

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 97-5343

UNITED STATES OF AMERICA,

Petitioner-Appellee,

v.

MICROSOFT CORPORATION,

Respondent-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

**RESPONSE OF THE UNITED STATES TO APPELLANT MICROSOFT
CORPORATION'S MOTION FOR A STAY OF THE PRELIMINARY INJUNCTION
INSOFAR AS IT RELATES TO WINDOWS 98**

The United States opposes Microsoft Corporation's ("Microsoft") Motion For a Stay of the Preliminary Injunction Insofar as it Relates to Windows 98 ("Motion"). The district court issued the preliminary injunction nearly six months ago, on December 11, 1997. Microsoft, as it now concedes, recognized that the preliminary injunction "prima facie" covers Windows 98 (Motion at 2). Microsoft nonetheless completed its plans for Windows 98 without requesting from the district court a determination whether or how the preliminary injunction applies to Windows 98. This is despite the district court's invitation to seek "further order[s]" (JA 1300), and the United States' repeated urgings that Microsoft do so.

Having chosen to ignore the preliminary injunction in implementing Windows 98, Microsoft now seeks to use its impending release and licensing of that product as an excuse for

seeking a stay in the first instance from this Court, rather than from the district court as Federal Rule of Appellate Procedure 8(a) mandates. Microsoft's attempt to use exigent circumstances entirely of its own making as an excuse for bypassing the district court should not be condoned; accordingly, Microsoft's Motion should be denied.

1. "The cardinal principle with respect to stay applications under Rule 8 is that such relief must first be sought in the lower court." 16A Charles A. Wright, et al., Federal Practice and Procedure, § 3954, at 282 (2d ed. 1996). A party may seek relief from the court of appeals only when it shows "that application to the district court for the relief sought is not practicable, or that the district court has denied an application, or has failed to afford the relief which the applicant requested." Fed. R. App. P. 8(a).

Microsoft has advanced no valid reason for bypassing the district court. Microsoft was free to seek clarification from the district court at any time as to whether or how the preliminary injunction, which covers "any successor version" of "Windows 95," might apply to Windows 98. Indeed, the district court expressly invited applications seeking "further order[s]" (JA 1300), and the United States repeatedly urged Microsoft to seek the district court's guidance. Nonetheless, as its executives explained to the government, Microsoft decided to complete its plans for Windows 98 -- which Microsoft last year announced it anticipated releasing during the second quarter of 1998 -- without regard to the preliminary injunction. As one executive testified, despite "the order," Microsoft "elected to continue on [its chosen] path" (Maritz Dep. 78, 84, attached as Exhibit A).¹

¹Another executive testified (Allchin Dep. 103, attached as Exhibit B) that Microsoft executives concluded that they "specifically weren't going to think about" the preliminary injunction's impact on Windows 98. He further explained (id.):

Because Windows 98's development was well underway, and because Microsoft plainly understood that the preliminary injunction might apply to Windows 98, the only responsible course would have been for Microsoft to seek the district court's guidance. To this day, however, Microsoft has failed to discharge this responsibly. And the reason is plain. By waiting until the eve of Windows 98's release to file its Motion, Microsoft attempts not only to garner what it apparently perceives as the tactical advantage of filing in this Court, but also to present this Court with the fait accompli of Windows 98 implemented without regard to the district court's order, a short time-frame in which to rule, and a self-generated claim of hardship. But because these circumstances are entirely a result of Microsoft's own "delay in seeking relief," Nassau Boulevard Shell Serv. Station, Inc. v. Shell Oil Co., 869 F.2d 23, 24 (2d Cir. 1989) (per curiam), the impending release of Windows 98 provides no basis for circumventing the district court. Cf. Hirschfeld v. Board of Elections, 984 F.2d 35, 38-40 (2d Cir. 1993) (denying a stay sought under Rule 8(a) "without even examining this court's standard for granting a stay" when the moving party made "no showing of impracticability of bringing such a motion before the district court" and further holding that, were it to reach the merits, it would deny the application because any irreparable injury was "self-inflicted").

2. Microsoft seeks to excuse its delay in seeking a stay on the ground that it could not earlier colorably claim irreparable injury (Motion at 3). But this argument is inconsistent with Microsoft's prior assertion to this Court, made in support of its motion for expedited

[W]e had a meeting to review the judge's order and when it touched Windows 98 for the first time, his last paragraph there was very broad and sweeping which stunned us and at that point we said, oh, what does that mean? And we said we're not going to think about it because -- because it's so hypothetical about what we should or could do

consideration of its appeal, that the mere “speculation” that the preliminary injunction might apply to Windows 98 “in and of itself is causing immediate irreparable injury to Microsoft” (Reply of Microsoft Corporation in Support of its Motion for Expedited Consideration at 3 (Dec. 23, 1997)). In any event, Microsoft does not contest that its application for a stay was ripe weeks ago, well before the April 21, 1998, oral argument. Indeed, the United States offered in late March to join Microsoft in a motion before the district court to clarify Windows 98's status under the preliminary injunction. Nonetheless, Microsoft waited until this late date to seek a stay.

3. There is, moreover, no basis for Microsoft’s assertion (Motion at 4) that it was “not practical” to seek relief from the district court. Certainly, the mere fact that the district court imposed the preliminary injunction does not show that seeking clarification or a stay of that order would have been a futile gesture, particularly when the district court invited the parties to seek “further order[s]” (JA 1300). See Ruiz v. Estelle, 650 F.2d 555, 567 (5th Cir. Unit A 1981) (district court should rule in the first instance on a motion for a stay “unless it clearly appears that further argument in support of the stay would be pointless”).

Nor is this Court better situated than the district court to rule on Microsoft’s motion. To the contrary, this case presents compelling reasons for adhering to Rule 8(a) and for permitting the district court, in the first instance, to consider Microsoft’s request for relief. First, a central purpose behind Rule 8(a)’s requirement that an application for a stay “must ordinarily be made in the first instance in the district court,” Fed. R. Civ. P. 8(a), is to permit the district court to develop the factual record needed to resolve the application. Microsoft has asserted that Windows 98 differs significantly from Windows 95 (Motion 3-4), that it will suffer irreparable

injury absent a stay (Motion at 7), and that delaying the release of Windows 98 would harm third parties (Motion at 7-8), all of which may require factual development.²

Second, because Microsoft failed to seek timely relief, the district court has yet authoritatively to construe its order. To be sure, the literal language of the preliminary injunction reaches “any Microsoft computer operating system software (including Windows 95 or any successor version thereof)” (JA 1300). A court order, however, must be construed in light of the “the objective circumstances surrounding [its] issuance.” United States v. Young, 107 F.3d 903, 907 (D.C. Cir. 1997). The district court entered the preliminary injunction based on a particular balancing of the equities on the record before it (JA 1295).³ Accordingly, it is far from

²Microsoft’s reliance on its assertion that “the Internet-related technologies in Windows 98 are even more deeply integrated into the operating system than they were in Windows 95” (Motion at 3) is ironic in light of Microsoft’s position in this case, reiterated at oral argument, that the degree of technical integration of two products is irrelevant to the operation of Section IV(E)(i) of the consent decree (Tr. at 14). Indeed, Microsoft expressly agreed with this Court that, under its construction of the consent decree, it may compel OEMs to license any product as long as that product is included in the package Microsoft labels “Windows” (Tr. at 17-18).

³The United States did not, as Microsoft contends (Motion at 5), “effectively concede” at oral argument that “there had been no showing that anyone would suffer irreparable injury in the absence of the order entered.” To the contrary, when asked by this Court (Tr. at 61) -- in the context of a colloquy as to whether Microsoft was on notice of the equitable issues raised by the United States’ request for further injunctive relief (JA 40-43) -- whether Microsoft “talked about” such “irreparable harm,” counsel for the United States answered “Yes” and explained that Microsoft had disputed the existence of such harm on the (incorrect) ground that its licensing restrictions did “nothing to exclude Netscape” and that “users were, after all, free to get rid of Internet Explorer if they want to” (see JA 450, 962, 970, 975). Counsel merely noted that Microsoft did not address “in [such] terms” whether, absent the imposition of expeditious relief, the government would suffer irreparable harm (Tr. at 61). Indeed, based on the United States’ submissions and its request for the expeditious imposition of permanent relief (JA 100-08, 261-62, 318, 321, 337, 983; CJA 152, 249, 371, 414), the district court concluded over Microsoft’s objections (JA 474-76, 1250-51) that, absent a preliminary injunction, the public interest in competition would suffer irreparable harm because Microsoft’s forced licensing of Internet Explorer threatened to foreclose competing web browsers and thereby eliminate a nascent threat to Microsoft’s operating system monopoly (JA 1297-98).

clear that the court intended its order to apply to a successor version of Windows if that version were determined to present significantly different facts and, consequently, might be judged to present a different balancing of the equities. The district court should decide this question in the first instance.

CONCLUSION

Microsoft has engaged in “delaying tactic[s] that [are] inequitable.” Nassau Boulevard Shell Serv. Station, Inc. v. Shell Oil Co., 869 F.2d 23, 24 (2d Cir. 1989) (*per curiam*).

Accordingly, its reasons for failing to file its Motion in the district court should be rejected, and its Motion for a partial stay of the preliminary injunction should be denied without prejudice.

See Rakovich v. Wade, 834 F.2d 673, 675 (7th Cir. 1987) (*en banc*).

Respectfully submitted.

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May 7, 1998

CERTIFICATE OF SERVICE

I hereby certify that on May 7, 1998, I caused the foregoing RESPONSE OF THE UNITED STATES TO APPELLANT MICROSOFT CORPORATION'S MOTION FOR A STAY OF THE PRELIMINARY INJUNCTION INSOFAR AS IT RELATES TO WINDOWS 98 to be served by hand upon:

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EXHIBIT A

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CIVIL INVESTIGATIVE)
DEMAND)
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DEPOSITION OF PAUL MARITZ, a Witness

herein, taken on behalf of the Government at 9:00
A.M., Friday, April 3, 1998, at One Microsoft,
Building 42, Redmond, Washington, before Katherine
Gale, CSR, RPR, pursuant to Civil Investigative
Demand and Subpoena.

REPORTED BY:
Katherine Gale,
CSR 9793
Our File No. 44761

1 A No.

2 Q Were you aware of an order by the
3 United District Court in the District of Columbia in
4 or about December of 1997?

5 A How could I not be?

6 Q And was any consideration given to the
7 question of whether or not that order required
8 Microsoft to offer a version of Windows 98 that did
9 not include a browser?

10 A From my perspective, it would have --
11 not including browser technology in Windows 98 would
12 require us to develop a different product. So the
13 answer is no.

14 Q I want to be sure that the question and
15 answer are meeting. I'm not now asking whether it
16 would have been a good idea or not.

17 A Okay.

18 Q I'm asking whether there was any
19 consideration given.

20 A I did try and think about what the
21 order could mean. And I came to the conclusion that
22 it would mean that we would be -- essentially be
23 asked to develop a different product because taking
24 "browser technology," quote, unquote, out of Windows
25 98 would change the very nature of the product. So

1 yeah, we did think about it. But our decision has to
2 be to go ahead and, given the nature of the Windows
3 98 product, to deliver that product.

4 Q And I want to be sure that I'm being
5 clear in my questions about what I'm asking.

6 There are, at least potentially, a
7 variety of ways and a variety of extents to which you
8 could ship a version of Windows 98 that did not have
9 IE4.0 in it the way that it is now going to be
10 shipped, ranging from taking out all the technology
11 which I understand you're going to tell me is not
12 possible, but ranging from that, to just suppressing
13 the icon. There's a whole range of things that could
14 be done.

15 Were any of those things considered;
16 that is, did you give consideration to doing any of
17 those things?

18 A We did try to think about what the
19 order could possibly mean. And you get exact -- the
20 problem is, as you said, you get right into this
21 debate about where does this browser technology begin
22 and end. And so in that sense we've -- our -- we
23 didn't see anything meaningful that we could do
24 without radically developing a new product, so we've
25 elected to continue on our current path.

1 Q When you say we elected to do that -
2 A The decision.
3 Q I understand that was a decision that
4 was made by Microsoft. Who in Microsoft participated
5 in that decision?
6 A It would have been myself and Jim
7 Allchin with advice, obviously, of counsel.
8 Q Anyone other than you and Mr. Allchin
9 and counsel?
10 A There would have been, you know -- I
11 don't know. Could have been any number of people
12 working for Jim who are in the development of the
13 product. I may or may not have discussed it at some
14 point with Bill Gates. But Jim and I would have been
15 the primary decision makers on that.
16 Q Was there ever anything in writing
17 prepared concerning the question of whether you were
18 required under the court order to offer a version of
19 Windows 98 other than the version that you're
20 offering?
21 A Not to my knowledge.
22 Q That is, this was entirely an oral
23 discussion?
24 A I believe so, yes.
25 Q There were never any E-mails back and

1 forth from -- to or from anybody about it; is that
2 what you're saying?

3 A There could have been. I don't recall
4 any. But I don't think so. I think there were none.

5 Q Did anybody make a recommendation about
6 this?

7 A Well, we had a discussion, obviously.
8 And the result of that discussion was to try and
9 understand what could be implied here. And then you
10 get into this whole debate. And then we decided that
11 given the very nature the Windows 98 product, it was
12 not something that we wanted to -- that we decided to
13 go ahead with the delivery of Windows 98, so that's
14 what we've been working on.

15 Q I understand that you decided to go
16 ahead with Windows 98. And my question really
17 doesn't relate to whether or not you go ahead with
18 Windows 98. My question goes to whether or not when
19 you release Windows 98, you also release another
20 version of Windows 98 that is in some way different.

21 A There -- we have not had any specific
22 proposal as to how we would -- whether we would do
23 anything like that.

24 Q Have you had any discussion about
25 whether you would do anything like that in the last

1 six months?

2 A As I said, when the judge's order came
3 out in whenever it was -- December or November -- we
4 obviously tried to understand what was being implied
5 here. Our conclusion is that browser technology is
6 so inextricably integrated into Windows 98 that there
7 is no realistic meaningful alternative to that
8 product. And we would have to go back to the drawing
9 board and do another product.

10 Q When did that decision that you say was
11 made get made?

12 A I don't recall precisely. But it would
13 have been made in that few weeks after the judge's
14 order.

15 Q Late December, early January?

16 A In that time frame, yeah.

17 Q And leaving counsel aside, you
18 participated in that decision and Mr. Allchin
19 participated in that decision?

20 A I think so, yes.

21 Q Was there a meeting about this?

22 A Yes. I mean, we had -- as I said, we
23 had several meetings to try and digest and understand
24 the judge's order.

25 Q And in particular, I'm talking now

1 about -- and I think you may have also been, but I
2 just want to be clear -- specifically that part of
3 the judge's order that talked about having a version
4 of any successor product to Windows 95 that did not
5 include or -- I don't want to paraphrase the judge's
6 order -- but that offered an alternative? That's the
7 part we're talking about; is that correct?

8 MR. HEINER: Can I have that read back,
9 please?

10 (Question read.)

11 Q BY MR. BOIES: Let me ask you: When
12 you say you had a number of meetings to try to
13 understand the judge's order, what part of the
14 judge's order were you talking about?

15 A The whole thing. I mean, I don't want
16 to go through it again, but there were a lot of
17 things in there that I personally found confusing.

18 Q Okay. And you told people you found it
19 confusing?

20 A Correct.

21 Q Now, I want to focus on Windows 98.

22 A Correct.

23 Q Did you have any discussions about
24 whether the court's December 1997 order required you
25 to offer a second version of Windows 98?

1 A Yes.

2 Q Was there an in-person meeting at which
3 that was discussed?

4 A Yes. And there was -- I don't recall a
5 particular meeting, but we had several meetings, that
6 I've already indicated, after that on the issuance of
7 the judge's order. And I don't recall specifically
8 when or where, but the topic would have been
9 discussed in those meetings.

10 Q And do those --

11 A And you should advise me here whether
12 those meetings are privileged communication or not.

13 MR. HEINER: If Mr. Boies asks you a
14 question that I think I need to advise you on, I
15 will. So far so good.

16 Q BY MR. BOIES: Did those meetings take
17 place here at Microsoft's headquarters?

18 A Yes.

19 Q In addition to you and Mr. Allchin, did
20 anyone at a senior level of Microsoft, other than
21 counsel, participate in those meetings?

22 A I do recall one meeting with Mr. Gates.
23 But I think that that meeting was primarily focused
24 on our existing shipping product Windows 95.

25 Q Do you I understand your testimony to

1 be that the decision in terms of whether to offer a
2 second version of Windows 98 was a decision that was
3 not discussed with Mr. Gates?

4 A I -- my recollection is -- I don't
5 recall it being specifically discussed at that
6 meeting. It may have been, but I don't specifically
7 recall it.

8 Q Whether it was at that meeting or any
9 other meeting or in a telephone conversation, did you
10 ever participate in a discussion with Mr. Gates about
11 the question as to whether there was going to be or
12 should be a second version of Windows 98?

13 A Not directly, no.

14 Q Indirectly?

15 A I don't recall any such discussion. I
16 mean, the -- we obviously in the weeks following the
17 judge's decision Jim and I made a determination to
18 continue with Windows 98 development, and I don't
19 recall that being questioned in any way by Bill
20 Gates.

21 Q I want to be sure that I'm being clear.

22 A Sure.

23 Q I wasn't suggesting that you were going
24 to abandon Windows 98 development. What I was
25 focusing on is whether there would be a version of

1 Windows 98 -- a second version of Windows 98.

2 A There was no such discussion.

3 Q With Mr. Gates?

4 A Correct.

5 Q And insofar as you are aware, Mr. Gates
6 never had that discussion with anyone; is that
7 correct?

8 A I don't know. I mean, I'm not -- I --
9 what I recall is that everyone was in agreement,
10 almost without need for extensive discussion, that
11 the notion of taking IE4 technologies out of Windows
12 98 would mean a radically different product and just
13 so unthinkable that we just dismissed it almost out
14 of hand.

15 Q What I'm trying to do is focus on who
16 dismissed it out of hand and whether that was
17 something that you and Mr. Allchin did on your own or
18 whether that is something Mr. Gates participated in.

19 A It was done primarily by Jim and
20 myself, and that was a decision that was not
21 challenged by Mr. Gates.

22 Q Was it reviewed by Mr. Gates?

23 A I can't remember if it was explicitly
24 reviewed or not. But obviously he would have known
25 that we were continuing.

EXHIBIT B

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OFFICE OF THE ATTORNEY GENERAL)
STATE OF TEXAS)
CIVIL INVESTIGATIVE DEMAND)
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DEPOSITION OF JAMES EDWARD ALLCHIN, a

witness herein, taken on behalf of the Office of the
Attorney General of Texas, at 9:20 A.M., Thursday,
March 19, 1998, at One Microsoft Way, Redmond,
Washington, before Kathleen E. Barney, CSR, pursuant
to Civil Investigative Demand.

REPORTED BY:
Kathleen E. Barney,
CSR No. 5698
Our File No. 44554

1 A. Right. And then this gives the OEMs
2 time to update their inventory and -- it's a very
3 dicey situation. I personally don't get involved
4 into the term of whether certain OEMs get an
5 advantage because of their particular distribution
6 approach. I don't personally deal with that. I just
7 know the marketing benefit of all at the same time.
8 And I think we have everybody agreed to that here
9 now.

10 Q. Currently does Microsoft have any plan
11 to make available either at retail or to OEMs two or
12 more different versions of Windows 98? Is there any
13 plan to make available a version of Windows 98 in
14 which Internet Explorer or any part of it, an icon or
15 any other part, is removed or hidden in any way?

16 A. No. When you say versions, I assume
17 you don't mean localized and everything else. You're
18 talking about the IE issue.

19 Q. Yes, a version with anything different
20 about IE?

21 A. No.

22 Q. Has there been any development work, to
23 your knowledge, done on a separate version of Windows
24 98 that has any part of IE removed, deactivated or
25 hidden in any way?

1 A. No.

2 Q. Have there been discussions you're
3 aware of where that possibility, whether or not to
4 work on such a version has been discussed?

5 A. We had a discussion that said we
6 specifically weren't going to think about this.

7 Q. A discussion not to discuss?

8 A. Well -- that we specifically weren't
9 going to bother to the development team who is in the
10 middle of fixing bugs to worry about hypothetical
11 what-ifs, so it's not been discussed with the team
12 and we specifically haven't put any IQ on it at all.

13 Q. When did that discussion take place?

14 A. The time I remember was when we had a
15 meeting to review the judge's order and when it
16 touched Windows 98 for the first time, his last
17 paragraph there was very broad and sweeping which
18 stunned us and at that point we said, oh, what does
19 that mean? And we said we're not going to think
20 about it because -- because it's so hypothetical
21 about what we should or could do, should do,
22 whatever, you know, it could be all wasted effort, so
23 that was the only time that I know of.

24 Q. Was there any discussion at that
25 meeting, you know, that if we were to think about it,

1 if we were to consider doing something, the options
2 from a technical standpoint might be A, B, C, we
3 could do this to an icon, we could do this to certain
4 codes, anything talked about what might be done if
5 you decided to think about it?

6 A. Specifically referring to Windows 98,
7 the answer is no. We obviously did go back and
8 rethink Windows 95 but the answer is no, Windows 98
9 is more complicated from that perspective and there's
10 never been any discussion about it that I've been a
11 part of.

12 Q. Was there discussion at this meeting
13 you've described that Windows 98 is more complicated
14 so it would be harder to do or do you not --

15 A. Yes.

16 Q. What was said along those lines?

17 A. There's things like this help thing
18 that will be definitely a mess that, you know, it's
19 like, you know, how much effort would this be? Oh, a
20 lot. We're not -- and who knows if that would
21 satisfy anybody. We're not thinking about it. March
22 on. So in our business we could disrupt a lot of
23 people for nothing in a situation where time is
24 slipping away on us.

25 Q. Do you remember approximately when this