

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STATE OF NEW YORK, *et al.*,

Plaintiffs,

v.

MICROSOFT CORPORATION,

Defendant.

Civil Action No. 98-1233 (CKK)

EXECUTIVE SUMMARY

(January 29, 2008)

Introduction

The Court has prepared this brief summary to assist the public in understanding the Court's ruling on certain plaintiff states' (the "Moving States") motions to extend the Final Judgments in the case *State of New York, et al. v. Microsoft Corp.*, Civil Action No. 98-1233. This document is not the opinion of the Court and should not be considered a substitute for the full Memorandum Opinion. Given the demonstrated public interest in this case and the length of the Court's Memorandum Opinion, the Court provides the following synopsis of some of the key legal and discretionary conclusions. In so doing, however, the Court emphasizes that this is a very complex and unprecedented case and that this summary, by necessity, simplifies the issues.

Overview of Court Findings

The Court's decision in this matter is based upon the extreme and unforeseen delay in the availability of complete, accurate, and useable technical documentation relating to the Communications Protocols that Microsoft is required to make available to licensees under Section III.E of the Final Judgments. The Court concludes that the Moving States have met their burden of establishing that this delay constitutes changed circumstances, which have prevented the Final Judgments from achieving their principal objectives. As such, the Court shall extend until November 12, 2009 those provisions of the Final Judgments that are not already extended until that date, thus making all provisions of the Final Judgments coterminous. The Court's extension should not be viewed as a sanction against Microsoft, but rather as a means to allow the respective provisions of the Final Judgments the opportunity to operate together towards maximizing Section III.E's procompetitive potential.¹ In addition, the Court reiterates that an

¹ The Court's extension of the Expiring Provisions does not include Section III.B of the Final Judgments, which the Moving States do not seek to extend.

antitrust decree should endure only so long as necessary to ensure competition. The Court certainly anticipates that there will, and must, be finality to its oversight of the Final Judgments.

The Nature of the Moving States' Request

- The Final Judgments at issue were entered in November 2002, and were originally set to expire on November 12, 2007, unless the Court granted an extension.
- Certain provisions of the Final Judgments have already been extended until November 12, 2009, at the joint request of the parties in this action and the related action, *United States v. Microsoft Corp.*, Civil Action No. 98-1232. The extended provisions include § III.E (requiring licensing of Communications Protocol and related technical documentation), and § III.F.1, (prohibiting retaliation against ISVs and IHVs).
- In contrast, the following provisions (collectively, the “Expiring Provisions”) were not extended by agreement of the parties: § III.A (prohibiting retaliation against OEMs); § III.B (requiring uniform license terms for Covered OEMs); § III.C (allowing OEMs to install Non-Microsoft Middleware); § III.D (requiring disclosure of APIs used by Microsoft Middleware); § III.G (prohibiting exclusive agreements with IAPs, ICPs, ISVs, IHVs, or OEMs); and § III.H (allowing end users and OEMs to disable access to middleware and designate Non-Microsoft Middleware Products as defaults). On October 30, 2007, the Court granted a Joint Motion to extend the Expiring Provisions through January 31, 2008, in order to allow the Court to properly consider the Moving States’ motions to extend.
- The Moving States now seek to extend all of the provisions of the Final Judgments until November 12, 2012, five years beyond their original expiration date.

The Final Judgments At Issue

- The Final Judgments are premised upon the same liability finding affirmed by the United States Court of Appeals for the District of Columbia Circuit in *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001). The New York Movants’ Final Judgment was the result of a negotiated consent decree settling the remedy portion of this case as to the “Settling States” or “New York Group,” while the Court entered the California Movants’ Final Judgment after a thirty-two day remedy-specific evidentiary hearing involving the “Litigating States” or “California Group.”
- The Final Judgments are substantively quite similar because both followed upon, and were constrained by, the D.C. Circuit’s specific liability findings, as well as its guidance as to the nature of an appropriate remedy in light of those findings.
- The Settling States’ Final Judgment created a three-person Technical Committee (“TC”)

to assist in enforcement of the Settling States' Final Judgment. Although the Litigating States initially opposed the creation of a technical committee, over time they recognized the beneficial role of the TC, and retained their own expert, Mr. Craig Hunt, who has assisted and participated in the TC's activities on behalf of the Litigating States.

- The Court commends the members of the TC, as well as Mr. Hunt, because the TC has truly become one of the most successful aspects of the Final Judgments. The TC has gone far beyond the simple "monitoring" with which it was tasked in the Settling States' Final Judgment, to providing testing, feedback, and critiques that have proved critical to all Plaintiffs' efforts to maximize the full potential of the Final Judgments' remedies.

Applicable Legal Standard

- The Court concludes that its authority to modify the Final Judgments derives from two independent sources: (1) the Court's retained jurisdiction under the Final Judgments; and (2) the Court's authority to modify the terms of a decree, which is largely embodied in Federal Rule of Civil Procedure 60(b).
- The Court specifically retained "clearly articulated" and "broadly drawn" jurisdiction over this action, embodied in two paragraphs of the Final Judgments, which provide: (1) that the Court may act *sua sponte* to issue orders or directions relating to the construction or carrying out of the Final Judgments, "the enforcement of compliance therewith, the modification thereof, and the punishment of any violation thereof;" and (2) that any of the parties to the Final Judgments may apply to the Court "at any time for further orders and directions as may be necessary or appropriate to carry out or construe th[e] Final Judgment, to modify or terminate any of its provisions, to enforce compliance, and to punish violations of its provisions." Final Judgments, § VII.
- The Moving States and Microsoft disagree over the appropriate legal standard to apply to the Moving States' motions to extend. The Moving States argue that the Court is granted broad discretion to modify a decree in order to accomplish its intended result, based on the Supreme Court's decision in *United States v. United Shoe Mach. Corp.*, 391 U.S. 244, 250 (1968) and the D.C. Circuit's opinion in *United States v. Western Electric Co.*, 46 F.3d 1198, 1202 (D.C. Cir. 1995). In contrast, Microsoft argues that the proper standard—derived from *Rufo v. Inmates of the Suffolk County Jail*, 502 U.S. 367, 383 (1992)—is that "a party seeking modification of a consent decree bears the burden of establishing that a significant change in circumstances warrants revision of the decree," *id.* at 383. The Court concludes that the Moving States have met their burden under either test.

Extension of the Expiring Provisions Through 2009 is Appropriate Due to the Unforeseen Delay in the Implementation of Section III.E

- At the time that the Court entered the Final Judgments, all parties involved anticipated

that the technical documentation required under § III.E would be released, at the latest, by February 2003. More than five years later, the technical documentation envisioned by that Section is still not available to licensees in a complete, useable, and certifiably accurate form, despite the fact that § III.E was intended to be the “most forward-looking provision” in the Court’s remedy. Nor has the enforcement road been altogether smooth with respect to the other provisions of the Final Judgments.

- Although the technical documentation project is complex and novel, it is clear, at least to the Court, that Microsoft is culpable for this inexcusable delay. To be sure, the delay has developed in stages, and at each step Microsoft commendably has been willing to work with the Plaintiffs and the TC to address issues and identify a means of resolving them. The parties’ negotiations, in turn, have achieved a worthy goal by obviating the need for compliance-related litigation. Quite simply, because the parties have negotiated solutions to each of the myriad issues arising under § III.E, the Court has never been asked to find Microsoft out of compliance with § III.E, and has not deemed a *sua sponte* finding of non-compliance necessary or fruitful in achieving compliance.
- Nevertheless, practically speaking, Microsoft has never complied with § III.E. While Microsoft eventually proposed a plan that now appears to be producing the type of quality technical documentation required by § III.E, it did so in the face of mounting pressure from all Plaintiffs and the Court. In addition, there is no reason why the type of documentation finally being created could not have been created from the outset if the necessary resources had been devoted to the project.
- As a result of the delay in § III.E’s implementation, the provisions of the Final Judgments have not yet had the chance to operate together as the comprehensive remedy the Court and the parties envisioned when the Final Judgments were entered.
- The Court concludes that the § III.E delay, with its ramifications for the Final Judgments’ overall implementation, is entirely incongruous with the original expectations of the parties and the Court, and thus constitutes a “significant change in circumstances” that warrants modification under *Rufo* .
- The Court also concludes that an extension is warranted under *United Shoe* because the § III.E delay has impeded the Final Judgments from accomplishing their intended result and achieving their principal objects.
- The Court cannot know what impact the technical documentation required by § III.E will have on the market once it is finally available in a certifiably complete, accurate, and useable form. The Moving States, however, proffer realistic examples of ways in which the Expiring Provisions of the Final Judgments can yet play a significant role in maximizing § III.E’s potential. In the face of these examples, the Court concludes that allowing the Expiring Provisions of the Final Judgments to lapse before § III.E has even

been given a chance to succeed might threaten the ability of the Final Judgments to achieve their full procompetitive impact.

Microsoft's Additional Arguments Against Extension

- Microsoft asserts that the New York Movants should not be able to escape the five-year term included in their negotiated consent decree. The Court agrees that modification of a consent decree is an “extraordinary remedy;” however, the consent decree in this instance is unusual in that it was not reached as an alternative to a finding of liability, but rather was negotiated based on the D.C. Circuit’s findings of liability and guidance as to the parameters of an appropriate remedy. Further, the Court concludes that the New York Movants have yet to realize the benefit of the bargain embodied in the consent decree because Microsoft still has not fulfilled its technical documentation obligations under § III.E.
- Microsoft also highlights its overall compliance with the Expiring Provisions and its cooperation with the Plaintiffs and TC, and argues that allowing the New York Movants to extend the Expiring Provisions will deter parties from negotiating consent decrees. The Court is sensitive to this policy argument, and stresses that its decision to extend the Expiring Provisions of the Final Judgment must be viewed in the proper, highly unique, context: this case involves an extremely complex and rapidly evolving market; the remedy phase of this case was uniquely constrained by the D.C. Circuit’s guidance as to the parameters of an appropriate remedy; the actual remedy encompassed in the Final Judgments includes highly novel approaches; and within that unique remedy, § III.E represented the “*most* forward-looking” and most innovative provision.
- The Court does not dispute that Microsoft has been overwhelmingly cooperative with the Plaintiffs and the TC over the past five years. To the contrary, the Court commends Microsoft for its willingness to address issues as they arose and to negotiate solutions rather than force litigation. In many respects, Microsoft’s conduct has been a model for parties engaged in complex and protracted litigation. As such, the Court’s extension of the Expiring Provisions should not be viewed as a sanction against Microsoft. Rather, the extension is based upon the Court’s conclusion that the delay in producing technical documentation that is certifiably complete, accurate, and useable has prevented the Final Judgments from achieving their intended result, under *United Shoe*, and also constitutes changed circumstances under *Rufo*.

Arguments Regarding the Appropriate Length of the Extension

- The Moving States present a compelling argument that continued oversight by Plaintiffs, the TC, and the Court, is essential to give prospective licensees confidence that the technical documentation they will get when they execute a license is complete, accurate and useable. This argument, however, is based on speculation that the § III.E delay will

persist. From all reports, it appears that Microsoft has finally committed the resources necessary, and adopted an approach likely to produce technical documentation that is complete, accurate, and usable to licensees.

- Moreover, parties considering licenses should take comfort in the fact that the oversight of the TC, the Plaintiffs, and the Court is currently assured until November 2009, and will thus continue while the technical documentation is tested and finalized. The Court is unaware of any reason that the technical documentation required by § III.E should not be complete, accurate, and usable to licensees long before November 2009.
- The Moving States also offer an appealing argument that a five-year extension of the existing decree does no more than was originally intended by the parties and by the Court, by allowing the provisions of the Final Judgments to operate together for five years. The *United Shoe* standard indeed suggests that the Court would be justified in extending the entire Final Judgments until November 12, 2012, in order to accomplish their intended result. *Rufo*, however, counsels a more measured approach, requiring that a modification to a consent decree be “suitably tailored to the changed circumstances” that warrant the modification. *Rufo*, 502 U.S. at 383.
- The Court concludes that the most appropriate approach is to assess the need for continued Court oversight in reasonable incremental periods. The extension of the Expiring Provisions is only warranted due to the change in circumstances brought about by the extreme delay in the implementation of § III.E, and that provision currently remains in effect until November 12, 2009. Rather than speculate as to the possible state of the technical documentation at that point in time, the Court shall make the Expiring Provisions coterminous with § III.E.
- Ultimately, the Court’s decision not to extend the Final Judgments beyond November 12, 2009 now does not foreclose the possibility of doing so in the future. Indeed, the mechanisms are already in place to reexamine § III.E’s implementation and the Final Judgments’ termination in the Fall of 2009. At present, the Final Judgments give Plaintiffs the right “in their sole discretion” to request an additional three-year extension of certain provisions of the Final Judgment until November 12, 2012, and the door likewise remains open for the Court to reassess the need for continued oversight as the expiration of the Final Judgments in November 2009 approaches. At that point, certifiably complete, accurate, and useable documentation will, presumably, be available to licensees, and the Court will be in a far better position to evaluate § III.E’s implementation, as well as the role that the other provisions of the Final Judgments play in supporting § III.E.