IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, Plaintiff, vs. MICROSOFT CORPORATION, Defendant	Civil Action No. 98-1232 (CKK)
STATES OF NEW YORK *ex rel.* Attorney General ELIOT SPITZER, *et al.*, Plaintiff, vs. MICROSOFT CORPORATION, Defendant	Civil Action No. 98-1233 (CKK)

Tunney Act Comments of

Consumer Federation of AmericaCalPIRG
Connecticut Citizen Action Group
ConnPIRG
Consumer Federation of California
Consumers Union
Florida Consumer Action Network
Florida PIRG
Iowa PIRG
Massachusetts Consumers' Coalition
MassPIRG
Media Access Project
U.S. PIRG

Submitted January 25, 2002

A FINAL JUDGMENT MUST CORRECT THE VIOLATION OF THE LAW

THE MICROSOFT-DOJ PROPOSED FINAL JUDGMENT IS NOT IN THE PUBLIC INTEREST

We find the Microsoft-Department of Justice final judgment proposal to be fundamentally flawed. It is as an entirely inadequate remedy to the sustained, egregious, illegal conduct engaged in by Microsoft to thwart competition in the software industry and protect and enhance its own monopolies. Because it fails to protect consumers, it fails to serve the public interest. It should be rejected by the District Court.

FEDERAL LAW REQUIRES PUBLIC COMMENT. THE COURT SHOULD REVIEW ALL COMMENTS

Federal antitrust law (Tunney Act, 15 U.S.C. § 16) requires the Department of Justice to "receive and consider" comments related to the proposed Microsoft-DOJ resolution currently under review by Judge Colleen Kollar-Kotelly of the U.S. District Court for the District of Columbia. Judge Kollar-Kotelly has ordered the Justice Department to provide to her by February 27 its response to comments received. The Tunney Act requires Judge Kollar-Kotelly, in turn, to determine whether the Microsoft-DOJ proposal is in the "public interest" To make that determination, she may —to our mind *must*— consider the competitive impact of the proposal, including:

- termination of alleged violations and prevention of future monopolization,
- provisions for enforcement and modification,
- duration or relief sought,
- anticipated effects of alternative remedies actually considered, and
- any other considerations bearing upon the adequacy of such judgment.

Under the Tunney Act, Judge Kollar-Kotelly is also given the *option* of reviewing the original comments provided to the Department of Justice, rather than just the DOJ's response to them. We believe that Judge Kollar-Kotelly should endeavor to read all comments submitted in this highly contentious and landmark case. We believe that the Department of Justice is

institutionally disposed to give inadequate consideration to comments such as these critical to a resolution that it, along with Microsoft, has proposed.

Our comments demonstrate that determining whether the DOJ-Microsoft proposal is in the public interest should be a fairly straight forward exercise. The proposal fails to terminate the antitrust violations of which Microsoft has been found guilty (at trial and on appeal). Its enforcement provisions are weak at best. It restricts Microsoft behavior for a much-too-short period of time. Myriad other problems, discussed below as well as in detailed analysis attached to these comments prepared by the Consumer Federation of America and Consumers, encumber and eviscerate an otherwise vague and loophole-riddled settlement proposal. Finally, a strong, workable alternative remedy, advanced by the state attorneys general who continue to aggressively pursue the case, already has been submitted to the Court for review. Unlike the Microsoft-DOJ proposal, that alternative would protect consumers and the public interest. With such numerous and obvious shortcomings, the District Court should reject the Microsoft-DOJ proposal in short order.

THE PUBLIC INTEREST TEST REQUIRES THAT FINAL JUDGMENT PROTECTS CONSUMERS

We insist on such an outcome on behalf of our constituencies, who are America's average consumers. Our groups have worked on basic consumer pocketbook issues across the nation for decades, and our membership numbers in the tens of millions. We believe that the public interest in this case is properly understood to include the harms that average consumers have experienced due to Microsoft's illegally anti-competitive activities. Individual consumers ultimately paid the price of Microsoft's past abuses of monopoly power, directly and indirectly, and they will pay for a continuation of the Microsoft monopoly. Any remedy endorsed by the Court needs to benefit consumers by restoring competition in those segments of the software

industry that Microsoft has monopolized or is in danger of monopolizing. We acknowledge that, considering Microsoft's long-standing unfair business practices and deeply entrenched monopoly, such a task will not be easy. It is because of these same factors, however, that it is necessary.

THE SOFTWARE INDUSTRY IS RIPE FOR COMPETITION AND DOES NOT LEND ITSELF NATURALLY TO MONOPOLY

We begin by rejecting claims that the software industry is prone to natural monopoly. Were that the case, Microsoft would not have had to engage in its systematically anti-competitive practices to maintain and extend its monopolies. The trial record and reams of trade press accounts bear testimony to the unnatural acts embraced by Microsoft to create and protect its monopoly power over the years. These include leveraging the Windows operating system, slowing or stopping its own deployment cycle, denying access to application interfaces, threatening to deny access to its operating system, threatening to stop developing software for competing platforms, bloating the operating system with unnecessary functionality, hiding prices in whole computer configurations, compelling computer manufacturers (original equipment manufacturers, or OEMs) to use its browser, reaching pacts with other companies to deny the use of alternative browsers, and on and on. Though the Department of Justice at least appears to agree in principle that monopoly in the software industry is neither natural nor desirable, in practice its proposal – prepared jointly with Microsoft allows for the continuation, if not exacerbation, of Microsoft market power.

In our view, the software industry is ripe for competition. Competition would yield an explosion of innovation and consumer convenience. Consumers care about applications, not about operating systems. Furthermore, most consumers are inclined to invest time and money in

functional applications that they reasonably feel will endure, be supported, and work compatibility with other programs and their hardware. Independent vendors are interested, therefore, in creating products that match consumer expectations.

With the entrenched Microsoft monopoly, independent developers confront an applications barrier—Microsoft has such a significant lock on the computer platform and on applications used, that many developers are dissuaded from producing new products. Should the Microsoft monopoly be broken down, developers would look to create compatible, consumer-friendly products. In fact, that is what Netscape and Sun attempted to do with Navigator and Java—create software, known as "middleware" because they insert themselves between the operating system and applications running on top of the middleware. Because Netscape/Java was compatible across systems, it threatened Microsoft. Microsoft's reaction was to launch an illegal campaign to crush Netscape and undermine Java.

Because Microsoft illegally undertook to prevent competition, consumers were left with products that did not honestly earn their place in the marketplace. Microsoft products have not been disciplined for price and quality by competitors because of the company's anti-competitive practices. Remove the monopoly, and an avalanche of competition —aiming towards operable standards, innovative products, and better pricing— will be unleashed. Such developments would provide undeniable benefit to consumers. The software market will support, and therefore the public interest demands, actual competition within and between markets.

THE CHALLENGE BEFORE THE COURT

MICROSOFT'S DEEP-ROOTED ANTI-COMPETITIVE BUSINESS MODEL

Detailing Microsoft's anti-competitive business model is a nearly interminable task, though it was accomplished well by the District Court in its *Findings of Fact,* virtually all of

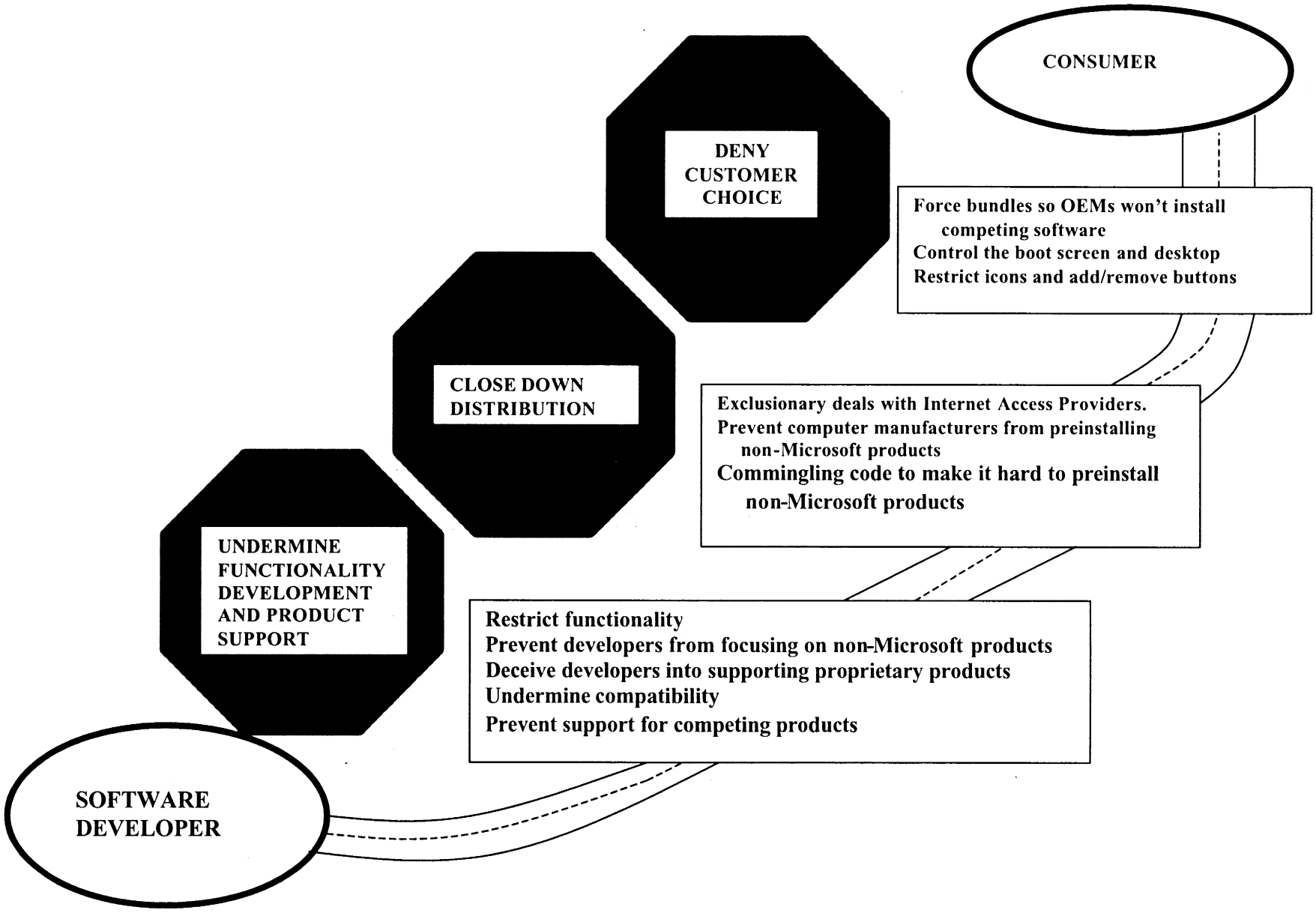
which were upheld on appeal. The analysis attached by Consumer Federation of America and Consumers Union describe at length the depths to which Microsoft would sink to prop up its operating system monopoly, and to conquer other markets, such as for the browser and business productivity suites. The list of corporate victims is long, and includes not just Netscape and Sun, but also IBM, Intel, and Apple. Figure 1, below, summarizes in simple terms the barriers to competition that Microsoft has repeatedly erected. We reiterate that the Department of Justice and the Court should not lose sight of the fact that such practices ultimately negatively impact individual consumers, in the forms of higher prices, reduced choice, and inferior products and service.

CONSUMERS ARE HARMED BY MICROSOFT'S ABUSE OF MARKET POWER

Microsoft's widespread, unlawful practices, which the Microsoft-DOJ proposal fails to correct, harm consumers both qualitatively and monetarily. The harms are sufficiently great to require that the Court avoid a "quick fix." It is much more important to devote a reasonable amount of time to get the final judgment right and protect consumers.

Microsoft's anticompetitive practices deny consumers choice. Microsoft strictly forces computer manufacturers to buy one bundle with all of its programs preloaded and biases the screen location, start sequences and default options. As a result, it becomes substantially difficult to choose non-Microsoft products. Products tailored to meet individual consumer needs (consumer friendly configurations, small bundles) are unavailable and eventually competing products disappear from the market. Further, by foreclosing the primary channels of distribution with exclusive contracts and other deals, Microsoft forces consumers of non-Microsoft products to acquire them in time-consuming and inconvenient ways.

FIGURE 1: HOW MICROSOFT STOPS COMPETITION AND HARMS CONSUMERS



In addition, Microsoft's practices impair quality and innovation. Because of Microsoft's leveraging of the operating system, superior products are delayed or driven from the marketplace. The District Court noted at least six instances in which Microsoft sought to delay the development of competing products. It noted as well several instances in which it delayed the delivery of its own products to accomplish an anti-competitive purpose. Resources are denied to and investment is chilled in competing products, slowing advances in technology and rendering some libraries of content obsolete. In addition, in several instances the Court found that Microsoft had undermined the ability of software applications or middleware to function properly with the Windows operating system. Thus, Microsoft has been quite willing to undermine the quality of its own and of competing products to preserve its market dominance.

In addition to qualitative harm, consumers have suffered monetary harm. The historical behavior of prices makes it possible to draw a direct line between competition and lower prices. Eliminating competition, as Microsoft has, results in higher prices. The fact that the excess price results from a failure to pass *cost reductions* through to consumers does not change the fact that consumers are overcharged. Nor does the fact that consumers do not pay for the software directly. In fact, there was a substantial increase in the price of Microsoft products in the 1990s that consumers paid in the price of the PCs they purchased. Of course, consumers do pay directly in the case of upgrades and for applications.

The centerpiece of Microsoft's pricing strategy has been to increase operating system prices while other components of the delivered PC bundle have fallen. Evidence at trial gave explicit estimates of the price of operating systems. The average preinstalled price is given as $19 in 1990 and over $49 in 1996. During that time span the average Microsoft revenue for preinstalled software rose from $25 to $62. Microsoft recognizes that it has been the beneficiary

of volume growth created by the falling price of the PC, which masks its increasing prices. Thus, one of the key elements in Microsoft's business model is to bury its products in bundles. This hides the price from the public and allows Microsoft to hide behind the declining price of the total package.

The Consumer Federation of America has estimated that in the five years between the start of the anticompetitive attack on the browser in 1995 and the District Court finding of liability, Microsoft overcharged consumers by about $20 billion. The economic analysis of other experts suggests overcharges of as much as $30 billion.

In addition to direct monetary costs, indirect monetary costs of the Microsoft monopoly also present themselves. Though difficult to calculate, they are no less significant, and demand to be considered. Consumers, individual and corporate, have undoubtedly lost hundreds of millions of dollars due to such issues as training, rapid upgrade cycles, software crashes, bloated bundles, debugging, service, and hardware upgrades.

WINDOWS XP/.NET, LEFT UNCHECKED, ENHANCES AND EXPANDS THE MICROSOFT MONOPOLY

Microsoft's brazen disrespect for the antitrust laws is nowhere more readily apparent than in the design of its newest bundle of products ("Windows XP," and the ".NET" initiative, hereafter referred to as "Windows XP/.NET"). The product is so blatantly at odds with the Court's ruling Microsoft must have designed it on the mistaken assumption that Microsoft would prevail in its appeal.

The extreme reliance of "Windows XP/.NET" on a huge bundle of entire applications and the continued reliance on contractual and technological bundling fly in the face of the Court's cautionary words. Windows XP and the .NET initiative are a bundle of services bolted together

by technological links (code embedded in the operating system), contractual requirements, and marketing leverage.

The software, applications, and services that Microsoft has bundled cover all of the functionalities that are converging on the Internet, including communications, commerce, applications, and service. Today these Internet activities are vigorously competitive, just as the browser was before Microsoft launched its victorious attack against Netscape. In other words, the anticompetitive and illegal business practices Microsoft used to win the browser war are being extended to virtually every other application that consumers use. The bundle is built on commingled code, proprietary languages, and exclusive functionalities that are promoted by restrictive licenses, refusal to support competing applications, embedded links, and deceptive messages. A strong remedy, unlike the weak one proposed by Microsoft and the Justice Department, is needed before Microsoft becomes the monopolist of virtually all computer and Internet applications.

THE PROPOSED FINAL JUDGMENT FAILS TO PROTECT INDEPENDENT SOFTWARE DEVELOPERS, COMPUTER MANUFACTURERS, AND CONSUMERS

The history of the case and our analysis of the software industry show that 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 GET LITTLE RELIEF UNDER THE MICROSOFT-DOJ PROPOSAL

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. It therefore controls 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 (APIs) are left in the hands of Microsoft to an extreme extent. As a consequence, the company will be encouraged to embed 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, as many crucial applications are available only for Windows. The proposed settlement does nothing to eliminate this "applications barrier to entry," such as by requiring the porting of Microsoft Office to other PC platforms. Rather than restore competition, the Microsoft-DOJ proposal all but legalizes Microsoft's previous anticompetitive strategy and institutionalizes the Windows monopoly.

COMPUTER MANUFACTURERS HAVE LITTLE ABILITY OR INCENTIVE TO INSTALL NON-MICROSOFT PRODUCTS UNDER THE PROPOSED FINAL JUDGMENT

The Microsoft-DOJ proposal does not shield computer manufacturers from Microsoft retaliation. The restriction on retaliation against computer manufacturers leaves so many loopholes that any OEM who actually offended 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 Microsoft Office) as an inducement to favor the applications that Microsoft is targeting at new markets, inviting a repeat of the fiasco in the browser wars. Retaliation in any way, shape, fit, form, or fashion should be illegal. Any adequate remedy, unlike the Microsoft-DOJ proposal, must include a prohibition on retaliation that specifically identifies price and non-price discrimination as well as applying to all monopoly products.

CONSUMER SOVEREIGNTY IS NOT RESTORED BY THE SETTLEMENT.

Because the proposed settlement requires no 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 retains the ability to be the pervasive default option and is allowed to harass consumers who switch to non-Microsoft applications. Furthermore, it still gets to sweep third party applications off the desktop, forcing consumers to choose them over and over.

GIVEN MICROSOFT'S PAST BEHAVIOR, ENFORCEMENT MUST BE SWIFT WITH SUBSTANTIAL SANCTIONS FOR NON-COMPLIANCE, BUT THE PFJ PROVIDES NO SUCH MECHANISMS

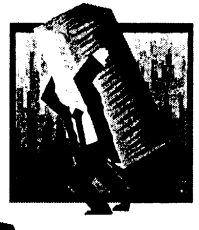
After the District Court identifies remedies that can address these problems, it must enforce them swiftly and aggressively. Microsoft has shown —through a decade of investigations, consent decrees and litigation— that it will not easily be deterred from defending

and extending its monopoly. Microsoft behaves as though it believes it has the right to do anything to eradicate competition. Every one of the illegal acts that led to the District Court findings of liability, unanimously upheld on appeal, took place *after* Microsoft signed its 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 set up to (maybe) hear complaints can be easily tied up in knots by Microsoft because of the vague language that creates it. Because of the delay in its implementation, the crucial element of API disclosure will be in place for only four years. If Microsoft violates the settlement, nothing happens to the company, except that it must "endure" the annoyance of this weak settlement for an additional two years. Moreover, Virtually every specific measure of the proposed settlement is either riddled with ambiguities or put under the sole discretion of Microsoft. In other words, Microsoft defines its own sanctions. The Department of Justice and the Court must not forget that independent software vendors were the targets of Microsoft's campaign and that the competitive process in the software market was its victim. When we review the question of whether the proposed settlement will lift the yoke of anticompetitive practices from this market, we find that it will not (see Figure 2). Under the proposed settlement, Microsoft preserves immense market power and discretion. The settlement cannot work to restore competition because independent software developers will not be freed to produce software products in a competitively neutral environment. As a result, consumers will continue to suffer at the hands of the Microsoft monopolies. The proposed settlement does not serve the public interest and must be rejected.

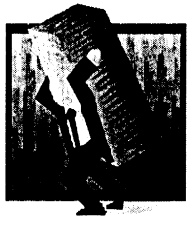
FIGURE 2: SOFTWARE COMPETITION WILL NOT BE RESTORED BECAUSE THE SETTLEMENT DOES NOT CREATE A LEVEL PLAYING FIELD FOR INDEPENDENT SOFTWARE VENDORS

DO I HAVE A FAIR CHANCE TO HAVE CONSUMERS USE MY PRODUCT?
Consumers have to choose my software twice to get my icon on the screen.
Consumers never have to choose Microsoft's; it's still the default.
Microsoft can sweep my icon off the system every 14 days.



WILL OEMs PUT MY PRODUCT ON THE PC?
Microsoft's code is guaranteed to be in every PC, only its icons are removed.
My code gets into only those PCs that I convince OEMs to install.
Microsoft can still give OEMs "considerations" to promote its product.
Microsoft can engage in Joint Ventures and prevent OEMs from using mine.
Microsoft can leverage its monopoly applications to keep my products out.

WHAT APIs DO I GET TO SEE?
Only APIs for products Microsoft has already developed.
Only APIs that Microsoft has decided not to move into the operating system.
Only APIs that Microsoft decides do not compromise its piracy, virus, licensing, digital rights management, encryption or authentication systems.



WHEN DO I GET TO SEE THE APIs?
Very late in the process, after Microsoft has had a huge head start in developing its products.
Only after Microsoft ships a fix, up until a year from now.

WHAT DO I HAVE TO DO TO SEE THE APIs?
License my software to Microsoft.
Convince Microsoft my planned product is reasonable.
Let Microsoft decide if I have a viable business.
Let Microsoft review and certify my product before I ship it.