

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

MICROSOFT CORPORATION,

Defendant.

Civil Action No. 98-1232 (TPJ)

STATE OF NEW YORK *ex rel.*

Attorney General DENNIS C. VACCO, *et al.*,

Plaintiffs,

v.

MICROSOFT CORPORATION,

Defendant.

Civil Action No. 98-1233 (TPJ)

**PLAINTIFFS' RESPONSE TO AND MOTION TO STRIKE "REPRESENTATION
OF MICROSOFT CORPORATION" AND REQUEST FOR LEAVE OF COURT
TO CONDUCT LIMITED ADDITIONAL DISCOVERY RELATING THERETO**

Apparently deeply stung by the powerful and damaging testimony delivered last Monday by the government's technical expert witness, Professor Edward Felten, defendant Microsoft on December 16 filed a so-called "Representation of Microsoft Corporation." In fact, Microsoft's pleading is a blatant *misrepresentation* of Professor Felten's testimony. In substance it is little more than a Microsoft press release, improperly captioned as a pleading and submitted to this Court, containing erroneous and misleading attempts to introduce "facts" through the unsworn "testimony" of Microsoft's counsel.

Professor Felten testified accurately to facts known to and investigated by him in response to questions asked by Microsoft's counsel. Rather than asking additional questions concerning the areas about which it now complains, Microsoft chose to quickly end Professor Felten's cross examination, terminating it much earlier than it had estimated. Now, with Professor Felten safely off the stand, Microsoft is attempting to inject false and misleading information into the record through its manifestly improper "Representation." Because Microsoft's unprecedented pleading flatly misstates the trial record and gratuitously and erroneously attempts to mischaracterize Professor Felten's testimony, it should be stricken.

In addition, Microsoft's "Representation" contains information regarding Microsoft's testing of Professor Felten's prototype removal program that reveals the need for further discovery by plaintiffs. Microsoft's pleading admits that its testing of the prototype removal program was performed in "September, not December, 1998." (Representation at 3, ¶4) In spite of this newly acknowledged fact, when plaintiffs on September 29, 1998 deposed James Allchin (the Microsoft trial witness who will testify with respect to Professor Felten's program and conclusions), Mr. Allchin steadfastly refused to testify about the results or methodology of any testing and even claimed that testing "was not complete." Basic fairness requires that plaintiffs have an opportunity to depose Microsoft's technical witness prior to his cross-examination at trial concerning his testing and evaluation of Professor Felten's work. Accordingly, plaintiffs request leave to conduct limited, carefully tailored discovery of Mr. Allchin and Microsoft on this issue, or in the alternative, that the Court circumscribe Mr. Allchin's testimony with regard to Professor Felten's conclusions and the prototype removal program.

I. PROFESSOR FELTEN’S TESTIMONY WITH REGARD TO WINDOWS UPDATE

Microsoft erroneously claims that Professor Felten made “accusations,” testified “without any attempt to ascertain the facts,” and “conceded” certain things about the effect of the prototype removal program. Professor Felten’s testimony did none of these things; Microsoft’s claims are not only improper attempts to augment the record other than through witnesses or documents; they are utterly baseless.

As the exchange in the trial transcript quoted by Microsoft in its Representation makes clear, Professor Felten testified merely to the timing of certain events and *facts* that have existed since September. His testimony was, and remains, accurate: he has worked with the prototype removal program continuously over the past several months, and did not experience any problems until December 4. As Professor Felten testified, his subsequent investigation into the nature of the problems, which he undertook promptly and thoroughly, ascertained that the two changes he described on page 39 of the December 14, 1998 (PM) trial transcript were the cause of the problems, and accordingly that targeting these changes eliminated the problems. At no point did either Professor Felten or counsel for plaintiffs assert *why* Microsoft had taken the actions it did on or around December 4. Moreover, Microsoft chose not to cross-examine Professor Felten in Court in any further detail about these actions or the reasons for them.

Microsoft’s contentions that Dr. Felten (1) “accused” Microsoft of anything other than making changes to an ActiveX control and introducing a bug into its software (without imputing any malicious intent to those changes), and (2) “made the accusation without any attempt to ascertain the relevant facts” are frivolous and defamatory. They accordingly should be stricken.

II. MICROSOFT COUNSEL’S IMPROPER ATTEMPT TO TESTIFY

More generally, to the extent that Microsoft counsel’s Representation purports to allege facts relevant to this case, it is a manifestly improper attempt at unsworn, inappropriate testimony that should be stricken in its entirety. Should Microsoft wish to introduce facts of its own in response to anything in Professor Felten’s testimony, it will have ample opportunity to do so in the proper fashion: in the sworn testimony of its own witnesses which, of course, will then be subject to cross-examination by plaintiffs (assuming plaintiffs are permitted to conduct adequate discovery with regard to that testimony, as discussed below). At present, however, Microsoft counsel’s factual assertions have no place in the record.

Microsoft’s attempts to mischaracterize and misrepresent Professor Felten’s testimony, by claiming that his prototype removal program is “really a program intended to ‘disable’ or ‘hide’ Web browsing functionality in Windows, as Dr. Felten conceded at the outset of his testimony,” (*see* Representation at 2), are particularly egregious. Microsoft cannot, through the unsworn “testimony” of its counsel, correct a factual record that made quite clear Professor Felten’s expert conclusion: That the prototype removal program *removes* web browsing from Windows 98, and does considerably more than merely “disabling” or “hiding” web browsing. Only Microsoft’s counsel, not Professor Felten, used the terms “disable” and “hide,” and Professor Felten responded as follows:

Q. Okay. And the prototype removal program is a method to *hide* access to that activity, right?

A. Yes. And the IE 4 Web browser is a product that gives the user the ability to engage in that activity of Web browsing. That’s what users are buying when they buy a Web browser. They are buying something that will let them browse the Web.

Q. Okay. And what you're saying in your testimony is that you found a way to remove the ability of users to perform that function in Windows 98, but you're not claiming in your testimony that you have found a way to remove the Internet Explorer 4 software itself from Windows 98; isn't that correct?

A. I don't see there as being much of a distinction there. If you have removed the ability to browse the Web, as far as the user is concerned, Web browsing -- the Web browser is *gone*.

* * * * *

Q. Now focusing on the sentence that begins 'second' in Paragraph 54, are you denying here this morning that the IE 4 Web browsing software remains in Windows 98 after the prototype removal program is run?

A. When the prototype removal program has been run, the user is no longer able to browse the Web. The Web browsing is *gone*. The Web browsing function or the Web browsing application, which are different ways of saying the same thing, are *gone*.

Q. Right. The software is *disabled*?

A. *Gone*. (12/14/98 A.M. Tr. 32:23-33:14 [emphasis added], 41:19-42:4.)

* * * * *

A. Sure. The prototype removal program removes Internet Explorer. It removes the ability to browse the web, and it prepares the machine to accept the installation of another web browser. (12/14/98 P.M. Tr. 46:14-17).

A single "yes" prefacing multiple, consistent answers explaining that the prototype removal program "removes" web browsing and renders the Web browser "gone" does not constitute any "concession," as Microsoft's counsel now seeks to suggest. Moreover, a full-text word search of the transcripts of Dr. Felten's testimony indicate that only Microsoft's counsel ever used the words "disable" or "hide." The representation that Professor Felten has "conceded" anything is frivolous and should be stricken.

III. REQUEST FOR LEAVE FOR LIMITED FURTHER DISCOVERY

Finally, Microsoft's Representation includes, *inter alia*, the statement that "the tests on which our showing [that the prototype removal program allegedly renders Windows Update non-functional] will be based were performed in *September*, not December, 1998." (See Representation at 3.) This admission is startling in light of the deposition testimony of Jim Allchin. When Mr. Allchin, the trial witness on whose prospective testimony Microsoft has represented it will rely in seeking to rebut Professor Felten's testimony, was deposed on September 29, 1998, he acknowledged that he had "a team" conducting testing and analysis of Professor Felten's prototype removal program (a copy of the source code of which, along with Professor Felten's detailed expert report describing his work and conclusions, Mr. Allchin had received and reviewed *before* his deposition. 9/29/98 J. Allchin Depo Tr. At 93:6-94:3). Mr. Allchin testified:

Q. Are there aspects of Professor Felten's utility that you believe actually do not work in the sense of do not operate or operate differently than IE in Windows 98 would operate rather than simply not having been tested?

A. That's correct.

Q. What are those aspects?

A. I'm not prepared to cover them today, but I can assure you that there are many.

Q. And why are you not prepared to cover them today?

A. Because I don't have the facts here with me.

* * * * *

Q. As best you understand it currently, what are the kinds of things that your team has found that do not operate properly?

- A. I couldn't begin to cover them here. The testing is not complete. We have to do more work. (9/29/98 J. Allchin Depo Tr. at 121:15-122:2, 122:10-15.)

Throughout his testimony, Mr. Allchin similarly refused to answer questions or provide any details about either the results of any analysis of Professor Felten's program, or about Mr. Allchin's own conclusions concerning the Felten analysis, even though Microsoft's Representation now reveals, for the first time, that the analysis apparently was complete at the time of Mr. Allchin's deposition. Mr. Allchin's deposition testimony, coupled with Microsoft's attempt on cross-examination to challenge the effects of Dr. Felten's prototype removal program, plainly indicate that plaintiffs have been deprived of a full and adequate opportunity to conduct discovery of Mr. Allchin with regard to Microsoft's efforts (undertaken under his supervision and presumably to be presented during his testimony at trial) to test the effects of Professor Felten's prototype removal program.

Plaintiffs accordingly request leave of the Court to conduct limited further deposition of Mr. Allchin at least ten days in advance of the date on which Microsoft anticipates Mr. Allchin will testify. In addition, plaintiffs request leave to conduct additional, limited, and narrowly focused document discovery for the details of the testing process employed by Microsoft and the results thereof. In the alternative, the United States requests that the Court preclude Mr. Allchin

(or any other Microsoft witness) from testifying at trial about Microsoft's testing of Professor Felten's prototype removal program.

DATED: December 21, 1998

Respectfully submitted,

_____/s/_____
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