

V. Microsoft Engaged In A Predatory Campaign To Crush The Browser Threat To Its Operating System Monopoly

85. With the browser threat to its operating system monopoly still robust after its failure to divide markets with Netscape, Microsoft embarked on a calculated campaign to protect its monopoly by thwarting the widespread adoption of rival browser products. That campaign had as its object increasing Microsoft's share of the browser market and sufficiently weakening Netscape and other rivals to ensure that non-Microsoft browsers (or other middleware) did not become an important platform to which developers wrote applications that ran on PCs.

A. After Netscape refused Microsoft's offer to divide the browser market, Microsoft embarked on a predatory campaign to eliminate the browser threat

1. Microsoft made obtaining browser share a central corporate objective

86. Failure to divide the browser market with Netscape frustrated Microsoft's objective of eliminating the threat that widely-used non-Microsoft browsers, in particular the Netscape browser, posed to Microsoft's operating system monopoly.

87. Microsoft nonetheless recognized that it could blunt the browser threat by weakening rivals and gaining browser market share.

- i. In an April 6, 1995 internal memorandum entitled "Netscape as Netware," Paul Maritz explained the threat posed by Netscape if Netscape enjoyed high market share. Maritz stated that if Netscape Navigator gained "significant market share," then "content providers see more to be gained in exploiting unique features of Netscape clients than in trying to be 'generic' across all clients." Maritz explained: "This feedback loop drives Netscape market share higher (as content providers encourage its use) to the point where Netscape can go 'proprietary' . . . Eventually they become a real 'platform,' and they are eating 'per PC' revenue that would otherwise go to the OS or to the Apps." GX 498, at MS98 0168614.
- ii. In an April 4, 1996 internal Microsoft memorandum, entitled "FY97 Planning Memo 'Winning the Internet platform battle'," Brad Chase wrote, "Go for maximum browser

share. *Why should you care?* This is a no revenue product, but you should worry about your browser share, as much as BillG because: we will loose [sic] the Internet platform battle if we do not have a significant user installed base. The industry would simply ignore our standards. Few would write Windows apps without the Windows user base. — at your level, if you let your customers deploy Netscape Navigator, you loose [sic] the leadership on the desktop.” GX 39, at MS6 5005720 (emphasis in original).

88. Microsoft understood the importance of increasing browser market share and made gaining browser market share a central corporate goal. This “very important” and “#1” goal to increase browser market share -- articulated among others by Bill Gates and his senior executives -- was a central focus of Microsoft’s corporate strategy from 1995 to the present day.

- i. In his “Netscape as Netware” memorandum, Paul Maritz wrote: “I think the most important thing we can do is to ‘not lose control’ of the Web client. By controlling the client, you also control the servers. We should not allow any one Web client to get to high volume. This means (i) not letting a vacuum open up, and (ii) ensuring that we get broad distribution for our Web client.” GX 498, at MS98 0168614.
- ii. Bill Gates wrote, in January 1996, that “Winning Internet browser share is a very, very important goal for us.” GX 295.
- iii. Paul Maritz, in June 1996, repeated that “Without browser share, everything is hard. So job # 1 is browser share.” GX 42, at MS6 6010346.
- iv. Microsoft executive Carl Stork wrote in September 1996 that “Browser share is Job 1 at this company, and OSR2 is the vehicle to get IE3 on these machines.” GX 44.
- v. In an internal March 25, 1997 Microsoft e-mail exchange between Stork, Megan Bliss, and others, Bliss wrote: “I thought our #1 strategic imperative was to get IE share (they’ve been stalled and their best hope is tying tight to Windows, esp. on OEM machines). That is, unless I’ve woken up in an alternative state and now work for Netscape.” GX 56, at TXAG 0009634.
- vi. An April 1998 marketing plan for IE5 lists Specifically, the
document read:
GX 432 (sealed).

2. Microsoft embarked on a predatory and anticompetitive course of conduct designed to gain browser share

89. To achieve its goal of weakening browser rivals and protecting its operating system monopoly, Microsoft set out on a campaign to gain browser market share through predatory and anticompetitive means. Microsoft's practices included giving its browser away "forever free," coercing third parties not to deal with or support competitive browsers, and to carry its browser in ways that disadvantaged rivals, and paying other browser suppliers' customers and distributors not to carry other browsers or to do so only on disadvantageous terms. Among other things:

89.1. Microsoft, without legitimate justification and for the purpose of blunting the browser threat, tied its Internet Explorer browser to Windows, refusing to offer an unbundled option despite the plain existence of separate demand for browsers and operating systems. See infra Part V.B.

89.2. Microsoft imposed anticompetitive restrictions on OEMs' ability to modify the Windows desktop and start-up screens, even though doing so reduced the value of Windows. See infra Part V.C.1.

89.3. Microsoft bestowed favors on OEMs that assisted Microsoft in its exclusionary strategy, punished OEMs that did not, and contractually restricted OEMs from removing the browser. See infra Part V.C.2.

89.4. Microsoft entered into exclusionary contracts with ISPs and OLSs accounting for the majority of consumer Internet access in the United States for the purpose and with the effect of limiting competitor browser usage and raising rivals' costs. See infra Part V.D.

89.5. Microsoft entered into exclusionary agreements with ICPs that included restrictive provisions that cannot be explained except as components of a predatory campaign designed to exclude browser rivals and protect Microsoft's operating system monopoly. See infra Part V.E.

89.6. Microsoft entered into an exclusionary agreement with Apple designed to limit competitive browser usage, raise rivals' costs, and increase usage of Internet Explorer on the MacIntosh operating system. See infra Part V.F.

89.7. Microsoft, after studying Netscape's sources of revenues and for the purpose of cutting off Netscape's "air supply," invested hundreds of millions of dollars in developing, promoting, and distributing its Internet Explorer browser, even though it planned to and did make the browser "forever free" and did not collect browser-related ancillary revenues. See infra Part V.G.

90. Microsoft had no plan or expectation that these acts would be profitable or make business sense, except by preventing rival browsers from developing into a rival development platform and thereby preserving Microsoft's operating system monopoly.

- i. In an internal memorandum Bill Gates sent on May 19, 1996, to his senior executives, he outlined a strategy against Netscape in the "browser war." Gates indicated that Microsoft would price many of Microsoft's Internet products "free." After outlining his strategy, Gates concluded that: "At some point financial minded analysts will begin to consider how much of a revenue stream Netscape will be able to generate." GX 41, at MS6 6012954-56.
- ii. Paul Maritz emphasized that Microsoft's goal of increasing browser share was more important than earning revenue from the browser. In a July 11, 1997 internal Microsoft e-mail, Maritz wrote: "There is talk about how we get more \$'s from the 1000+ people we have working on browser related stuff, but I have not lost sight of the fact that Browser Share is still an overwhelming objective. You may notice that I have kept IE marketing spend at very high level through FY'98. and resisted pressure to reduce this or switch it to other products. I also said 'no' on the proposal to charge separately for the Shell." GX 112; Maritz, 1/26/99pm, at 18:25 - 20:8, 21:22 - 22:22 (Maritz testified

that he rejected a proposal about splitting IE4 and charging a price for one of the pieces because “it would interfere with the objective” he “had which was to get more people using Internet Explorer.”).

iii. See also infra Part V.G.

3. Microsoft’s efforts to pressure Intel to stop developing or supporting platform-level software illustrate Microsoft’s predatory intent and tactics

91. In various meetings in 1995, Microsoft (i) forced Intel not to support rival platform-level software and (ii) candidly articulated its predatory plan to use its monopoly power and other predatory means to thwart the browser threat. Microsoft’s use of its monopoly power to pressure Intel not to support Netscape or offer Intel’s own platform-level technologies well illustrates both Microsoft’s predatory intent and the anticompetitive practices it employed to blunt threats to its operating system.

a. In an August 1995 meeting, Microsoft pressured Intel into not resuming platform-level software and not supporting Netscape and Java

91.1. As will be detailed below (Part VI.B.2.), Intel had developed software that Microsoft viewed as a platform-level software that might someday compete with Windows. In response to this potential threat, Microsoft engaged in a campaign to force Intel not to ship its software, then known as NSP. This effort culminated in an August 2, 1995, meeting, in which Bill Gates -- in a blunt use of Microsoft’s monopoly power -- threatened to withdraw support for Intel’s microprocessors unless Intel dropped support for platform-level software efforts and cooperated in Microsoft’s Internet strategies.

i. In May 1995, Microsoft vice-presidents Paul Maritz, Brad Silverberg, and Microsoft’s Carl Stork, met with Intel executives to discuss Intel’s NSP program. The Microsoft executives complained that Intel was shifting the

software boundary with its NSP project by writing software that Microsoft considered to be part of its operating system space. GX 275; McGeady, 11/9/98pm, at 23:3 - 26:23. In Microsoft's view, NSP made Intel a competitor in Microsoft's operating system space. GX 275; McGeady, 11/9/98pm, at 26:25 - 27:11.

- ii. Bill Gates explained to Intel's Andy Grove that Intel's attempts to compete with, rather than follow, Microsoft in software were unacceptable: "The problem we have is that we have to sort of choose in software related issues which company will lead and which will follow. In chips its very clear. In software you have a group that won't allow us to lead and has all the prestide (sic) and profits of Intel to drive them forward." GX 277.
- iii. In an internal July 7, 1995 Microsoft e-mail, Gates reported that he had tried to convince Grove "to basically not ship NSP." GX 278; Maritz Dir. ¶ 320. Gates predicted that Intel would exert less pressure to ship NSP in 1995 but that it "will take a major effort for us to convince them to back off from this." Gates further elaborated that Microsoft is the "software company here and we will not have any kind of equal relationship with Intel on software." GX 278.
- iv. In an August 28, 1995 memorandum summarizing the meeting, Steven McGeady wrote: "On August 2 1995, in a meeting of Intel and MS executives, Bill Gates told Intel CEO Andy Grove to shut down the Intel architecture labs." GX 280. According to McGeady, Gates was upset that Intel was "making investments in software of any sort" because "he felt that anything" Intel "did in software was competitive." McGeady 11/9/98pm, at 10:10 - 14:3.
- v. McGeady explained the reason Intel abandoned its NSP development: "Intel did fail to introduce NSP into the marketplace because, as a primary cause, Microsoft in particular Bill Gates, told Andy Grove that MS did not want NSP in the marketplace," and because "Microsoft helped . . . in our business interests by threatening to withhold support for other microprocessors in the meantime." McGeady, 11/10/98pm, at 81:6-23.
- vi. See also infra Part VI.B.2.a.-b.; ¶¶ 347-350.

91.2. During this meeting on August 2, 1995, Microsoft told Intel not only that it wanted Intel to stop developing platform-level software, but also that it wanted Intel not to support other platform-level software that ran on Windows, especially Netscape's browser and Sun's Java

technologies, in any way that could contribute to their development as a rival platform.

- i. Gates made clear to Intel executives on August 2, 1995, that “Microsoft would not support” Intel’s “next processor offerings if we did not get alignment between Intel and Microsoft on platform issues” and on communications issues, i.e., Internet issues. McGeady, 11/9/98pm, at 14:14 - 15:4; GX 279 (“Gates would not agree to let processors/OSs programs to progress unencumbered by platform communications program issues.”).
 - ii. In addition to setting limits on Intel’s software efforts, Gates raised “Internet issues.” GX 279, at MS CID 00078. Gates cautioned that Microsoft was “very sensitive to what Intel might do on the client side. Example: JAVA, a show stopper.” Id. (By “client,” Gates meant “browser.” Maritz, 1/27/99am, at 27:12-21).
 - iii. McGeady explained that Gates also told Intel that it should “concentrate 70% of” its “resources on working with Microsoft’s technology and 3- percent on any third parties” technologies such as Netscape. McGeady, 11/12/98pm, 19:5 - 20:9. Gates further explained, with regard to this “30/70 use of 3rd party technologies,” that “Intel using Netscape in Windows environment is not a problem (provided we [Intel] do not set up the ‘positive feedback loop’ for Netscape that allows it to grow to de facto std.)” GX 279, at MS CID 00078.
 - iv. As McGeady testified, Gates permitted Intel’s internal use of Netscape browser as a stand-alone application on Windows, but “he didn’t want” Intel “to do anything that would encourage developers to begin to move to Netscape, thereby increasing the value of that platform to create this positive feedback loop, this increasing-returns kind of situation with Netscape.” McGeady, 11/12/98pm, 19:5 - 20:9. McGeady also testified that “it was very clear that Bill did not want us doing any development or technology work with Netscape that would improve . . . the viability of Netscape Navigator in the marketplace. They wanted us to, if we absolutely had to, use it just as a standalone product. He would acquiesce to that, but he didn’t want us doing any technical work with them.” McGeady 11/12/98pm, 20:10-20; GX 279 (Whittier’s minutes) (“BG: Supporting certain third party deals will be problem . . . we need to consider in the context of their (pervasive) internet program to assure we are not unknowingly stepping on one of their key strategies!”).
- b. In subsequent meetings in the Fall of 1995, Microsoft explained to Intel that its strategy would be to kill Netscape and control**

Internet standards

91.3. After Microsoft used its monopoly power to prevent Intel from developing its own platform-level software, Microsoft continued to pressure Intel not to support Netscape's browser and bluntly described to Intel its predatory scheme and objective. At a meeting held on November 9, 1995, Microsoft executive Paul Maritz met with Intel executives and explained to Intel, in explicit terms, that Microsoft's strategy was to kill Netscape and control Internet standards.

91.3.1. During this meeting, Paul Maritz told Intel that Microsoft would "cut off Netscape's air supply" -- that, in other words, by "giving away free browsers," Microsoft would choke off Netscape's sources of revenue and retard its ability to invest in developing its technology.

- i. McGeady testified that Maritz told Intel that Microsoft planned to "cut off Netscape's air supply," or in other words, "by giving away free browsers, Microsoft was going to keep Netscape from getting off the ground." McGeady, 11/9/98pm, at 53:6-23; GX 1640.
- ii. McGeady testified that Maritz explained Microsoft's strategy "was, first of all, to give the browser away from (sic) free, keep Netscape from getting any revenue from it, and that was their specific cut off of air supply. In other words, don't allow them to have any revenue to continue paying their engineers to build new products." McGeady, 11/9/98pm, at 54:21 - 55:16.
- iii. Maritz's inconsistent testimony to the contrary lacks credibility. When asked whether he told Intel that Microsoft's plan was to "cut off Netscape's air supply," Maritz testified at his deposition "it's possible, but I just don't recall it," Maritz, 1/25/99 pm, 74:18-75:16, but at trial, Maritz testified unequivocally and inconsistently that he "never said in the presence of Intel personnel or otherwise, that Microsoft would cut off Netscape's air supply or words to that effect." Maritz, 1/25/99pm, at 72:21 - 73:16; Maritz Dir. ¶ 333. And despite claiming that he did not say "words to the effect" of Microsoft planned to "cut off Netscape's air supply," he testified that he "may have pointed out on occasion that the base Internet technologies, the browser and the

Internet server, we were going to incorporate into Windows and not charge for it separately.” Maritz, 1/26/99am, 7:22 - 8:1. Maritz also conceded that he told Intel “on many occasions that it was” Microsoft’s “strategy to integrate Internet support into” its “operating system and not charge for it separately.” Maritz, 1/26/99am, 7:22 - 8:8.

- iv. **McGeady’s testimony is also corroborated by Maritz’s private comments to Intel conveying the same message, albeit more bluntly, that Microsoft was delivering publicly: that Microsoft intended to cripple Netscape by cutting off its sources of revenue. See infra Part V.G.1; ¶ 298.4.**

91.3.2. Paul Maritz also explained to Intel representatives that Microsoft’s response to the browser threat was to “embrace, extend, extinguish”; in other words, Microsoft planned to “embrace” existing Internet standards, “extend” them in incompatible ways, and thereby “extinguish” competitors.

- i. McGeady testified that Maritz told Intel that Microsoft’s strategy was to “embrace, extend, extinguish.” McGeady, 11/9/98pm, at 53:17 - 54:8; McGeady, 11/10/98 am, at 21:22 - 23:19; GX 564.
- ii. McGeady testified that Microsoft was going to take Internet standards, like HTML, “and extend it to the point where it was incompatible with the Netscape browser and encourage people to develop to their version of HTML so that pages couldn’t be read with Netscape’s browser.” McGeady, 11/9/98pm, at 55:7-14.
- iii. Russell Barck, an Intel executive, testified at his deposition that “in relation to Netscape, . . . Maritz . . . said the term ‘embrace and smother’ with respect to a strategy with respect to Netscape.” Maritz, 1/26/99 am, 55:19 - 57:1.
- iv. Rob Sullivan testified at his deposition that Maritz said the phrase “embrace and smother.” Maritz, 1/26/9am, 57:2-11. When asked about his understanding of the meaning of the embrace and smother concept, Sullivan testified that he “understood that concept to mean that Microsoft intended to deprive Netscape of revenue and viability.” Microsoft would achieve this “by giving away their products, by

embracing the Internet standards and extending them in a way that favored the Windows platform.” Maritz, 1/26/99am, 58:16 - 59:8.

91.3.3. Paul Maritz also explained to Intel representatives that another aspect of Microsoft’s strategy to combat Netscape was to create dependencies between the operating system and the browser.

- i. McGeady testified that, based on the meeting with Maritz, Microsoft planned “to create some various levels of dependencies between the operating system and the browser that would differentially advantage their browser.” McGeady, 11/9/98pm, at 54:15 - 55:14; GX 564.

91.3A. Microsoft’s suggestion that its threats to Intel did not affect Intel’s support for Netscape (MPF ¶ 939) is contrary to the record.

- i. **Although Intel initially informed Microsoft that it would use Netscape’s server software in its “Internet-in-a-Box” server product (GX 284), McGeady testified that in early 1996, just before it was scheduled to ship, Intel pulled back the product, which was based on Netscape server software, and reengineered it for Microsoft’s server software, even though Intel’s performance analysis showed that Netscape’s server software performed substantially faster than Microsoft’s on Intel hardware. McGeady, 11/12/98pm, at 25:15 - 27:2; McGeady, 11/12/98am, at 71:19 - 72:8.**
- ii. **See infra Part VI.A; ¶ 333.2 (detailing how Microsoft convinced Intel to withhold public support for Java). Microsoft persuaded Intel to reassign McGeady away from Java and Internet responsibilities because Microsoft believed that he was too enthusiastic a supporter of Java and the paradigm of Internet-based applets. GX 288 (4/17/96 Maritz e-mail to Gates, et al., noting that McGeady “remains an issue” for Microsoft because of his support for Java and that Intel’s Frank Gill had assured Maritz that McGeady would be taken out of line management); McGeady, 11/12/98am, at 44:18 - 45:71, 47:21 - 48:14.**

91.4. Microsoft continued to monitor to ensure that Intel did not voice public support for Netscape, even to the point of regulating Intel’s internal browser use.

- i. In an internal June 6, 1996 e-mail, Bill Gates reported to other executives that he spoke with Intel's CEO, Andy Grove, and Bill Gates reported: "I said it was important that Intel NOT ever publicly say they are standardizing on Netscape browsers." McGeady, 11/9/98pm, 49:3 - 50:2; GX 289.

92. Microsoft's efforts to ensure that Intel not support Netscape, and its blunt warning that it would "cut off" Netscape's "air supply," were neither isolated events nor normal competitive banter or "locker room talk." Rather, they were part of a calculated, multifaceted predatory scheme, the details of which are set forth below.