different and inconsistent versions of Windows imposed by regulators who fail to coordinate. This fact is illustrated by the decision KFTC to allow PC manufacturers to install the full version of Windows with media functionality for export. Although manufacturers in Korea would be in the KFTC's jurisdiction it refrained from exercising it so the Korean OEMs would not be at a commercial disadvantage in the international market as they would be if they could only license and install the Korean version of Windows that is missing functionality.

Second, Inconsistent Approaches: Inconsistent applications of the compulsory licensing remedy in the US and EU also pose a problem to Microsoft and the global IT industry. The US government and the European Commission have taken rather different approaches to the type of documentation they require Microsoft to produce and license for similar and in to a large part identical parts of Windows PC and server technology. Without getting into the complex and subjective question of whether one approach is better than the other, it is fairly clear that there are considerable efficiencies in having a consistent approach. If the different regulators do not arrive at a consistent approach among themselves the effect is that the authority that makes the most extensive demands imposes its standard *de facto* on a world-wide basis, which could amount to an extraterritorial application of its law.

Third, Unilateral Action: the EU trade secrets decision provides the starkest example of one jurisdiction attempting to impose its view of IP and competition law on a global basis without regard to the differing views of other jurisdictions. It is still possible that the European courts will take a different approach that might be more considerate of the value of trade secrets in other legal systems. Cooperation between

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[26] Commission Report to the Council and the European Parliament on the Application of the Agreement between the European Communities and the Government of the United States of America regarding the Application of their Competition Laws OJ L173/28 (13 September 1999), paragraph 3 (internal quotations omitted). Article IV of the Agreement provides: "Each Party shall consider important interests of the other Party in decisions as to whether or not to initiate an investigation or proceeding, the scope of an investigation or proceeding, the nature of the remedies or penalties sought, and in other ways, as appropriate." 1991 U.S.-EC Comity Agreement at art. IV.

industry and regulators as well as comity and coordination among regulators and courts in different jurisdictions can best address competition law concerns and avoid the problems that can arise in the unrestrained or uncoordinated extra-territorial application of law.

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