

CASE 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' MOTION FOR IMMEDIATE ISSUANCE OF MANDATE

This Court has directed the Clerk to withhold issuance of the mandate until “seven days after disposition of any timely petition for rehearing.” Order of June 28, 2001, citing D.C. Cir. Rule 41. The Court specified, however, that its instruction was “without prejudice to the right of any party at any time to move for expedited issuance of the mandate for good cause shown.” *Id.* In light of the exceptional importance of this case, and the strong public interest in prompt entry of a decree providing an effective remedy for Microsoft’s illegal conduct, the United States and the State Plaintiffs respectfully move that the Court direct the Clerk to issue the mandate immediately.

1. As the Court recognized in deciding at the outset to hear the appeal *en banc*, this case is of “exceptional importance.” Orders of June 13, 2000. The Court has since found that

Microsoft had a monopoly with respect to Intel-compatible PC operating systems, that Microsoft behaved anticompetitively, and that its anticompetitive conduct contributed to maintenance of its monopoly power, in violation of Section 2 of the Sherman Act. Microsoft's operating system affects millions of businesses and hundreds of millions of consumers worldwide. Delay in imposing an effective remedy inflicts substantial and widespread consumer injury and needlessly prolongs uncertainty in the computer industry. In a dynamic marketplace, speed is of the essence in remedying the effects of unlawful exclusionary conduct designed to crush nascent competitive technologies. In these circumstances, the public interest is plainly served by allowing the proceedings on remand to go forward as quickly as possible.

2. There is no good reason to delay issuance of the mandate until mid-August or later.

The United States and the State Plaintiffs do not intend to petition for rehearing. Whether or not Microsoft decides to seek rehearing, the Court has already devoted unusually extensive resources to this matter, including two days of oral argument. There is no reason to believe that a petition for rehearing of this per curiam *en banc* decision would be granted and, therefore, no reason to await any such filing before issuing the mandate.

Furthermore, the United States and the State Plaintiffs do not intend to seek Supreme Court review of the case at this stage. While the United States and the State Plaintiffs do not know whether Microsoft will seek such review,¹ the possibility that Microsoft might choose to file a petition for certiorari does not preclude immediate issuance of the mandate. The Court's Order does not direct the Clerk to withhold the mandate pending the filing of any petition for certiorari.

¹The United States and the State Plaintiffs reserve the right, of course, to file a conditional cross-petition for certiorari in the event that Microsoft seeks Supreme Court review at this time.

If Microsoft sought to stay the issuance of the mandate beyond the period specified in the Order, it would be required to file a motion showing that the petition for certiorari “would present a substantial question and that there is good cause for a stay.” Fed. R. App. P. 41(d)(2)(A). *See also* D.C. Cir. Rule 41(a)(2) (motion for stay of mandate must “set[] forth facts showing good cause”); *Johnson v. Bechtel Associates Prof’l. Corp.*, 801 F.2d 412, 415 (D.C. Cir. 1986). We have no reason to believe that Microsoft would be able to meet that standard.

For the foregoing reasons, the Court should direct the Clerk to issue the mandate immediately. We have informed counsel for Microsoft of our intention to file this motion.

Respectfully submitted.

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CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of July, 2001, I caused one copy of the foregoing APPELLEES' MOTION FOR IMMEDIATE ISSUANCE OF MANDATE to be served by facsimile, followed by the first class U.S. Mail, postage prepaid, or by hand upon:

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