

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

UNITED STATES' PROPOSED FINDINGS OF FACT

THE INJUNCTION AND MICROSOFT'S RESPONSE

1. The Order entered by this Court on December 11, 1997, ("Order") preliminarily enjoined Microsoft Corporation from "licensing the use of any Microsoft personal computer operating system software (including Windows 95 or any successor version thereof) on the condition, express or implied, that the licensee also license and preinstall any Microsoft Internet browser software (including Internet Explorer 3.0 and 4.0 or any successor version thereof)." (Order at 19).
2. In response to the Court's December 11, 1997, Order, Microsoft sent PC OEMs a letter advising that Microsoft read the injunction to require that Microsoft offer OEMs the option of deleting from OSR 2 *every* file, and nothing less than every file, that, by Microsoft's definition, "make[s] up Internet Explorer 3.0 in the retail channel." Microsoft attached to its letter a list of what it determined to be such files. (Gov't Exhibit 7; Tr. 1/14 p.m. at 9:12 - 10:22).
3. Microsoft told OEMs in its letter that such a version of Windows "will not boot" and "will be deficient in other ways" (Gov't Exhibit 7). At the time Microsoft sent the letter to OEMs, its top executives knew that this "option" yielded a version of Windows that did not work (Tr. 1/14 p.m. at 14:22 - 15:1), and therefore was commercially worthless.
4. Although Microsoft stated that this "total deletion" option was the only action the Court's injunction required it to take, its letter to OEMs also "voluntarily" offered a second "option": installing the original version of Windows 95 from the summer of 1995 (Build 950.6), from which the entire set of files that make up Internet Explorer 1.0 have been removed. (Gov't Exhibit 7). Microsoft's letter to OEMs acknowledged that this two-and-one-half year old version of Windows 95 "does not include various new features of OSR 2.0 that support the latest hardware advances, including large hard drives, USB support, Intel MMX capabilities, and so forth." (Gov't Exhibit 7 at 2).
5. Microsoft executives acknowledge that obsolete versions of Windows, and thus this voluntary "option," are commercially worthless to OEMs. (Declaration of Joachim Kempin at 5, ¶10, *cited at* U.S. Motion for Contempt at 6).
6. Because these two "options" are commercially worthless to OEMs, OEMs that want to license and preinstall a viable, current version of Windows 95 still have no choice but to license and preinstall Internet Explorer 3.0.

**MICROSOFT EASILY COULD HAVE COMPLIED,
AND EASILY COULD COMPLY NOW, WITH THE COURT'S INJUNCTION**

7. Instead of responding to the Court's Order by offering OEMs commercially worthless "options," Microsoft could have complied with the Order by, among other possible means, utilizing a simple, existing, Microsoft-created procedure to remove Internet Explorer from the OSR 2 version of Windows 95. (See Tr. 1/14 p.m. at 21:1-15).

The Preinstallation of Internet Explorer 3 on PCS with OSR 2

Provides Various Ways For End Users to Browse the World Wide Web

8. There are a number of common methods by which a user of the OSR 2 version of Windows 95 can use IE 3 to access and browse the Internet's World Wide Web ("the Web"). Those methods include the following: (1) double clicking on the desktop icon labeled "the Internet"; (2) clicking on the entry "Internet Explorer" in the list of programs found in the Start menu; (3) double clicking on the file entitled "IEXPLORE.EXE" found by using the Windows 95 file navigation tools; (4) using the "Run" feature in the Start menu to execute "IEXPLORE.EXE"; and (5) accessing the Windows 95 help system and choosing a help topic that pointed to a specific Web site. (Tr. 1/13 a.m. at 38:17 - 43:23).

The Add/Remove Programs Utility and its Purpose

9. Each version of Windows 95, including the OSR 2 version, includes a utility called "Add/Remove Programs" that enables a user automatically to remove applications or other software programs installed on the user's computer. The Add/Remove Programs utility can be accessed through the Windows 95 Control Panel. (Tr. 1/13 a.m. at 44:3-7; Tr. 1/14 a.m. at 39:7-22, 42:3-25, 43: 21-25).

10. A user may choose to remove an application or other software for a number of reasons, including to replace an existing program with another program providing comparable functionality, to reduce desktop clutter that causes confusion, and to conserve computer memory. (Tr. 1/14 a.m. at 44:20 - 48:5, 55:24 - 56:12).

Microsoft has Enabled the Add/Remove Programs Utility to Remove IE 3

11. Corporate customers have informed Microsoft that they desire the option to remove the preinstalled copy of Internet Explorer that comes with Windows 95 in order to prevent employees from using IE to access and browse the Web at work. In part in response to these specific requests, Microsoft devised a method to enable PC users to remove Internet Explorer using the Add/Remove Programs utility. (Tr. 1/14 a.m. at 4:1-13, 48:8-21, 49:18 - 50:5). Using the utility to remove IE modifies certain files in Windows 95 and deletes certain software code (Tr 1/13 a.m. at 50:25 - 51:13; Tr. 1/14 a.m. at 40:20 - 41:12), including the Internet Connection Wizard, which David Cole described as part of IE 3.0. (Tr. 1/14 p.m. at 7:11-21).

12. Microsoft explains to users how to uninstall IE in this manner. For example, Microsoft has described the Add/Remove Programs method of removing IE in two articles published in the Microsoft "Knowledge Base," a collection of technical articles Microsoft makes available to the public through, among other means, the Microsoft Web site. (Gov't Exhibits 3, 4; Tr. 1/13 a.m. at 46:2-7, 47:5-19, 53:18 - 54:9, 55:16 - 56:8). These technical articles explain how, if IE is not included in the list of programs that may be removed, the user can simply reinstall another copy of IE (from the backup copy of Windows 95 typically provided by the computer manufacturer on a CD-ROM with a new PC, or from any other source) to add it to the list of programs that a user may uninstall using the Add/Remove Programs utility. (Tr. 1/13 a.m. at 47:5-14).

13. Microsoft also advertises broadly that Internet Explorer "uninstalls easily" if a user wants

to "simply get rid of it." Microsoft makes clear that the Add/Remove utility is the mechanism by which a user can remove one Internet browser if they want to use another: "Both Navigator and IE uninstall easily if you decide to only use one." (Gov't Exhibit 6; Tr. 1/14 a.m. at 57:3 - 59:4).

14. Using the Add/Remove Programs utility bears out Microsoft's public representations. Removing IE 3 from OSR 2 is accomplished quickly and easily by accessing the Windows 95 Control Panel and selecting the Add/Remove Programs utility. Upon invoking the "Install/Uninstall" portion of the utility, the screen tells the user that: "The following software can be *automatically removed* by Windows." (Tr. 1/13 a.m. at 49:18 - 50:1) (emphasis added). If the user selects Internet Explorer, a dialogue box appears stating: "This will *remove* Microsoft Internet Explorer. Do you wish to continue?" (Tr. 1/13 a.m. at 50:9-10) (emphasis added). If the user selects "yes," a second dialogue box appears containing the statement "Internet Explorer uninstall has successfully completed." (Tr. 1/13 a.m. at 50:11-14; Tr. 1/14 a.m. at 54:23 - 55:3). Not every file installed by IE 3.0 is removed by the utility. (Tr. 1/13 p.m. at 73:7). However, this fact is not unique to IE; many applications or other programs leave behind various files when they are uninstalled with the utility. (Tr. 1/14 a.m. at 41:13 - 42:2).

**Removal of IE 3 Using the Add/Remove Programs Utility
Prevents a User from Using IE to Access and Browse the Web**

15. After Internet Explorer is removed using the Add/Remove Programs utility, Internet Explorer is no longer available for end users to employ to access and browse the Web. None of the five methods of using IE identified above are available to the user or will allow the user to access and launch IE or reach the Web. (Tr. 1/13 a.m. at 50:15-24; Tr. 1/13 p.m. at 45:8-17, 52:22 - 53:6, 67:4-9; Tr. 1/14 a.m. at 50:6-23). Instead, a user can access and browse the Web only by using or writing software *other* than IE. This includes installing a browser, such as Netscape Navigator or IE; installing another software program (*e.g.*, Visio or Quicken) which may allow Web browsing (or may allow a software programmer to write a web browser software program); or using various online service or Internet Service Provider access software, either separately obtained or, in some cases, shipped with Windows 95. (Tr. 1/13 p.m. at 38:14 - 39:2; Tr. 1/14 a.m. at 50:24 - 51:14; Tr. 1/14 a.m. at 75:15 - 77:12; Tr. 1/14 p.m. at 3:9-17 - 7:5-10).

16. The average end user cannot write software code sufficient to browse the Web using Windows 95 once IE has been removed using the Add/Remove Programs utility. (Tr. 1/14 a.m. at 77:14-22).

**Removing Internet Explorer with the Add/Remove Programs Utility Has
Virtually No Impact on the Functioning of Windows 95 or Other Applications**

17. After IE 3 is removed using the Add/Remove Programs utility, all the usual functions performed by Windows 95 operate normally. (Tr. 1/13 p.m. at 3:11 - 4:12). The only noticeable effects of so removing IE 3 are what one would reasonably expect upon removal of a Web browser -- the inability to access and browse the Web or to view documents formatted using the standard Web page format, Hypertext Markup Language ("HTML"). (Tr. 1/13 p.m. at 4:6-22).

18. Microsoft can identify only three programs which experience any problems after IE 3 is removed using the Add/Remove Programs utility. Two of these, AT&T WorldNet and the Microsoft Network ("MSN"), are Internet access software that one would not expect to work without a browser installed. Moreover, users can readily obtain fully functioning copies of such access software from a number of different sources and install them to obtain the AT&T or MSN service. (Tr. 1/13 p.m. at 10:14 - 11:17, 74:16-23; Supplemental Decl. of David Cole at 4,

¶ 8(f)). The third program, Microsoft's Personal Web Server, a program that allows users to share Web pages with other users, also comprises Internet-related software. (Tr. 1/13 p.m. at 75:1-9).

19. Applications vendors whose products rely specifically on Internet Explorer 3 in order to perform certain functions such as accessing and browsing the Web will typically ship a copy of Internet Explorer with their application. (Declaration of J.J. Allaire, Nov. 17, 1997, at 1 ¶ 2; Declaration of Jesse Boudreau, Nov. 17, 1997, at 2 ¶¶ 3,4; Declaration of Mike Devlin, Nov. 8, 1997, at 3 ¶5; Declaration of Mazin Ramadan, Nov. 9, 1997, at 2-3 ¶7; Declaration of Robert Bickel, Nov. 19, 1997, at 2 ¶8; Tr. 1/14 a.m. at 64:1-5). For example, Microsoft Office, a suite of office productivity software, and Quicken, a personal finance software program produced by Intuit Corporation, both include a copy of IE with their products. A user who purchases a PC which does not have IE 3 preinstalled can easily install it if an application the user wants to employ requires IE to function. (Tr. 1/13 p.m. at 6:1 - 7:22).

20. Microsoft typically provides warnings in its Knowledge Base technical articles about negative consequences that could result from following procedures (such as deleting functions from the Windows 95 registry) which are deemed by Microsoft to create a risk of harm to Windows or to applications. The two Knowledge Base articles instructing users how to remove Internet Explorer 3.0 and 3.02 do not provide any such warnings. (Tr. 1/13 a.m. at 56:20 - 58:3). Indeed, David Cole could not identify *any* warning to end users, either in a dialogue box or in any Knowledge Base article, that using the Add/Remove Programs utility to remove Internet Explorer will "degrade" the operating system, and was not aware of any discussions within Microsoft to provide such warnings. (Tr. 1/14 a.m. at 61:5 - 62:16).

21. Employing the Add/Remove Programs utility to uninstall IE effectively removes the Internet browser from Windows 95 for end users while leaving an up-to-date, functioning version of Windows 95 that is commercially viable for OEMs. (Tr. 1/14 p.m. at 21:1-15). Such an approach therefore constitutes compliance with the Order. Moreover, the trade press has reported that there are other feasible means of removing IE 3 from Windows 95. (Tr. 1/13 a.m. at 54:16 - 55:15).

MICROSOFT CONSTRUED THE PRELIMINARY INJUNCTION TO REQUIRE WHAT IT KNEW TO BE A SENSELESS RESULT

Microsoft chose not to utilize the easily implemented Add/Remove Programs utility to comply with the Court's Order. Instead, Microsoft devised a response to the Order that required the removal of every single file contained in MSIE30.EXE, a container program that is shipped in the Internet Explorer Starter Kit box. (Gov't Exhibit 7; Tr. 1/13 p.m. at 63:23 - 64:4; Tr. 1/14 p.m. at 10:10 - 11:1) MSIE30.EXE includes a number of "shared program libraries" or "system services files." Microsoft knew that such files are commonly distributed by many applications and software programs in addition to IE, and that their wholesale removal from Windows 95 would cause the operating system not to function.

22. A shared program library is a collection of software code that is relied upon and used by multiple applications, and in some cases, by the operating system as well. (Tr. 1/13 p.m. at 13:10-15).

23. Microsoft makes available to software developers and vendors shared program libraries it has created with Windows 95. (Tr. 1/13 p.m. at 14:14-20). It is a "very common practice" for applications vendors to redistribute with an application Microsoft's shared program libraries on

which the application relies. (Tr. 1/13 p.m. at 14:21 - 15:1; Tr. 1/14 a.m. at 63:9 - 64:5). Because Microsoft routinely issues new revisions of shared program libraries, applications vendors typically redistribute the particular versions of the shared program libraries their application needs. This ensures that the application will work even if it is running on top of a version of Windows 95 that includes a different version of the shared library on which the application relies. (Declaration of John Gailey, Nov. 17, 1997, at 2 ¶4; Tr. 1/13 p.m. at 15:17 - 16:8; Tr. 1/14 a.m. at 68:11-23).

24. When the application is installed, it will typically update the existing version of the shared program library that the user may already have installed on the user's PC with the version that is shipped with the application, unless the existing version is newer. (Tr. 1/13 p.m. at 17:20-25; Tr. 1/14 a.m. at 68:5-10, 71:19 - 72:13). Word 97, a word processing application produced by Microsoft, Microsoft Office (which includes Word 97), Symantec's Norton Utilities 3.0, a software package that enhances the reliability of the operating system and improves various aspects of the PC's performance, Intuit's Quicken financial software, and Novell's Groupwise, a group collaboration product, are examples of applications that redistribute shared program libraries created by Microsoft. (Gailey Decl. at 2, ¶4; Tr. 1/13 p.m. at 16:14 - 17:6; Tr. 1/14 a.m. at 69:18-25, 70:14 - 71:7).

25. The fact that a product redistributes some shared program libraries does not make that program part of the Windows 95 operating system. (Tr. 1/14 a.m. at 71:8-11). Thus, for example, Mr. Cole does not consider Intuit's Quicken or even Microsoft Office to be part of the Windows 95 operating system even though both redistribute shared program libraries. (Tr. 1/14 a.m. at 70:14 - 71:7; 73:1-4).

26. Similarly, the fact that an application redistributes some shared program libraries does not make those libraries part of the application. (Tr. 1/14 a.m. at 73:5-16).

27. Because removing from Windows 95 certain shared program libraries that applications have installed or updated may significantly impair Windows 95's operation, *see infra*, ¶¶ 30-34, the Add/Remove Programs utility typically does not remove such shared files when removing an application (Tr. 1/13 p.m. at 19:24 - 20:9; Tr. 1/14 a.m. at 40:20 - 41:25). For example, in the case of Microsoft Word 97 and Norton Utilities 3.0, removal of each application using the Add/Remove Programs utility will leave behind the shared program libraries installed by that application. (Tr. 1/13 p.m. at 18:1-17; Tr. 1/13 p.m. at 52:15-21; Tr. 1/14 a.m. at 55:5-16). For the same reasons, removing Internet Explorer 3 using the Add/Remove utility will leave behind the shared program libraries that are redistributed by IE 3. (Tr. 1/13 p.m. at 19:24 - 20:9, 45:18-24; Tr. 1/14 a.m. at 55:5-16).

The Option Microsoft Chose to Offer OEMs In Response to the Court's Order Will "Break" Windows

28. Because shared program files redistributed by various applications replace or update similar files in Windows, and because such files are shared by various programs and Windows, it is not possible to remove or delete such files when removing a program without harming those other programs or Windows. For example, removal of every file that is distributed on the Microsoft Word 97 CD-ROM will cause various features of Windows 95 to break. (Tr. 1/13 p.m. at 19:13-23).

29. Microsoft has shipped a shared program library called COMCTL32.DLL with Windows 95 since the first version of Windows 95 was released in August 1995, one year before Internet Explorer 3.0 was released. IE 3.0 distributes an updated version of COMCTL32.DLL that, when

installed, replaces the existing version shipped with Windows 95. (Declaration of David Cole at 27, ¶¶83-84; Tr. 1/13 p.m. at 13:21, 14:11, 62:9-12).

30. Deleting every file that is contained in MSIE30.EXE causes Windows 95 to fail to start up because such a deletion removes this redistributed COMCTL32.DLL file without replacing it with another version. (Tr. 1/13 p.m. at 18:18 - 19:23, 65:9-13). Windows would be similarly crippled by removing every file installed by any other application that also contained COMCTL32.DLL.

31. Because one of the shared program libraries relied upon and redistributed by Norton Utilities is COMCTL32.DLL, removal of every file that is distributed on the Norton Utilities 3.0 CD-ROM will cause Windows 95 to fail to start. (Tr. 1/13 p.m. at 16:14 - 17:16; 19:2-12).

32. Similarly, for the reasons set forth above, removing every file that is installed when a user installs IE 3 on Windows 95 will cause Windows 95 to fail to start. (Tr. 1/13 p.m. at 13:1-9, 18:18 - 19:1).

33. In assessing how to comply with the Court's Order, Microsoft decided that it was required to offer OEMs only the option of deleting every single file (and not a portion of the files) contained in MSIE30.EXE. (Gov't Exhibit 7; Tr. 1/13 p.m. at 63:23 - 64:4; Tr. 1/14 p.m. at 10:10 - 11:1).

34. Microsoft knew that it could have deleted a much smaller set of files in order to remove the user's ability to access and browse the Web using Internet Explorer. Windows 95 would still function as expected after deleting this smaller set of files. (Tr. 1/14 a.m. at 60: 11-20).

35. Instead, Microsoft offered OEMs only the option of removing every file in MSIE30.EXE (Tr. 1/13 a.m. at 12:3 - 15:16; Tr. 1/13 p.m. at 60:16 - p. 61:3), knowing that this action would yield a senseless result -- that the version of Windows it was offering to OEMs would not operate at all. (Microsoft Memorandum in Opposition to the Motion of the United States for Judgment of Civil Contempt and to Enforce Preliminary Injunction, Exhibit B; Tr. 1/14 p.m. at 15:3-16).

**Microsoft Did Not Seek Clarification of the
Court's Order to Avoid This Senseless Result**

36. In spite of this knowledge, Microsoft did not seek guidance from the Court before taking the extreme step of offering OEMs a non-working version of OSR 2. (Tr. 1/13 a.m. at 24:12 - 25:16). Microsoft has not sought clarification of the Court's Order.

37. Instead, Microsoft has stated that the Court's Order is "absolutely clear" and requires the distribution of a product that does not work. (Tr. 1/14 p.m. at 15:3-16). Microsoft executives assumed that the Court meant to issue an order that required them to choose each and every file contained in MSIE30.EXE as the appropriate set of files to delete from OSR 2, even though such deletion would result in Microsoft distributing a broken version of Windows 95. (Tr. 1/13 a.m. at 24:12 - 25:16).

38. Microsoft explains its actions by pointing to the words "the software code that Microsoft itself now separately distributes at retail as 'Internet Explorer'" in the Court's Memorandum accompanying its Order. (Tr. 1/13 a.m. at 12 - 15; Tr. 1/13 p.m. at 60:16 - 61:1). However, the Court's Order itself does not contain that language and the opinion, read as a whole, does not command a response by Microsoft that is commercially non-viable and senseless. Moreover, according to Microsoft, *there is no such thing as a retail version* of Internet Explorer 3.0. (Tr. 1/13 p.m. at 61:2-4; Tr. 1/14 p.m. at 12:9-12). Microsoft cannot identify a direct technical linkage between what it calls Internet Explorer 3.0 at retail and a set of files that constitute Internet Explorer 3.0. (Tr. 1/14 p.m. at 13:5-14).

39. Although Microsoft read the Court's Order to require that it offer OEMs only this non-

functioning version of Windows 95, Microsoft nevertheless offered a second option: a version of Windows 95 equivalent to the August 1995 retail version (with no basis in the Court's opinion or elsewhere). Microsoft knew that OEMs have no interest in licensing obsolete versions of Windows (*see* Kempin Decl. at 5, ¶10), including this so-called second option.

MICROSOFT IS IN CONTEMPT OF THE COURT'S DECEMBER 11, 1997 ORDER

Because neither "option" Microsoft has offered to OEMs in response to the Court's December 11, 1997, Order is commercially viable, Microsoft is, for all practical purposes, continuing to condition OEM licenses to Windows 95 on OEMs licensing and preinstalling Microsoft's Internet browser software. Consequently, Microsoft has not complied with the Court's Preliminary Injunction Order. 40. Because Microsoft chose a response to the Court's Order that it knew was senseless and offered OEMs no viable choice at all, because Microsoft had available but chose to ignore at least

one ready, preexisting method of complying (the Add/Remove Programs utility), and because Microsoft has never sought clarification or modification of the Court's order to avoid the senseless result Microsoft claims was required, Microsoft is in civil contempt of the Court's Order.

Dated: January 19, 1998

Respectfully submitted,

Joel I. Klein
Assistant Attorney General

A. Douglas Melamed
Principal Deputy Assistant Attorney
General

Rebecca P. Dick
Director of Civil Non-Merger
Enforcement

Christopher S Crook
Chief
Phillip R. Malone
Steven C. Holtzman
Pauline T. Wan
Karma M. Giulianelli
Michael C. Wilson
Sandy L. Roth
John F. Cove., Jr.
Mark S. Popofsky
Attorneys

Antitrust Division
U.S. Department of Justice
Room 10-0101
450 Golden Gate Avenue
San Francisco, CA 94102
415/436-6660

CERTIFICATE OF SERVICE

The undersigned certifies that on January 19, 1998, copies of the foregoing UNITED STATES' PROPOSED FINDINGS OF FACT were served by facsimile transmission and Federal Express overnight delivery upon:

Special Master

Professor Lawrence Lessig
1525 Massachusetts Avenue
G-502
Cambridge, MA 02138

Counsel for Microsoft Corporation

William H. Neukom, Esq.
Microsoft Corporation
One Microsoft Way
Redmond, Washington 98052

Richard J. Urowsky, Esq.
Sullivan & Cromwell
125 Broad Street
New York, New York 10004

James R. Weiss, Esq.
Preston Gates Ellis & Rouvelas Meeds
1725 New York Avenue, NW
Washington, DC 20006

Mark S. Popofsky
Attorney
Antitrust Division