



Memorandum

To: The Novell Board

From: David R. Bradford

Date: April 12, 1995

Subject: Microsoft - Legal Complaint in DOS Market

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The attached draft complaint reflects a proposed legal strategy to limit Microsoft's power (both current and future) and to obtain damages from Microsoft for their anti-competitive conduct as it relates to its monopolization of the desktop operating system market.

1. The Basic Legal Strategy

- (a) Microsoft's Illegal Conduct. Although Microsoft may have obtained its desktop PC operating system monopoly legally during the early and mid-1980's, from 1988 to the present it has engaged in illegal predatory acts to maintain that monopoly position. Most important here, Microsoft illegally prevented DR DOS (later Novell DOS) from penetrating the desktop PC operating system market by (1) per processor licenses, (2) exclusionary pricing schemes, and (3) the Windows incompatibility scare.

This legal theory has the advantage of being simple and clear and relying on established principles. Indeed, the Justice Department has already adopted the core of this view in the proposed Consent Decree in finding, for example, that the per processor licensing scheme constituted an illegal effort to maintain Microsoft's monopoly power.

- (b) Novell's Relief. The legal strategy does not stop with the request for payment of damages (the complaint prays for \$1 billion in damages, before trebling). The complaint also looks to the future, seeking injunctive relief that would limit Microsoft's ability to leverage its desktop PC monopoly position in a manner that gives it an unfair advantage in the network operating system and desktop PC applications markets. For example, the complaint proposes disclosure of all Microsoft operating system API's as a mechanism for leveling a

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playing field that Microsoft has skewed by its illegal monopolization of the desktop.

2. The Statute of Limitations

The statute of limitations for antitrust violations is four years. The statute of limitations presents two issues for Novell's consideration.

First, Microsoft may assert the statute of limitations to block Novell's claims altogether. Because many of Microsoft's misdeeds began as early as 1988, it is realistic to assume that Microsoft will attempt to invoke a statute of limitations defense for at least some of the predatory practices at issue.

Moreover, because DR DOS was effectively driven from the market in 1992 by actions that were underway in 1991, any further delay could increase the risk that Microsoft's defense will be successful. Given that the destruction of DR DOS provides the clearest legal claim against Microsoft, and the best platform from which to insist on injunctive relief that can protect Novell's interests in the future, the effects of any additional delay needs to be weighed with care.

Second, even if Microsoft were not able to obtain a dismissal of Novell's claims based on a statute of limitations defense, the statute can serve to limit Novell's recovery. This is because Novell may not be permitted to recover for sales that it lost over four years ago. Under quite conservative assumptions, Novell could well be losing about \$10 million for every month it further delays taking action against Microsoft.

3. Assignment of the Case to a Third Party

We have an outstanding offer to assign the DR DOS claim to a third party. While such an approach has some advantages, it would appear to also have certain distinct disadvantages.

Initially, it is unlikely that Microsoft would view Novell more favorably if it were sued by someone closely associated with Novell rather than directly by Novell itself. Nor should it be assumed that Microsoft will respond to a suit by Novell by increasing hostile actions in the market; experience suggests that antitrust defendants tend to curb their behavior during the pendency of litigation to avoid generating evidence that helps their adversary's case.

More substantively, if a third party is controlling the claim, Novell will have little, if any, say on injunctive relief that might result from the case, setting the rules under which Microsoft will be permitted to compete. Furthermore, a third party not in the applications or network operating system business may lack standing to ask for relief that would be of benefit to Novell, particularly early disclosure of APIs. To the degree that the purpose of the case is to shape the future, Novell should not lightly give up control of the litigation.

Having said that, Novell recognizes that this suit, if filed directly, would be a distraction to management and likely worsen relationships with Microsoft. However, the filing of this case should come as no surprise to Microsoft given that everyone, including Attorney-General Janet Reno, universally declared Microsoft's conduct in the DOS market as a blatant violation of the U.S. Antitrust laws. In fact, Microsoft must be thanking their lucky stars that this case has not been

previously filed.

4. Conclusion

Novell should file its Antitrust claim against Microsoft. Two years ago we might have been the only company complaining of their conduct. It's a different story today. This is a great case and will require Microsoft to get serious about working responsibly with Novell in the future. Unless Microsoft is convinced that Novell will file suit, we will continue to only get crumbs of cooperation from Microsoft.