

ARGUED FEBRUARY 26 & 27, 2001, DECIDED JUNE 28, 2001

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

No. 00-5212

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

MICROSOFT CORPORATION,

Defendant-Appellant

Consolidated with No. 00-5213

APPELLEES' RESPONSE TO PETITION FOR REHEARING

Appellant Microsoft Corporation (“Microsoft”) for a second time challenges Finding of Fact 161 as clearly erroneous, repeating the same arguments it made in its principal brief on appeal (see Pet. 3-12; MS Br. 78-79). Microsoft also treats its Petition for Rehearing as an occasion to expound upon a variety of topics, most of them irrelevant to the issue at hand. Microsoft speculates about the significance of that finding with respect to the remedy to be fashioned by the district court on remand, and then attempts to bolster its Petition with references to its own extra-record pronouncements about how it intends to address this Court’s decision.

The only part of Microsoft's Petition that is even arguably appropriate for consideration on rehearing is its claim that Finding of Fact 161 is clearly erroneous — a claim that this Court already explicitly considered and properly rejected in its June 28, 2001 Opinion at 38-39. Microsoft's repetition of its arguments offers no basis for this Court to reweigh the evidence that it has already considered in concluding that Finding of Fact 161 was not clearly erroneous. Further, Microsoft's arguments with respect to remedy are premature and inappropriate for consideration in a petition for rehearing.

1. Microsoft's argument that Finding of Fact 161 is clearly erroneous (Pet. 3-12) and provides no sound reason for the Court to revisit its contrary conclusion (Opinion 38-39).

First, Finding of Fact 161 (JA 2326) by its terms relates to the Windows 95 operating system:

161. Microsoft bound Internet Explorer to Windows 95 by placing code specific to Web browsing in the same files as code that provided operating system functions. Starting with the release of Internet Explorer 3.0 and "OEM Service Release 2.0" ("OSR 2") of Windows 95 in August 1996, Microsoft offered only a version of Windows 95 in which browsing-specific code shared files with code upon which non-browsing features of the operating system relied.

Microsoft's Petition, however, focuses on evidence relating to Windows 98, a different operating system. Indeed, the only reference to Windows 95 in Microsoft's Petition is in a quotation from a government witness (Pet. 7), and that evidence supports the finding, notwithstanding Microsoft's efforts to discredit it. Thus, Edward Felten's testimony that directly supports the finding, Felten ¶ 31 (JA 3016), is wholly ignored by the Petition.

Second, as to the placement of code in Windows 98 files (*see* Opinion 38; FF 174), Microsoft offers only a selective review of evidence already considered by the Court. Its

proposed reweighing of that evidence is insufficient to establish a need for rehearing.

a. Microsoft's argument that this Court failed to recognize clear error in the district court's findings rests primarily on James Allchin's testimony that there is no code specific to Web browsing in Windows 98 — because, according to Allchin's direct testimony, all browsing code also performs operating system functions — and thus there is no commingling of code specific to Web browsing with other code (*see* Pet. 4; Opinion 38). But, as we observed (Gov. Br. 66) when Microsoft made this argument in its principal brief (MS Br. 78-79), Allchin admitted on cross-examination that Windows 98 contains code used only to browse the Web. Tr. 2/2/99 am at 65-67 (JA 14208-10). Microsoft also cites Allchin's denial that Microsoft commingled code for the specific purpose of making that code difficult to identify and remove (Pet. 10-11, quoting JA 8107-08), and it claims that, as a general matter, Microsoft follows good engineering practices in arranging code (Pet. 10, 11). But neither proposition establishes that there was no code specific to Web browsing in the same file as other code.

b. Microsoft's further contention that this Court gave too much weight to the evidence it cited in support of the district court's findings is also insufficient to justify rehearing.

(i) *Weadock*. The Court quoted the testimony of Government expert Glenn Weadock that "Microsoft 'design[ed] [IE] so that some of the code that it uses co-resides in the same library files as other code needed for Windows.' Direct Testimony ¶ 30." Opinion 38. Microsoft observes (Pet. 6), as it did in its principal brief (MS Br. 79), that

Weadock did not claim to have read the Windows source code. But Microsoft points to nothing in the record indicating that reading source code is the only way to learn how code is organized. In fact, Weadock described the bases for his testimony, which included his discussions with Windows software developers (Weadock ¶ 10). Weadock's observation that Felten was more knowledgeable about this issue does not support Microsoft's claim that Weadock "was relying entirely on Felten's views" (Pet. 7). Nor does it indicate anything about the relevant issue, whether browser-specific code is found in the same files as other code, that Weadock did not assert that the arrangement of the software code in Windows 98 lacked any technical justification (Pet. 6-7). Finally, Microsoft completely mischaracterizes the record when it claims that, "when specifically asked on cross-examination whether he was 'suggesting that in designing Windows 98, Microsoft ha[d] commingled code units with other unrelated code units in a single DLL file,' Weadock replied, 'No, I'm not.' 11/16/98 am Tr. at 69" (Pet. at 6). Microsoft's question to Weadock was about what Weadock meant in one sentence of his testimony related to software design in general. Tr. 11/16/98 am at 68:23-70:4 (JA 5829-31). Weadock never retreated from the portion of his direct testimony on which the Court properly relied.

(ii) *Felten*. The Court also cited the testimony of Edward Felten that one library file includes a bundle of separate functions, some of which relate specifically to Web browsing and some of which relate to general user interface. Opinion 38-39, citing Tr. 12/14/98 am at 60-61 (JA 6953-54). Microsoft contends (Pet. 7) that, "[d]espite his bald assertion that '[t]here is other code specific to IE Web browsing that could be deleted' from

certain files in Windows, Felten expressly stated in his written direct testimony that he had made no attempt to identify such software code. Felten ¶ 58 (J.A. 3025).” What Felten actually said in the cited paragraph, however, was that “I have not attempted to identify *all* such code.” *Id.* (emphasis added). Microsoft also discounts Felten’s testimony because he did not seek to determine whether there is code “that can be removed from the operating system without impairing its functionality.” Pet. 8. But Felten was not attempting to determine what specific code could be removed from Windows; rather, his goal was to demonstrate that user access to Web browsing could be removed from Windows. Tr. 6/10/99 pm at 46-47 (JA 9308-09). Obviously, removing browser-specific code removes the browser-specific functions provided by that code. But this fact says nothing about the commingling of code.

(iii) *GX 1686*. This Court observed that *GX 1686* (sealed) indicates that some functions in a Windows file “can be described as ‘IE only,’ others can be described as ‘shell only’ and still others can be described as providing both ‘IE’ and ‘shell’ functions.” Opinion 39. Microsoft attempts to discredit this evidence by arguing that many functions fall into the third group, and that further testing might show the third group to be larger still. Pet. 9-10. Even if true, however, that does not demonstrate that no browsing-specific code is commingled with other code, and does not negate the Court’s observation that *GX 1686* provides support for the finding. *See GX 1619* (author of *GX 1686* stating that “[a]rguably, based on Felton’s [sic] testimony, this list could be used to ‘separate’ shdocvw into two parts: Shared+shell and browser specific. *So this may not be useful.*” (emphasis added)).

In short, Microsoft's argumentative reweighing of the evidence already considered by the Court does not establish that the Court erred when it concluded that, although the testimony is "contradictory," the district court's findings were not clearly erroneous. Opinion 39. In short, Microsoft is not entitled to a rehearing.

2. Microsoft prefaces its attack on Finding of Fact 161 with a suggestion that the Court's rulings on the commingling of code "might be read to suggest" that particular remedial provisions should be imposed (Pet. 1-2), which it contends would be inappropriate (Pet. 2-3). This argument is premature. The question of remedy has been directed to the district court on remand. More to the point, Microsoft's speculative concerns about Finding 161's potential impact upon the remedy to be determined by the district court do not justify rehearing; indeed, Microsoft does not even suggest that it does. In addition, Microsoft's statements that it is responding to the Court of Appeals' ruling are irrelevant to the Petition.

Although the Court did not affirm all of the district court's findings with respect to liability under Section 2 of the Sherman Act, it affirmed findings that Microsoft engaged in a wide range of exclusionary conduct designed to eliminate the middleware threat to its operating system monopoly by, *inter alia*, requiring customers to take Internet Explorer with Microsoft's Windows 95 and Windows 98 operating systems through contractual and technological means. The Court left to the district court on remand the task of fashioning an appropriate decree to remedy the effects of Microsoft's unlawful conduct and restore competition, to the extent possible. It is time for that process to go forward.

CONCLUSION

Microsoft's Petition for Rehearing should be denied.

Respectfully submitted.

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July 26, 2001

CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of July, 2001, I caused one copy of the foregoing APPELLEES' RESPONSE TO PETITION FOR REHEARING to be served by facsimile, followed by the first class U.S. Mail, postage prepaid, or by hand upon:

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