IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, Petitioner, v. MICROSOFT CORPORATION, Respondent.	Supplemental to Civil Action No. 94-1564 Hon. Thomas Penfield Jackson

**MOTION BY THE UNITED STATES
FOR JUDGMENT OF CIVIL CONTEMPT
AND TO ENFORCE PRELIMINARY INJUNCTION**

"If a party can make himself a judge of the validity of orders which have been issued, and by his own act of disobedience set them aside, then are the courts impotent, and what the Constitution now fittingly calls the `judicial power of the United States' would be a mere mockery." *Gompers* v. *Buck Stove & Range Co.*, 221 U.S. 418, 450 (1911). That is precisely what Microsoft has sought to achieve in the wake of this Court's December 11, 1997, preliminary injunction. In that order, this Court required Microsoft to cease and desist from forcing OEMs to license and preinstall Internet browser software in order to obtain a license to Windows 95. But in its December 15, 1997, public response to the injunction, Microsoft, without seeking further guidance from this Court or consulting the United States, made clear that an OEM not wishing to license Internet Explorer in order to obtain the latest version of Windows 95 has two, and only two, options: (1) the OEM may license a version of Windows 95 that Microsoft believes will not work; or (2) the OEM may license a version of Windows 95 that is two-and-a-half years out of date and is not commercially viable.

As Microsoft well knows, these are options in name only. Far from treating the Court's Order with "[]obedience" and "respect[]" until properly challenged, *Walker* v. *City of*

Birmingham, 388 U.S. 307, 314 (1967) (internal quotations omitted), Microsoft has cynically acted as if the preliminary injunction permits it to perpetuate the very conditioning the Court enjoined. Microsoft's naked attempt to defeat the purpose of the Court's Order and to further its litigation strategy is an affront to the Court's authority; the Court accordingly should hold Microsoft in civil contempt and act swiftly to bring it into compliance.[1/]

I. This Court's Preliminary Injunction

This Court enjoined Microsoft from conditioning a license for "Microsoft personal computer operating system software," including "Windows 95," on an OEM agreeing to "license and preinstall any Microsoft Internet browser software" "including Internet Explorer 3.0[&] 4.0" (Memorandum and Order 19 (Dec. 11, 1997) ("Mem."")). The meaning of the Court's injunction is obvious: Microsoft must permit an OEM to license the most up-to-date version of Windows 95 without also requiring an OEM to take the browser functionality.

Indeed, in light of the concerns that drove the Court to issue the Order, the proscription could have no other meaning. *See United States* v. *Christie Indus., Inc.*, 465 F.2d 1002, 1007 (3d Cir. 1972) (explaining that "[t]he language of an injunction must be read in light of the circumstances surrounding its entry" including "the mischief that the injunction seeks to prevent"); *United States* v. *Greyhound Corp.*, 508 F.2d 529, 532 (7th Cir. 1974) (same). The injunction was intended to end, at least during the pendency of the case, Microsoft's use of its monopoly power in the market for operating system software to force OEMs to take what Microsoft promotes as a separate product, Microsoft's browser (Mem. at 15, 16-17). A construction of the terms "operating system software" and "Microsoft Internet browser software" that authorizes degrading the non-browser functionality of Windows 95 would effectively require OEMs to take a license to both Windows 95 and Internet Explorer and thereby thwart the Court's purpose and impermissibly render the preliminary injunction's

[1]This Court, of course, retains jurisdiction to enforce the unstayed preliminary injunction during the pendency of Microsoft's present appeal. *See Deering Milliken, Inc.* v. *FTC.*, 647 F.2d 1124, 1128-29 (D.C. Cir. 1978). *See generally* 16 Charles A. Wright *et al.*, *Federal Practice and Procedure* § 3921.2, at 56-58 (2d ed. 1996).

prohibition on conditioning a dead letter. *See Greyhound*, 508 F.2d at 533 (rejecting construction of decree that would "for all practical purposes" "render th[e] provision a nullity"). The Court thus plainly required Microsoft to offer to OEMs the option of obtaining Microsoft's most current version of Windows 95 less *only* the software that enables web browsing functionality with *no other* function degraded.

As the record before the Court amply reflects, Microsoft can provide this option with ease.[2/] Microsoft already enables PC users who obtain Internet Explorer through non-OEM channels to "uninstall" (essentially deactivate) the Internet Explorer browser software using Windows 95's simple built-in "Add/Remove Programs" utility (Gaspar Decl. ¶ 19, Exh. 9 ("IE uninstalls easily if you want . . . simply [to] get rid of it . . . .")), and has even included this uninstall ability (albeit concealed) in the OEM Service Release 2 ("OSR 2") version (Declaration of Michael McCarthy ¶ 4, App. 3 ("McCarthy Decl.)). Uninstalling Internet Explorer in this way eliminates visible signs of, and user access to, browser functionality without harming the underlying operating system. As the United States previously explained (U.S. Reply Br. 16 n.16; U.S. Response to Microsoft Sur-Reply at 4 n.4) -- and Microsoft did not contest -- Microsoft could readily implement a similar option for OEMs by providing OEMs with the most current version of Windows 95 from which Microsoft has removed the Internet icon and other aspects of the browser that are visible to users or allow users access to it. That is, Microsoft could offer the most current version of Windows with the same changes already made to it as would result when a user activates the uninstall utility and removes browser functionality.

[2]The United States has previously told the Court that it believes Microsoft's statements about Windows 95 "breaking" if one were to remove entirely all of the files that are installed when Internet Explorer is installed are greatly overblown, and that, at most, removal of only a *handful* of those files might under some circumstances create problems. The United States has also previously told the Court on several occasions that Microsoft's concerns can be avoided by a simpler yet fully-effective means of relief. It is *that* relief the United States urges the Court to order now in order to achieve an immediate resolution of this matter.

II. Microsoft Has Flouted This Court's Order

Although making available this simple and obvious version of Windows 95 would have complied with both the letter and spirit of the Court's injunction, Microsoft chose a different course. Specifically forbidding OEMs from removing the Internet icon from its conditioned offering,[3/] Microsoft on December 15 announced two alternatives to the current conditioned license, neither of which is commercially feasible. Microsoft's "options" thus leave OEMs with no option at all and have the practical effect of perpetuating the very conditioning the Court enjoined. Microsoft's transparent attempt to rewrite the injunction to permit precisely what it precludes constitutes a flagrant disregard of this Court's lawful authority and warrants holding Microsoft in civil contempt. *See Greyhound*, 508 F.2d at 532-33 (upholding *criminal* contempt conviction because the defendant's "strained and twisted interpretation of the order" would "render the provision a nullity" and explaining that such "`tortured constructions'" or "mere `paper compliance'" coupled with failure to seek clarification from the court is "strong evidence of a willful violation of the decree").

On December 15, 1997, three days after the Court issued its preliminary injunction, Microsoft announced that it had "complied" with the Court's injunction by sending a letter notifying PC manufacturers that, if they no longer wish to license Internet Explorer along with Windows 95, they have two -- and only two -- "options" for licensing Windows 95. First, an OEM may license the current OSR 2 version of Windows 95 with the option of "removing . . . all the files that are included in the *retail* version of Internet Explorer 3.0" (Microsoft Telephone Press Conference Tr. 3 (emphasis added)). However, according to Microsoft, an OEM taking this option will confront a version of Windows 95 *that will not work* and that is different from what a user would have after "uninstalling" the very same retail version of Internet Explorer 3. In its December 15 press conference, Microsoft flatly

[3] *See* Microsoft Telephone Press Conference Tr. 12 (Dec. 15, 1997), McCarthy Decl. ¶ 3, App. 2; Microsoft Press "Questions & Answers," ("Microsoft Qs & As") (Dec. 15, 1997), McCarthy Decl. ¶ 2, App. 1. Of course, removing the icon is the very alternative some OEMs have requested or actually performed (before being forced by Microsoft to stop) in the past. *See* U.S. Memo in Support of Contempt Petition at 16, 20.

said that this "alternative" will result in a version of Windows 95 that "doesn't boot" and "isn't functional" (*Id.* at 6, 14; *see also* Microsoft Qs & As). As Microsoft itself has conceded, no OEM would license such an operating system (Microsoft Telephone Press Conference at 6, 13; Supplemental Declaration of David Cole at 2 ¶ 6 ("[E]xcluding files distributed `at retail' as `Internet Explorer 3.0' from OSR 2.0 would result in an operating system that would be seriously deficient and undoubtedly would find no acceptance in the marketplace.")).

The second "option" is that OEMs may license "the original OEM version of Windows 95, but with all Internet Explorer 1.0 files removed," which is equivalent to the August 1995 retail release of Windows 95 (Microsoft Telephone Press Conference at 3). Although this version of Windows 95 would function, it is commercially worthless to OEMs and no OEM would ever purchase it. Microsoft has produced two major upgrades to Windows 95 since this original version was released in August 1995. The updated versions (including OSR 2) provide numerous *non-browser* operating system "bug fixes" and enhancements to Windows 95, such as support for larger hard drives and a new file system (Declaration of Brad Chase, ¶ 5; Cole Declaration ¶ 42). Microsoft has made clear that OEMs quite reasonably demand the current version of Windows 95 that includes these operating system bug fixes and enhancements. Indeed, less than a week ago, Microsoft's senior vice president in charge of licensing Windows 95 to OEMs stated in a declaration Microsoft lodged with the Court:

> As demand-driven enterprises, OEMs are interested in installing the most up-to-date and popular version [sic] Microsoft's operating systems on their new machines. I am not aware of any interest among OEMs in installing outmoded versions of Windows 95.

Declaration of Joachim Kempin at 5 ¶ 10. Like the first "option" proffered by Microsoft to create the appearance of complying with the Court's Order, this purported "option" is no option at all. Any OEM that does not want to license Internet Explorer is stuck with the "option" of receiving what Microsoft itself recognizes as an outdated, commercially worthless version of Windows 95.

The only alternative Microsoft has left for OEMs, therefore, is to continue to take the present conditioned license -- and Microsoft knows this. Microsoft cannot, through the shell-game of defining "Windows 95" without "Internet browser software" as Microsoft sees fit, render the injunction meaningless. Compliance, as explained above, requires Microsoft to make available the most up-to-date version of Windows 95 apart from what the market regards as the browser. To be sure, the decree left to Microsoft to work out precisely how to avoid the forbidden conditioning; but "[i]t does not lie in [Microsoft's] mouth[] to say that [it] has an immunity from civil contempt because the plan or scheme which [it] adopted was not specifically [forbidden]." *McComb* v. *Jacksonville Paper Co.*, 336 U.S. 187, 192 (1949). Microsoft is "not an unwitting victim[] of the law" but rather "took a calculated risk when under the threat of contempt [it] adopted measures designed to avoid the legal consequences" of this Court's injunction. *Id.* at 193.

And the reasons why Microsoft attempted what is most charitably characterized as impermissible "mere `paper compliance,'" *Greyhound*, 508 F.2d at 532, are plain. By suggesting that only commercially worthless options comply with the injunction, Microsoft seeks to make a mockery of the Court's Order in the hopes of bolstering its argument that Section IV(E)(i) of the consent decree affords it "`unfettered liberty'" (Mem. at 15) to decide what it can require OEMs to take in its Windows 95 license. At the same time as it rewrites the preliminary injunction to fit its theory of the case, Microsoft continues to impair consumer choice and cause the very marketplace harm that the Court by its injunction intended to prevent. As this Court explained, the "probability" that Microsoft's conditioned licenses "continue to reinforce its operating system monopoly" "is simply too great to tolerate indefinitely" until the government's request for permanent relief is "finally resolved." Mem. at 17.

III. The Court Should Act Swiftly To Bring Microsoft Into Compliance With Its Order

Accordingly, the United States requests that the Court judge Microsoft in civil contempt. Because of the flagrant manner in which Microsoft violated the preliminary

injunction, and to ensure compliance in the future, the United States believes an appropriate remedial sanction is an order requiring Microsoft to give the United States and the Court at least 30 days notice (1) of Microsoft's intent to release commercially any new PC operating system or Internet browser product, including upgrades to existing products; (2) of the nature of the release; and (3) of the steps Microsoft intends to take to ensure that the release complies with the preliminary injunction.[4/]

The United States further seeks an order from the Court requiring Microsoft to comply with the outstanding preliminary injunction in the manner outlined above. Specifically, the United States requests that Microsoft be required to offer OEMs the option of licensing the most current OSR version of Windows 95 from which Microsoft has removed the Internet icon and other aspects of the Internet Explorer browser that are visible to the user or allow the user access to the browser, without impairing any operating system functionality, as outlined in the attached proposed order.

The United States believes that the Court can and should act swiftly in ruling on the United States' Motion. There is particular urgency in this period, which Microsoft itself described as critical for new computer sales (Tr. at 40 (Dec. 5, 1997)), that OEMs should be given a commercially viable option to the present conditioned license. The United States

[4]Obviously, notwithstanding this obligation on a going forward basis, Microsoft should be required to come into compliance immediately.

therefore requests that the Court require Microsoft to respond to this Motion by Friday, December 19, 1993. The United States further requests that the Court grant the requested relief as soon thereafter as possible.[5/]

Dated: December 17, 1997

Respectfully submitted,

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[5]If the Court determines that the United States' request for injunctive relief or judgment of contempt requires further proceedings, the United States requests that the Court grant preliminary relief requiring Microsoft to comply with the attached proposed order pending the outcome of such proceedings. Because, as explained above, implementing the proposed relief is trivial, Microsoft will suffer no injury, let alone irreparable injury, by complying with it. In contrast, the public interest plainly is served by securing consumer choice and preventing Microsoft, through its licensing practices, from seeking to reinforce its operating system monopoly. *See also* Memorandum of Amicus CCIA in Support of Petition 13 (Nov. 20, 1997) (explicating harm to the public interest from Microsoft's practices). Although Microsoft opposed CCIA's participation as *amicus curiae*, the United States believes such participation is appropriate in the circumstances presented by this case and therefore consents to the Court granting CCIA's motion.

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CERTIFICATE OF SERVICE

The undersigned certifies that on December 17, 1997, copies of the foregoing Motion by the United States For judgment of Civil Contempt and to Enforce Preliminary Injunction and supporting documents were served by facsimile transmission and Federal Express overnight delivery upon:

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