

U.S. vs. Microsoft Corp., Final Judgement

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

CIVIL ACTION NO. _____
UNITED STATES OF AMERICA, plaintiff,
v.
MICROSOFT CORPORATION, Defendant.

FINAL JUDGEMENT

WHEREAS plaintiff, United States of America, having filed its Complaint in this action on July 15, 1994, and plaintiff and Defendant, by their respective attorneys, having consented to the entry of this Final Judgment without trial or adjudication of any issue of fact or law; and without this Final Judgment constituting any evidence or admission by any party with respect to any issue of fact or law;

NOW, THEREFORE, before any testimony is taken, and without trial or adjudication of any issue of fact or law, and upon consent of the parties, it is hereby

ORDERED, ADJUDGED AND DECREED as follows:

I.

JURISDICTION

This Court has jurisdiction of the subject matter of this action and of the person of the Defendant, Microsoft Corporation ("Microsoft"). The Complaint states a claim upon which relief may be granted against' the Defendant under Sections 1 and 2 of the Sherman Act, 15 U.S.C. 1, 2.

II.

DEFINITIONS

1. "Covered Product(s)" means the binary code of (i) MS-DOS 6.22, (ii) Microsoft Windows 3.11, (iii) Windows for Workgroups 3.11, (iv) predecessor versions of the aforementioned products, (v) the product currently code-named "Chicago, and (vi) successor versions of or products marketed as replacements for the aforementioned products, whether or not such successor versions or replacement products could also be characterized as successor versions or replacement products of other Microsoft Operating System Software products that are made available (a) as stand-alone products to OEMs pursuant to License Agreements, or (b) as unbundled products that perform Operating System Software functions now embodied in the products listed in subsections (i) through (v). The term "Covered Products" shall not include "Customized" versions of the aforementioned products developed by Microsoft; nor shall it apply to Windows NT Workstation and its successor versions, or Windows NT Advanced Server.

2. "Customized" means the substantial modification of a product by Microsoft to meet the particular and specialized requirements of a final customer of a computer system. It does not include the adaptation of such a product in order to optimize its performance in connection with a Personal Computer System manufactured by an OEM.
3. "Duration" means, with respect to a License Agreement, the period of time during which an OEM is authorized to license, sell or distribute any of the Covered Products.
4. A "License Agreement" means any license, contract, agreement or understanding, or any amendment thereto, written or oral, express or implied, pursuant to which Microsoft authorizes an OEM to license, sell or distribute any Covered Product with its Personal Computer system(s).
5. A "Minimum Commitment" means an obligation of an OEM to pay Microsoft a minimum amount under a License Agreement, regardless of actual sales.
6. "Lump Sum Pricing" means any royalty payment for a Covered Product that does not vary with the number of copies of the Covered Product that are licensed, sold or distributed by the OEM or of Personal Computer Systems distributed by the OEM.
7. "New System" means a system not included or designated in a Per System License.
8. "NDA" means any non-disclosure agreement for any pre- commercial release of a Covered Product that imposes any restriction on the disclosure or use of any such pre-commercial release of any Covered Product or any information relating thereto.
9. "OEM" means an original equipment manufacturer or assembler of Personal Computer Systems or Personal Computer System components (such as motherboards or sound cards) or peripherals (e.g., printers or mice) that is a party to a License Agreement.
10. "Per Copy License" means any License Agreement pursuant to which the OEM's royalty payments are calculated by multiplying (i) the number of copies of each Covered Product licensed, sold or distributed during the term of the License Agreement, by (ii) a per copy royalty rate agreed upon by the OEM and Microsoft, which rate may be determined as provided in Section IV (H).
11. "Per Processor License" means a License Agreement under which Microsoft requires the OEM to pay Microsoft a royalty for all Personal Computer Systems that contain the particular microprocessor type(s) specified in the License Agreement.
12. "Per System License" means a License Agreement under which Microsoft requires the OEM to pay Microsoft a royalty for all personal Computer Systems which bear the particular model name(s) or number(s) which are included or designated in the License Agreement by the OEM to Microsoft, at the OEM's sole option and under the terms and conditions as set forth herein.
13. "Personal Computer System" means a computer designed to use a video display and

keyboard (whether or not the video display and keyboard are actually included) which contains an Intel x86, or Intel x86-compatible microprocessor.

14. "Operating System Software" means any set of instructions, codes, and ancillary information that controls the operation of a Personal Computer System and manages the interaction between the computer's memory and attached devices such as keyboards, display screens, disk drives, and printers.

III.

APPLICABILITY

This Final Judgment applies to Microsoft and to each of its officers, directors, agents, employees, subsidiaries, successors and assigns; and to all other persons in active concert or participation with any of them who shall have received actual notice of this Final Judgment by personal service or otherwise.

IV.

PROHIBITED CONDUCT

Microsoft is enjoined and restrained as follows:

A. Microsoft shall not enter into any License Agreement for any Covered Product that has a total Duration that exceeds one year (measured from the end of the calendar quarter in which the agreement is executed).

Microsoft may include as a term in any such License Agreement that the OEM may, at its sole discretion, at any time between 90 and 120 days prior to the expiration of the original License Agreement, renew such License Agreement for up to one additional year on the same terms and conditions as those applicable in the original license period.

The License Agreement shall not impose a penalty or charge of any kind on an OEM for its election not to renew all or any portion of a License Agreement. In the event that an OEM does not exercise the option to renew a License Agreement as provided above, and a new License Agreement is entered between Microsoft and the OEM, the arm's length negotiation of different terms and conditions, specifically including a higher royalty rate(s), will not by itself constitute a penalty or other charge within the meaning of the foregoing sentence.

The Duration of any License Agreement with any OEM not domiciled in the United States or the European Economic Area that will not be effective prior to regulatory approval in the country of its domicile may be extended at the option of Microsoft or the OEM during the time required for any such regulatory approval.

License Agreement provisions that do not bear on the licensing or distribution of the Covered Products may survive expiration or termination of the License Agreement.

B. Microsoft shall not enter into any License Agreement that by its terms prohibits or restricts the OEM's licensing, sale or distribution of any non-Microsoft Operating System Software product.

C. Microsoft shall not enter into any Per Processor License.

D. Except to the extent permitted by Section IV (G). below, Microsoft shall not enter into any License Agreement other than a Per Copy License.

E. Microsoft shall not enter into any License Agreement in which the terms of that agreement are expressly or impliedly conditioned upon:

(i) the licensing of any other Covered Product, Operating System Software product or other product (provided, however, that this provision in and of itself shall not be construed to prohibit Microsoft from developing integrated products); or

(ii) the OEM not licensing, purchasing, using or distributing any non-Microsoft product.

F. Microsoft shall not enter into any License Agreement containing a Minimum Commitment. However, nothing contained herein shall prohibit Microsoft and any OEM from developing non-binding estimates of projected sales of Microsoft's Covered Products for use in calculating royalty payments.

G. Microsoft's revenue from a License Agreement for any Covered Product shall not be derived from other than Per Copy or Per System Licenses, as defined herein. In any Per System License:

(i) Microsoft shall not explicitly or implicitly require as a condition of entering into any License Agreement, or for purposes of applying any volume discount, or otherwise, that any OEM include under its Per System License more than one of its personal Computer Systems;

(ii) Microsoft shall not charge or collect royalties for any Covered Product on any Personal Computer System unless the Personal Computer System is designated by the OEM in the License Agreement or in a written amendment. Microsoft shall not require an OEM which creates a New System to notify Microsoft of the existence of such a New System, or to take any particular actions regarding marketing or advertising of that New System, other than creation of a unique model name or model number that the OEM shall use for internal and external identification purposes. The requirement of external identification may be satisfied by placement of the unique model name or model number on the machine and its container (if any), without more. The OEM and Microsoft may agree to amend the License Agreement to include any new model of Personal Computer System in a Per System License. Nothing in this clause shall be deemed to preclude Microsoft from seeking compensation from an OEM that makes or distributes copies of a Covered Product in breach of its License Agreement or in violation of copyright law;

(iii) The License Agreement shall not impose a penalty or charge on account of an OEM's

choosing at any time to create a New System. Addition of a New System to the OEM's License Agreement so that Covered Products are licensed for distribution with such New System and royalties are payable with respect there to shall not be deemed to constitute a penalty or other charge of any kind within the meaning of the foregoing sentence;

(iv) All OEMs with existing Per System Licenses, or Per Processor Licenses treated by Microsoft under Section IV (J), as Per System Licenses, will be sent within 30 days following entry of this Final Judgment in a separately mailed notice printed in bold, boxed type which shall begin with the sentence "You are operating under a Microsoft Per System License," and shall continue with the language contained in the first four quoted paragraphs below. All new or amended Per System Licenses executed after September 1, 1994 shall contain a provision that appears on the top half of the signature page in bold, boxed type, shall begin with the sentence "This is a Microsoft Per System License," and which shall continue with the language contained in the first four quoted paragraphs below.

"As a Customer, you may create a 'New System' at any time that does not require the payment of a royalty to Microsoft unless the Customer and Microsoft agree to add it to the License Agreement."

"Any New System created may be identical in every respect to a system as to which the Customer pays a Per System royalty to Microsoft provided that the New System has a unique model number or model name for internal and external identification purposes which distinguishes it from any system the Customer sells that is included in a Per System License. The requirement of external identification may be satisfied by placement of the unique model name or model number on the machine and its container (if any), without more."

"If the customer does not intend to include a Microsoft operating system product with a New System, the Customer does not need to notify Microsoft at any time of the creation, use or sale of any such New System, nor does it need to take any particular steps to market or advertise the New System."

"Under Microsoft's License Agreement, there is no charge or penalty if a Customer chooses at any time to create a New System incorporating a non-Microsoft operating system. If the Customer intends to include a Microsoft operating system product with the New System, the Customer must so notify Microsoft, after which the parties may enter into arm's length negotiation with respect to a license to apply to the New System."

In the case of OEMs with Per Processor Licenses treated as Per System Licenses pursuant to Section IV (J), the notice shall include the following paragraph at the beginning of the notice:

"All models covered by your Per Processor License are now treated as subject to a Per System License. You may exclude any such model from being treated as subject to a Per System License by notifying Microsoft in writing. Such notice to Microsoft must include the model designation to be excluded from the Per System License. Such exclusion shall take effect on the first day of the calendar quarter next following Microsoft's receipt of such notice."

H. Microsoft may not use any form of Lump Sum Pricing in any License Agreement for Covered Product(s) executed after the date of this Final Judgment. It is not a violation of this Final Judgment for Microsoft to use royalty rates, including rates embodying volume discounts, agreed upon in advance with respect to each individual OEM, each specific version or language of a Covered Product, and each designated Personal Computer System model subject to the License Agreement.

I. OEMs that currently have a License Agreement that is inconsistent with any provision of this Final Judgment may, without penalty, terminate the License Agreement or negotiate with Microsoft to amend the License Agreement to eliminate such inconsistent provisions. An OEM desiring to terminate or amend such a License Agreement shall give Microsoft ninety (90) days written notice at any time prior to January 1, 1995.

J. If an OEM has a License Agreement that is inconsistent with any provision of this Final Judgment, Microsoft may enforce that License Agreement subject to the following:

(i) if the License Agreement is a Per Processor License, Microsoft shall treat it as a Per System License for all existing OEM models that contain the microprocessor type(s) specified in the License Agreement except those models that the OEM opts in writing to exclude and such exclusion shall take effect on the first day of the calendar quarter next following Microsoft's receipt of such notice; and

(ii) Microsoft may not enforce prospectively any Minimum Commitment.

K. Microsoft shall not enter into any NDA:

(i) whose duration extends beyond (a) commercial release of the product covered by the NDA, (b) an earlier public disclosure authorized by Microsoft of information covered by the NDA, or (c) one year from the date of disclosure of information covered by the NDA to a person subject to the NDA, whichever comes first; or

(ii) that would restrict in any manner any person subject to the NDA from developing software products that will run on competing Operating System Software products, provided that such development efforts do not entail the disclosure or use of any Microsoft proprietary information during the term of the NDA; or

(iii) that would restrict any activities of any person subject to the NDA to whom no information covered by the NDA has been disclosed.

L. The form of standard NDAs will be approved by a Microsoft corporate officer and all non-standard language in NDAs that pertains to matters covered in Section (K) above will be approved by a Microsoft senior corporate attorney.

M. Within thirty (30) days of the entry of this Final Judgment, Microsoft will provide a copy of this Final Judgment to all OEMs with whom it has License Agreements at that time except for those with licenses solely under the Small Volume Easy Distribution (SVED) program or the

Delivery Service Partner (DSP) program.

V.

REPORTING

A. To determine or secure compliance with this Final Judgment, duly authorized representatives of the Plaintiff shall, upon written request of the Assistant Attorney General in charge of the Antitrust Division, on reasonable notice given to Defendant at its principal office, subject to any lawful privilege, be permitted:

1. Access during normal office hours to inspect and copy all books, ledgers, accounts, correspondence, memoranda and other documents and records in the possession, custody, or control of Defendant, which may have counsel present, relating to any matters contained in this Final Judgment.
2. Subject to the reasonable convenience of Defendant and without restraint or interference from it, to interview officers, employees, or agents of Defendant, who may have counsel present, regarding any matters contained in this Final Judgment.

B. Upon written request of the Assistant Attorney General in charge of the Antitrust Division, on reasonable notice given to Defendant at its principal office, subject to any lawful privilege, Defendant shall submit such written reports, under oath if requested, with respect to any matters contained in this Final Judgment.

C. No information or documents obtained by the means provided by this Section shall be divulged by the Plaintiff to any person other than a duly authorized representative of the Executive Branch of the United States government, except in the course of legal proceedings to which the United States is a party, or for the purpose of securing compliance with this Final Judgment, or as otherwise required by law.

D. Defendant shall produce to plaintiff, within forty-five (45) days, any documents provided to the Directorate-General for Competition of the European Commission ("DG-IV") in connection with its monitoring or securing of compliance with any Undertaking by or Decision against Microsoft that relates to Microsoft's licensing of any Covered Product. In addition, Defendant shall not object to disclosure to Plaintiff by DG-IV of any other information provided by Defendant to DG-IV, or to cooperation between DG-IV and Plaintiff in the enforcement of this Judgment, provided that Microsoft shall receive in advance a detailed description of the information to be provided and the Plaintiff will accord any Microsoft information received from DG-IV the maximum confidentiality protection available under applicable law. Specifically, Plaintiff will treat Microsoft information that it receives from DG-IV as "confidential business information" within the meaning of the Freedom of Information Act, 5 U.S.C. 552, with Microsoft deemed a "submitter" of the information under the statute. Plaintiff shall take precautions to ensure the security and confidentiality of Microsoft information provided in electronic form.

E. If at the time information or documents are furnished by Defendant to Plaintiff, Defendant represents and identifies in writing the material in any such information or document to which a claim of protection may be asserted under Rule 26(c) (7) of the Federal Rules of Civil Procedure, and Defendant marks each pertinent page of such material "Subject to claim of protection under Rule 26(c) (7) of the Federal Rules of Civil Procedure," then ten days notice shall be given by Plaintiff to Defendant prior to divulging such material in any legal proceeding (other than a grand jury proceeding) to which Defendant is not a party.

VII.

FURTHER ELEMENTS OF JUDGMENT

A. This Final Judgment shall expire on the seventy eighth month after its entry.

B. Jurisdiction is retained by this Court over this action and the parties thereto for the purpose of enabling any of the parties there to to apply to this Court at any time for further orders and directions as may be necessary or appropriate to carry out or construe this Final Judgment, to modify or terminate any of its provisions, to enforce compliance, and to punish violations of its provisions.

VIII.

PUBLIC INTEREST

Entry of this Final Judgment is in the public interest.

Entered: _____

UNITED STATES DISTRICT JUDGE