SCHEDULED FOR ORAL ARGUMENT APRIL 21, 1998

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

No. 97-5343

MICROSOFT CORPORATION,

Respondent-Appellant,

v.

UNITED STATES OF AMERICA,

Petitioner-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF COLUMBIA

BRIEF OF APPELLEE UNITED STATES OF AMERICA

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

. Parties And Amici.

All parties, intervenors, and amici appearing before the district court and in this Court are listed in the Brief for Appellant Microsoft Corporation ("Microsoft").

. Ruling Under Review

The description of the ruling under review appears in the Brief for Appellant Microsoft.

. Related Cases

This case is related to No. 98-5012, which involves a petition for a writ of mandamus and which was consolidated by this Court with this case for the purposes of oral argument on February 2, 1998.

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GLOSSARY

Br.	Brief for Appellant Microsoft Corporation
CIS	Competitive Impact Statement
CJA	Confidential Joint Appendix
JA	Joint Appendix
OEM	Original Equipment Manufacturer
OS	Operating System
OSR	OEM Service Release; the version of Windows 95 supplied to OEMs for preinstallation onto new personal computers
PC	Personal Computer

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STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

Appellant Microsoft's brief sets forth the basis for subject matter and appellate jurisdiction.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Did the district court correctly treat the United States' Petition, which requested a judgment of civil contempt and injunctive relief, as additionally seeking a declaration that Microsoft's forced licensing of Internet Explorer to computer manufacturers violates the Final Judgment?

2. Did the district court appropriately enter a preliminary injunction designed to enforce an

outstanding order of the court when (i) Microsoft received notice that the United States requested permanent injunctive relief and, in responding to that request, addressed the issues relevant to entry of preliminary relief; (ii) the absence of additional proceedings caused Microsoft no prejudice; (iii) the court adequately explained the basis for the injunction; and (iv) the injunction preserves the competitive status quo and the court's ability to fashion appropriate permanent relief?

3. Did the district court correctly determine that the United States demonstrated a substantial likelihood of success on the merits?

STATEMENT OF THE CASE

. Background

1. The Final Judgment

The United States commenced this action to enforce a court order. That order, a consent decree, was entered as a Final Judgment in a suit brought by the United States to enjoin Microsoft from employing certain terms in its licensing agreements with original equipment manufacturers ("OEMs") that unlawfully maintained Microsoft's monopoly in personal computer ("PC") operating systems ("OSs") in violation of Sections 1 and 2 of the Sherman Act, 15 U.S.C. 1-2. See United States v. Microsoft Corp., 1995-2 Trade Cas. (CCH) ¶ 71,096 (D.D.C 1995).

The Final Judgment terminated those licensing practices. It also prohibited practices beyond those charged in the Complaint. Such additional restrictions are common in antitrust judgments; without them the enjoined party might achieve its anticompetitive goals by using a different device. See International Salt Co. v. United States, 332 U.S. 392, 400 (1947).

As the Competitive Impact Statement ("CIS") and other Tunney Act filings explain, Section

IV(E)(i) of the Final Judgment, at issue here, was such an additional restriction (JA 101-02, 227-28, 231). Section IV(E)(i), which Microsoft itself terms an "anti-tying" provision (Brief for Appellant Microsoft Corporation ("Br.") at 31), prohibits Microsoft from conditioning an OEM license to certain OS products on the OEM's licensing, inter alia, any "other product." Reflecting the rationale for antitrust scrutiny of tying arrangements, Section IV(E)(i) was intended to prohibit Microsoft from employing conditioned licenses involving its monopoly OS products "to extend or protect [Microsoft's] monopoly" (JA 231).

2. Windows 95

As this Court observed in ordering entry of the Final Judgment, "Microsoft dominates the world market for operating systems software that runs on IBM-compatible personal computers." United States v. Microsoft Corp., 56 F.3d 1448, 1451 (D.C. Cir. 1995). Microsoft's Windows 95 is the successor to MS-DOS 6 and Windows 3, which together dominated the market at the time of the Final Judgment's entry (JA 136-37). Because of Microsoft's monopoly power, OEMs believe it is essential to offer Windows 95 (JA 78, 139, 155, 178-79, 191-92, 212-13); indeed, when Microsoft threatened to withdraw a leading OEM's Windows 95 license, that OEM quickly capitulated to Microsoft's demands (JA 215-18, 278, 280). Microsoft projected that its share of OEM-installed OSs would approach 86% by mid-1997 (JA 77).

3. Internet Explorer And The "Browser War"

As the Internet's World Wide Web ("web") grew increasingly popular, companies developed Internet web browsers, which permit users to find and retrieve documents located on the web. Netscape released its Navigator web browsing product in late 1994 (JA 359). Microsoft responded to the new demand by releasing its own web browser, Internet Explorer, in the summer of 1995 (JA 1276), the same period during which Microsoft released Windows 95.

Although characterizing Internet Explorer in this litigation as a component of or "upgrade" to Windows 95 (Br. at 4-5; JA 469-70), Microsoft in fact treats Internet Explorer as a separate product in the usual commercial sense. Microsoft vigorously promotes Internet Explorer as a separate product, distributes Internet Explorer in the retail channel, offers it bundled with various software applications and third-party hardware products, permits it to be redistributed by Internet Service Providers, and makes it available for separate "downloading" over the Internet.[1] Indeed, Microsoft views Internet Explorer as locked in a "browser battle" with Netscape Navigator (JA 374; CJA 288). Microsoft carefully tracks the share of both products in what it sometimes calls a browser "market" and has made gaining significant browser market share a central corporate goal; and just as Netscape has done with its competing Navigator product, Microsoft has created versions of Internet Explorer for OSs other than Window 95, including that for the Apple Macintosh.[2]

To help win the "browser war," Microsoft conditioned its OEM licenses to Windows 95 on OEMs' licensing Internet Explorer (CJA 414). Microsoft included the first three versions of Internet Explorer on the Windows 95 "master" disk supplied to OEMs for preinstallation onto new PCs (JA 1277-78). Microsoft has made clear that its licensing agreements leave OEMs with no "choice about whether . . . they load Internet Explorer onto [PCs] that have Windows 95" (JA 255). OEMs,

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[1]See, e.g., JA 256-57, 285, 1057, 1083-84, 1088; CJA 254, 284-85, 363, 371-72, 386.

[2]See., e.g., JA 303, 336, 352, 373-74; CJA 249, 254, 258, 272, 285-88, 352-54, 360-64, 369-73, 376-86.

moreover, are "not allowed" to delete Internet Explorer or any component of it once preloaded (JA 255). For instance, Microsoft has enforced its licensing agreements to prevent OEMs from removing the Internet Explorer icon from the Windows 95 desktop (JA 278, 280) and has made clear that it would invoke its licensing agreements to deny similar requests (JA 256, 273).

Microsoft introduced its latest browser, Internet Explorer 4, in September 1997. For several months, Microsoft offered it available to OEMs, end users, and others only as a separate product on a separate CD-ROM. Moreover, Microsoft did not require OEMs to license Internet Explorer 4, but rather gave OEMs the option of shipping it to customers as a separate disk placed in the same box with a new PC (or in a few cases preinstalled on that PC). Starting in February 1998, Microsoft intended to invoke provisions in its licensing agreements to require that OEMs license and redistribute the separate Internet Explorer 4 CD-ROM disk with new PCs (JA 265).

B. Course of Proceedings

1. The United States' Petition And Microsoft's Response

In response to Microsoft's announcement that it would soon require OEMs to ship the Internet Explorer 4 CD-ROM in the box with new PCs, the United States filed its Petition seeking to hold Microsoft in civil contempt. The United States explained that Section IV(E)(i) of the Final Judgment prohibits Microsoft from conditioning a Windows 95 license on OEMs' licensing what in an ordinary antitrust sense is, and Microsoft itself treats as, a separate product. The United States attached documents, affidavits, and deposition transcripts demonstrating that Internet Explorer and Windows 95 are separate products and, therefore, that Microsoft's plans with respect to Internet Explorer 4, and its ongoing forced licensing to OEMs of Internet Explorer 3, violated Section IV(E)(i) (JA 85-99).

In addition to a judgment of civil contempt, the United States requested permanent injunctive relief. The United States asked the court, inter alia, to order Microsoft to "cease and desist" from requiring OEMs "to license any version of Internet Explorer as an express or implied condition of licensing Windows 95 or any [other] product" covered by the Final Judgment (JA 41). The United States further requested "such orders as the nature of the case may require and as the court may deem just and proper to compel obedience and compliance with the orders and decrees of this Court" (JA 43).

Microsoft responded by filing a lengthy Opposition with several hundred pages of exhibits, including several third-party declarations. Going well beyond the question whether the Court should issue an Order to Show Cause, Microsoft fully addressed the merits (JA 458-76). Recognizing that the United States requested a permanent injunction, which could issue only following a traditional balancing of the equities, see, e.g., Amoco Prod. Co. v. Gambell, 480 U.S. 531, 546 n.12 (1987), Microsoft also addressed in substance whether the requested relief was equitable. Pointing to its several hundred pages of supporting exhibits, Microsoft asserted, among other things, that permitting OEMs the option of shipping Windows 95 without Internet Explorer would "degrade" the OS (JA 449-50, 472-73).

Because the proper reading of Section IV(E)(i) presented the only disputed issue on the merits (JA 982, 1002), the United States, to expedite the dispute's resolution, agreed not to contest pertinent facts concerning the Final Judgment's negotiating history contained in Microsoft affidavits (JA 983). This concession, the United States explained in its Reply Brief, eliminated any genuine issue of material fact and permitted the court to rule on the merits "as a matter of law" (JA 1003). The United States further urged the court to "rule expeditiously" on the legality of Microsoft's impending forced licensing of Internet Explorer 4 because OEMs would “immediately” need to take steps to comply with it (JA 983, 996). Because Microsoft distributed Internet Explorer 4 “only as a separate, stand-alone product,” the United States proposed that the court simply prohibit Microsoft from requiring OEMs to license that product (JA 995-96).

The United States also proposed that Microsoft be required to offer OEMs the option of licensing a version of Windows 95 that did not include “the software code Microsoft separately distributes at retail as ‘Internet Explorer 3.0’” (JA 996). Recognizing that Internet Explorer 3 as distributed apart from Windows 95 contains a number of shared program libraries that, when installed, upgrade and replace certain essential Windows 95 files, the United States, contrary to what Microsoft contends (Br. at 21), made clear that it did not mean for Microsoft to offer a version of Windows 95 that was nonoperational for want of essential shared program libraries (JA 997).[3] The United States also explained that simply permitting OEMs to disable the Internet Explorer 3 web browsing functionality would “achieve much of the value of complete relief and would be consistent with the Final Judgment” (JA 996).

Microsoft filed a sur-reply along with further declarations, in which it did not contest that immediate relief with regard to Internet Explorer 4 would impose no burden. With respect to Internet Explorer 3, Microsoft asserted that the permanent relief suggested by the United States would degrade

[3]Shared program libraries are groups of files that perform certain functions (which Microsoft calls “operating system services” (Br. at 5)); applications are commonly written to call upon such libraries to use the functionality they provide (JA 1571). Shared program libraries, including those provided by Internet Explorer as it is separately distributed, are commonly redistributed by various Microsoft application products and by third-party Independent Software Vendors with their application products to ensure that they function no matter which version of Windows 95 a user’s PC contains (JA 1166, 1168, 1171, 1572-75, 1705, 1708).

Windows 95, although it acknowledged that the United States did not intend for Microsoft to market a version of Windows 95 that lacked system files essential for its operation (JA 1196-98). Finally, in response to the United States' point that Microsoft advertises that Internet Explorer 3 "uninstalls easily if you want to . . . simply get rid of it" (JA 996), Microsoft expressly -- and, as was later demonstrated, falsely -- stated that it was not possible to use Windows 95's built-in Add/Remove Programs utility to "uninstall" Internet Explorer 3 from OSR 2 -- the version of Windows 95 supplied to OEMs (JA 1198).[4] The United States, in response, noted that OSR 2 includes the Add/Remove Program utility and that Microsoft's declarant failed to explain why Microsoft could not "easily enable the program" to "uninstall the copy of IE 3.0 that it requires OEMs to install with Windows 95" (JA 1210).

2. The December 5, 1997, Hearing

At the subsequent hearing, both parties addressed whether Microsoft's conduct violated the decree (JA 1236). While Microsoft requested an evidentiary hearing to explore the decree's negotiating history (JA 1257), it acknowledged that the United States had agreed to treat the pertinent facts of that history asserted by Microsoft as true (JA 1241). Microsoft pointed to no other facts that it believed were both disputed and relevant to determining whether its forced licensing of Internet Explorer to OEMs transgressed the Final Judgment.

The parties also addressed relief. Microsoft pointed to no facts contradicting the United States' evidence that Microsoft easily could maintain the status quo with regard to Internet Explorer 4. With

[4]Windows 95's Add/Remove Programs utility, when invoked by a user to "uninstall" a particular application program, typically deletes files essential for an end user to run the application but leaves behind other files the application might have supplied, including shared program libraries (JA 1577-78, 1681-84).

respect to Internet Explorer 3, counsel for the United States conceded that factual issues pertaining to appropriate permanent relief remained (JA 1260). The United States reiterated, however, that ordering more limited forms of relief -- such as "uninstalling" Internet Explorer 3 -- "would be effective in accomplishing the purposes of the decree, extremely simple technologically for Microsoft to impose, [and] would cause none or virtually none" of the ill-effects Microsoft alleged (JA 1237).

3. The December 11, 1997, Order

The district court issued a ruling on December 11, 1997. The court declined to hold Microsoft in civil contempt, finding Section IV(E)(i)'s application ambiguous (JA 1289-90); but it recognized that it did "not necessarily follow that Microsoft's licensing practices are, in fact, in compliance with the terms of the Final Judgment" (JA 1290). The court accordingly treated the Petition as a request for declaratory and injunctive relief, ordered further proceedings, and referred the matter to a special master to "propose findings of fact and conclusions of law" to be "consider[ed] by the Court" (JA 1301).

Invoking its inherent power to enforce its orders, the court also entered a preliminary injunction. Observing that Microsoft's reading rendered Section IV(E)(i) "essentially meaningless," the court tentatively agreed with the United States that Section IV(E)(i) prohibits Microsoft's forced licensing with Windows of what in an antitrust sense is a separate product (JA 1293). Because the uncontested evidence demonstrated that Internet Explorer and Windows 95 are separate products, the court reasoned that the United States had a substantial probability of success on the merits (JA 1296). The court found that preliminary relief would impose no significant burden on Microsoft (JA 1296-97), and that it would advance the public interest because it appropriately preserved the competitive status quo and the court's ability "to fashion the least disruptive remedy if the evidence warrants" (JA 1295). The court explained that Microsoft's forced licensing of Internet Explorer was of particular concern because rival browsers might develop into a threat to Microsoft's monopoly (JA 1297-98). Because Microsoft's licensing practices might impede the development of such competition and garner for Microsoft "yet another monopoly in the Internet browser market," the court concluded, "[t]hose practices should be abated until it is conclusively determined that they are benign" (JA 1298).

The court accordingly enjoined Microsoft from licensing "any Microsoft personal computer operating system software . . . on the condition, express or implied, that the licensee also license and preinstall any Microsoft Internet browser software" (JA 1300). Reflecting the court's careful refusal to intrude into product design, the Order by its terms does not require Microsoft to terminate the forbidden conditioning in any particular way. Rather, when read in light of the court's objective of ensuring that competition on the merits determine how OEMs meet their separate demand for a web browser (JA 1297-98), the injunction plainly required Microsoft to grant OEMs the option of licensing a commercially viable version of Windows 95 absent that which satisfies that separate demand for a web browser: the ability to browse the web (browser functionality) (JA 1424-29).

The preliminary injunction thus effected no "radical[] alter[ation] of the <u>status</u> <u>quo</u>" (Br. at 13). When the United States brought suit, Microsoft offered Internet Explorer 4 to OEMs only on a separate CD-ROM; Microsoft could (and ultimately did) comply with the court's Order by not effectively requiring OEMs to license that separate disk (or a subsequent version of Windows 95 that placed Internet Explorer 4 on the same OEM installation disk). With respect to Internet Explorer 3, the preliminary injunction did not, as Microsoft asserts, require it to remove every shared program library Microsoft includes with Windows 95 and labels "Internet Explorer 3.0 technologies" (Br. at 13). Rather, Microsoft could have offered OEMs the option of a version of Windows 95 that did not include browser functionality, and could thereby have complied with the preliminary injunction, simply by permitting OEMs to "uninstall" Internet Explorer 3 from OSR 2 using procedures Microsoft built into Windows 95 and advertises to end users (JA 1365, 1422-31).

. Events After The Preliminary Injunction

1. Microsoft's Response

Although it easily could have complied with the preliminary injunction, Microsoft chose not to do so. Instead, Microsoft read the preliminary injunction to require it to offer OEMs an inoperable version of Windows 95 (JA 1320-22). Because, as Microsoft knew, no OEM would license this commercially worthless product (JA 1280), Microsoft's purported compliance with the preliminary injunction effectively required OEMs wishing to license Windows 95 also to license Microsoft's web browser. In other words, Microsoft read the preliminary injunction to command the very conditioning the court expressly declared must "abat[e]" (JA 1298).

As it does in this Court (Br. at 13), Microsoft justified its stance by reading the district court's statement that "[e]njoining Microsoft pendente lite from forcing OEMs to accept and preinstall the software code that Microsoft itself now separately distributes at retail as 'Internet Explorer 3.0' [will] impose[] no undue hardship on Microsoft" (JA 1296-97) to require that Microsoft remove from its OEM version of Windows 95 every file Internet Explorer 3 supplies, including shared program libraries that Internet Explorer upgrades and replaces in Windows 95 when installed, some of which are essential for Windows 95's operation (JA 1391). The district court, however, acknowledged

Microsoft's concern that removing certain shared program libraries would cause Windows 95 to "'break'" (JA 1294-95) and made clear that it did not intend Microsoft to offer a nonfunctional version of Windows 95 (JA 1297 n.8). Thus, the United States explained, Microsoft's decision to give this passage from the court's opinion -- which is not the injunction's actual language -- a wooden reading that compelled the very conditioning the injunction was intended to end was patently unreasonable (JA 1422-32).[5]

Although Microsoft chose to read the preliminary injunction to require what Microsoft itself described as a "sense[less]" result (JA 1376), and raises in this Court a number of procedural objections to its issuance, Microsoft neither moved the district court to reconsider the Order nor sought clarification of its obligations. Rather, Microsoft implemented a reading of the injunction it believed made "little sense" (JA 1376) and immediately appealed, thereby preventing the district court from modifying its Order should circumstances warrant.

2. <u>The United States' Motion For Civil Contempt</u>

The United States moved to hold Microsoft in contempt of, and to enforce, the preliminary injunction (JA 1316). The evidence at the subsequent hearing demonstrated, among other things, that, despite Microsoft's earlier assertions to the contrary, Internet Explorer 3 can be "uninstalled" from OSR 2, and its web browsing functionality rendered nonoperational, using Window 95's Add/Remove

[5]Reinforcing this conclusion is that Microsoft "voluntarily" offered OEMs the additional option of an operable, yet outdated version of Windows (JA 1391). That "option" was also commercially worthless to OEMs and thus failed to comply with the preliminary injunction (JA 1280, 1321-22, 1428). But the fact Microsoft hedged its bets with that option, which Microsoft never contended the preliminary injunction compelled it to supply, demonstrates that Microsoft recognized that its construction of the Order made "little sense" (JA 1376).

Programs utility (JA 1365, 1545-46, 1550, 1603, 1610-11, 1687-88). Indeed, Microsoft's own witness explained that Microsoft designed Internet Explorer 3 to be "uninstalled" in response to corporate customer demand for a version of Windows 95 that did not permit employees to "access the Internet and spend all their time surfing the web" (JA 1641, 1685-87).[6]

The United States and Microsoft agreed to resolve the United States' motion through a stipulation the Court entered on January 22, 1998 (JA 1780). Confirming that the preliminary injunction imposes no burden on it, Microsoft agreed, among other things, to permit OEMs to install the OSR 2 version of Window 95 "modified to reflect the set of changes that would be made" by "uninstalling" Internet Explorer 3 (JA 1780). Microsoft has since explained that this means of complying with the preliminary injunction will not impair any features of Windows 95 except "a few features [which] relate[] to Internet access." <http://www.microsoft.com/ corpinfo/1-22doj.htm>.

SUMMARY OF ARGUMENT

In consenting to the Final Judgment, Microsoft committed not to use its monopoly power in operating systems to force OEMs to license any "other" product. Microsoft broke that promise and violated the court's order by conditioning Windows 95 licenses on OEMs' licensing Internet Explorer, a web browser Microsoft undeniably treats as a distinct commercial product in every relevant sense. The United States thus sought a judgment of civil contempt and injunctive relief. Microsoft contested

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[6]A recent survey of 200 information technology managers reported that 34% "want the browser to remain separate" from Windows and that only 28% want the browser to be included with Windows. Infoweek, Survey Reveals Corporate Technology Managers Do Not Want Internet Explorer Integrated Into Microsoft's Windows Operating Systems (Feb. 9, 1998) <http://biz.yahoo.com/bw/980209/cmp_media_4.html>.

both the merits of the government's case and the propriety of the suggested remedy. On a well-developed record, the district court tentatively held Microsoft's conduct unlawful, ordered further proceedings, and entered a preliminary injunction.

Microsoft now objects to the procedures followed below, but its formalistic objections lack substance. The district court, finding Section IV(E)(i) ambiguous, properly ordered further proceedings to clarify its meaning. Contrary to what Microsoft argues, the United States in substance requested a declaration that Microsoft's conduct was unlawful. Even absent such a request, the court was entitled to take steps to clarify the decree on its own motion and to do so without regard to the "rigorous standards applicable to civil contempt" (Br. at 15).

Microsoft's contention that the preliminary injunction is "invalid" under the federal rules is similarly groundless. The court was entitled to take appropriate steps to enforce the Final Judgment without a specific request from the parties. Doing so deprived Microsoft of neither adequate notice nor an evidentiary hearing. Microsoft's response to the United States' request for a permanent injunction addressed the issues relevant to preliminary relief; the court had an adequate record for ruling on the pertinent issues; and Microsoft points to no facts or argument it was prevented from advancing that might have changed the result.

Indeed, Microsoft's belated compliance with the preliminary injunction shows that the court's actions caused Microsoft no prejudice and that Microsoft's contrary contention is merely continued gamesmanship. Without seeking clarification, modification, or even a stay from the court, Microsoft construed the preliminary injunction to require precisely the conditioning the court expressly sought to preclude. To resolve the ensuing contempt motion, Microsoft agreed to provide OEMs the very option that it had earlier represented was impossible. Because compliance with the preliminary injunction causes no hardship, and because Microsoft unreasonably responded to its issuance, Microsoft should remain subject to the injunction even if this Court were to conclude that different procedures should have preceded its entry.

Finally, the district court properly determined that the United States demonstrated a substantial probability of success on the merits. Microsoft's construction of Section IV(E)(i) impermissibly renders it meaningless. By contrast, the United States' reading -- that Microsoft violates Section IV(E)(i) by compelling OEMs to license what Microsoft itself treats as, and in antitrust terms is, a separate product -- gives meaning to both the section's prohibition and proviso and implements the section's purpose.

ARGUMENT

. THE DISTRICT COURT ACTED WITHIN ITS AUTHORITY IN TREATING THE MATTER AS AN ACTION FOR DECLARATORY AND INJUNCTIVE RELIEF

1. It is settled that a court, incident to its power to enforce a consent judgment, may issue declaratory rulings specifying whether particular conduct violates the judgment. See, e.g., United States v. Western Elec. Co., 894 F.2d 1387, 1388-91 (D.C. Cir. 1991); United States v. Western Elec. Co., 907 F.2d 160, 163 (D.C. Cir. 1990); Interdynamics, Inc. v. Wolf, 698 F.2d 157, 164-65 (3d Cir. 1982). This manner of enforcement is especially appropriate when a court finds that a provision's application to particular facts is unclear. See EEOC v. Safeway Stores, Inc., 611 F.2d 795, 798 (10th Cir. 1979). Clarifying a decree informs a subject party of its obligations and removes objections to subsequent enforcement through contempt. See D. Patrick, Inc. v. Ford Motor Co., 8 F.3d 455, 461 n.2 (7th Cir. 1993).

Indeed, were the law otherwise, a party subject to a consent judgment could render particular provisions unenforceable, and undermine the public interest, by successfully asserting the existence of ambiguity. A consent judgment, however, is not so easily evaded. For instance, when this case was last here, this Court responded to the suggestion that the Final Judgment's applicability to Windows NT was unclear by giving seemingly conflicting provisions a "logical interpretation" which eliminated any "continuing ambiguity." United States v. Microsoft Corp., 56 F.3d 1448, 1462 (D.C. Cir. 1995). A court confronted with such a suggestion post entry may similarly clarify a judgment's operation. See, e.g., Vertex Distrib., Inc. v. Falcon Foam Plastics, Inc., 689 F.2d 885, 892 (9th Cir. 1982).

It is precisely this authority to enforce a decree by clarifying it that the district court exercised here. Although declining to hold Microsoft in contempt on the ground that Section IV(E)(i)'s operation was unclear, the court observed that it did "not necessarily follow that Microsoft's licensing practices are, in fact, in compliance with the [Final Judgment's] terms" (JA 1290). The court thus ordered further proceedings on the "ultimate question" of "whether Microsoft is actually violating" the Final Judgment as well as the United States' "prayer for permanent injunctive relief" (JA 1294-95).

2. Microsoft nonetheless argues that the court acted "beyond its jurisdiction" because its "denial of the DOJ's request for a finding of contempt . . . disposed of the only pending claim for relief" (Br. at 27-28). Microsoft elevates form over substance. Although captioned a request for a judgment of civil contempt, the Petition itself expressly requested injunctive relief and "such further orders as . . . the Court may deem just and proper to [ensure] compliance" (JA 40-43). Because "a court is not bound by the procedural labels attached to the proceeding by the moving party," the district court properly treated the action as one for declaratory and injunctive relief. Interdynamics, 698 F.2d at 165

& n.5 (upholding district court's declaratory judgment when the plaintiff sought only a judgment of civil contempt through an order to show cause).

Microsoft seeks to avoid this simple legal principle by arguing that the United States at the December 5 hearing abandoned any request for relief not predicated on a finding of civil contempt (Br. at 25-26). But the district court found no waiver; and that determination is not clearly erroneous. Indeed, when the court asked whether it should read the Petition as a request for "specific enforcement," government counsel responded, "that is exactly how the Court should read it" (JA at 1236). As Microsoft points out, counsel added that the United States "believ[ed] the Court can find Microsoft in contempt and can impose th[e] specific relief to remedy the contempt" (JA at 1236). While that statement confirmed that the United States did not abandon its contempt argument, the colloquy as a whole makes clear that the United States also did not intend to abandon other avenues to terminating Microsoft's unlawful conduct. As counsel for the United States put it in a passage Microsoft omits, "appropriate action by the court would be to find Microsoft's behavior . . . to be a violation of the decree" and to impose injunctive relief (JA 1237-38).

In any event, the court had authority on its own motion to order further proceedings designed to clarify the decree. For instance, in Vertex Distributing, the district court, as in this case, refused to hold the defendants in civil contempt on the ground that the decree was ambiguous. Nonetheless, the court of appeals explained, "the district court could properly clarify that ambiguous language, and this it did, requiring defendants to change their future [conduct] to comply with the consent judgment, as clarified." 689 F.2d at 892; cf. Alberti v. Klevenhagen, 46 F.3d 1347, 1365 (5th Cir. 1995) (explaining that a court may modify a consent judgment "regardless of the parties' silence or inertia" (internal quotations omitted)).[7]

3. Finally, Microsoft argues that the finding of ambiguity required dismissal of the action because, Microsoft asserts, a court clarifying a decree must apply the "standards applicable to civil contempt," including that "any ambiguities in the Consent Decree be resolved in Microsoft's favor" (Br. at 13, 28, 33 & n.10). But the "standards" to which Microsoft points are intended to protect against the inappropriate imposition of possibly severe contempt sanctions; they do not supply general principles applicable to interpreting consent judgments. Indeed, the very case Microsoft cites explains that an action for contempt "entail[s] procedures and standards of proof <u>not</u> <u>applied</u>" in an action for declaratory and injunctive relief. <u>Brewster</u> v. <u>Dukakis</u>, 675 F.2d 1, 3-4 & n.2 (1st Cir. 1982) (emphasis added). And this Court, in actions seeking declaratory relief under a consent decree, construes ambiguous terms "in such a way to effectuate the [Decree's] purposes," rather than resolving ambiguities against enforcement. <u>United States</u> v. <u>Western Elec. Co.</u>, 12 F.3d 225, 233 (D.C. Cir. 1993).

II. THE DISTRICT COURT PROPERLY ENTERED THE PRELIMINARY INJUNCTION

The district court issued the preliminary injunction based on a well-developed record. The parties, through lengthy briefing and extensive evidentiary submissions, had fully addressed issues pertaining to whether Microsoft's forced licensing of Internet Explorer to OEMs violated Section IV(E)(i) of the Final Judgment. The parties also had addressed the feasibility of granting the injunctive

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[7]Microsoft contends that the Final Judgment confines the court to "ruling on applications [or other motions] made by the parties" (Br. at 28 n.7). But a provision declaring that a court retains jurisdiction for certain purposes, such as that to which Microsoft points, does not limit a court's inherent power to enforce its orders. <u>See, e.g.</u>, <u>United States</u> v. <u>Fisher</u>, 864 F.2d 434, 436 (7th Cir. 1988) (explaining that a provision retaining jurisdiction to enforce a decree is "superfluous").

relief the United States requested and whether granting that relief was equitable and in the public interest.

Although it chose to adduce extensive evidence and argument contesting the merits of the government's Petition and its request for permanent injunctive relief, Microsoft now contends that the preliminary injunction is "invalid" for failure to afford Microsoft notice and an opportunity to be heard. Microsoft is attempting to have it both ways. But "litigation is [not] a game, like golf, with arbitrary rules to test the skill of the players." Poliquin v. Garden Way, Inc., 989 F.2d 527, 531 (1st Cir. 1993). The record before the court was sufficient for it to rule, and any failure to hold further proceedings caused Microsoft no prejudice.

. The District Court Properly Declined To Hold An Evidentiary Hearing

A preliminary injunction's resolution of issues "is designed to be tentative." Aoude v. Mobile Oil Corp., 862 F.2d 890, 894 (1st Cir. 1988). For this reason "an evidentiary hearing is not an indispensable requirement when a court allows . . . a preliminary injunction." Id. at 893. Rather, "in certain settings a matter can adequately be 'heard' on the papers." Id. at 894; see also Ross-Whitney Corp. v. Smith-Kline & French Labs., 207 F.2d 190, 198 (9th Cir. 1953).

Contrary to what Microsoft contends (Br. at 18-19), this is true even when "the written evidence reveals a dispute as to material facts." When disputed issues do not turn on the credibility of affiants or declarants, such as when knowledge and intent are at issue, see, e.g., SEC v. Frank, 388 F.2d 486, 491 (2d Cir. 1968); Sims v. Greene, 161 F.2d 87, 88 (3d Cir. 1947), "the documentary evidence [before the court may be] sufficient to permit an informed, albeit preliminary, conclusion that injunctive relief [is] warranted." Campbell Soup Co. v. Giles, 47 F.3d 467, 472 (1st Cir. 1995); see also e.g., Schultz v. Williams, 38 F.3d 657, 658 (2d Cir.1994) (per curiam); Herbert Rosenthal Jewelry Corp. v. Grossbardt, 428 F.2d 551, 554 (2d Cir. 1970). In light of these principles, the district court did not abuse its discretion in declining to hold an evidentiary hearing here.

1. As to the merits, the district court faced no disputed issues of material fact and, therefore, was entitled to resolve the matter without an evidentiary hearing. See, e.g., Aoude, 682 F.2d at 893. The United States argued that Microsoft's forced licensing of Internet Explorer with Windows 95 violated Section IV(E)(i) because (1) that provision prohibits Microsoft from conditioning an OEM license to Windows 95 on OEMs' licensing what Microsoft and antitrust tying law treat as a separate product, and (2) under this test, Internet Explorer and Windows are separate products.

The proper construction of Section IV(E)(i) presented a question of law that was fully addressed in the parties' submissions and at the December 5 hearing. While Microsoft contested the United States' reading of Section IV(E)(i), arguing that Internet Explorer and Windows 95 are part of a single "integrated" product and, therefore, that Section IV(E)(i) did not prohibit Microsoft's conduct (JA 459-60, 460-67), that argument raised no disputed issue of material fact. The only potentially disputed relevant facts involved Microsoft's account of the decree's negotiating history; and United States agreed for the purpose of the district court's ruling not to contest Microsoft's description of the "the written communications and exchanges between the parties" (JA 983). Although arguing that "the court ought to proceed on the basis of a full record that will explore what was intended by th[e] provision" (JA 1257), Microsoft expressly recognized that the United States did "not contest" the facts contained in Microsoft's submissions (JA 1241). The United States' concession thus eliminated any issue of material fact and permitted the court to construe Section IV(E)(i) without holding an evidentiary hearing.[8]

The district court similarly faced no issue of material fact in determining that Internet Explorer and Windows 95 are separate products. The United States introduced ample evidence demonstrating that Microsoft markets Internet Explorer apart from Windows 95 and that consumers separately demand browsers and OSs. Although Microsoft contested other issues and introduced significant evidence in support of its arguments, it did not contest these issues. Instead, Microsoft argued only that this evidence was irrelevant.[9]

Having elected to contest neither the existence of separate consumer demand nor that it markets Internet Explorer and Windows 95 separately, Microsoft can hardly complain that it was improperly denied an evidentiary hearing. In any event, Microsoft has failed to demonstrate, as it must, that an evidentiary hearing "would [have been] productive." Ty, Inc. v. GMA Accessories, Inc., 132 F.3d 1167, 1171 (7th Cir. 1997). Microsoft now asserts (Br. at 19) that it would have sought to introduce further evidence demonstrating "there is no interest on the part of OEMs in licensing a version of Windows 95 with its Internet Explorer technologies removed." But additional evidence on this

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[8]Microsoft asked the Court to take evidence on "the history of the technology under review here" (JA 1257). This request appeared to pertain to Microsoft's contention that the Petition should be dismissed on equitable estoppel grounds because the United States allegedly knew Microsoft would include Internet Explorer with Windows 95 at the time of the decree's fashioning (JA 418, 476-77), a claim the United States demonstrated was untrue (JA 989-993, 1000-02). Because Microsoft does not challenge the preliminary injunction on this basis, its request is of no relevance here.

[9] See JA 469 ("The existence of separate consumer demand for particular features and functions of the operating system, however, does not mean that those features and functions cannot be elements of a single 'integrated product' for purposes of the proviso of Section IV(E)(i)."); id. at 470 (arguing that Microsoft's separate marketing of Internet Explorer is "irrelevant to whether Internet Explorer is part of an 'integrated product' under Section IV(E)(i)").

question would have served no purpose. The United States did not contend that demand exists for Windows 95 without that which Microsoft labels "Internet Explorer technologies," which include the shared program libraries that Microsoft makes available for distribution with both Internet Explorer and numerous other Microsoft and non-Microsoft applications (JA 1700-10). Rather, the United States demonstrated that there is demand for Windows 95 without the web browsing functionality that Internet Explorer provides (JA 92), and the district court was entitled to find separate consumer demand on the basis of this uncontested evidence. See infra pp.39-40.[10]

Microsoft complains on appeal that it was denied the opportunity to "cross-examine any oral testimony offered by the DOJ" (Br. at 19). But the United States had no duty to offer oral testimony for Microsoft's convenience.[11] In any event, even if the court erred in failing to hold an evidentiary hearing, that error was harmless. Microsoft's own evidence at the subsequent hearing on the United States' motion for contempt confirmed the requisite separate demand (JA 1641, 1685-87).

Finally, Microsoft asserts that, if granted an evidentiary hearing, it would have introduced

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[10]Contrary to what Microsoft contends, a software product such as Internet Explorer properly is defined by its "functionality" rather than "a block of software code" (Br. at 21 & n.3). This is because certain programs frequently "share" code. For instance, Microsoft Word, a word processing application program, may upgrade and replace certain shared program libraries when installed on a PC containing Windows 95 (JA 1574-75). When a user "uninstalls" Microsoft Word from that PC using Windows's 95 Add/Remove Program utility, these shared program libraries remain, and only a subset of files (which could not themselves supply Word's functionality) are removed. Nonetheless, from the user's perspective, the Microsoft Word product has been removed because the user may no longer invoke its functionality (JA 1575-76).

[11]Microsoft also contends that it was deprived of an opportunity to argue that the United States' evidence included inadmissible hearsay (Br. at 19), but it is settled that such material may be considered in entering a preliminary injunction. See generally 11A Charles A. Wright et al., Federal Practice and Procedure § 2949, at 214-15, 219-20 (2d ed. 1995).

additional evidence that forcing OEMs to license Internet Explorer with Windows 95 "does nothing to prevent OEMs from preinstalling Netscape Navigator on their computers" (Br. at 19). But such evidence would have been irrelevant. Tying arrangements harm competition merely by satisfying a demand rivals otherwise might meet. See generally Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 12-15 (1984). Section IV(E)(i) thus says nothing about -- and plainly does not contemplate a defense based on -- an OEMs' contractual freedom to license competing products. Such "negative" tying is proscribed by a separate provision of the decree, Section IV(E)(ii).

2. The district court did not err in imposing relief relating to Internet Explorer 4 without an evidentiary hearing. When the United States brought its Petition, Microsoft distributed Internet Explorer 4 to OEMs only on a separate disk, and it planned to require OEMs to distribute that separate disk in the box with new PCs early in 1998 (and, perhaps, subsequently to require OEMs to preinstall that disk). The United States demonstrated that enjoining this impending requirement would impose no burden on Microsoft (JA 995-96, 1220-21, 1224, 1236-37, 1259-60) and that preservation of OEMs' freedom to select among competing web browsers required immediate relief (JA 996, 1236-37). At the December 5 hearing, Microsoft offered no facts to contest these assertions. Indeed, it confirmed that a substantial percentage of OEMs would soon lose their freedom to choose whether to license Internet Explorer 4 (JA 1250-51). The record thus presented "no genuine issue of material fact" (JA 1224).[12]

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[12] At about the time of the hearing, Microsoft began distributing Internet Explorer 4 to OEMs preloaded on a new version of Windows 95, OSR 2.5, instead of on a separate CD-ROM (JA 1269). Microsoft ultimately complied with the preliminary injunction by keeping OSR 2.5 optional for OEMs (JA 1781).

3. The record before the district court also supported its conclusion that Microsoft could offer OEMs the option of a version of Windows 95 without Internet Explorer 3 browser functionality. Despite its detailed submissions, Microsoft had failed to explain why it could not offer a version of OSR 2 that included all shared program libraries yet otherwise omitted Internet Explorer 3 as separately distributed by Microsoft (JA 997). And, as the United States pointed out, Microsoft had also failed to explain why it could not offer OEMs the option of "uninstalling" Internet Explorer 3 from OSR 2 (JA 1210).

Moreover, even if the district court should have held a further evidentiary hearing on the relief with respect to Internet Explorer 3, its failure to do so caused Microsoft no prejudice. As explained above, Microsoft could have complied with the Order simply by permitting OEMs to "uninstall" Internet Explorer 3 from OSR 2. Despite Microsoft's prior representations to the contrary (JA 1198), the evidence showed this can be easily accomplished through procedures Microsoft explains to end users, thus confirming that, as Microsoft advertises, "Internet Explorer uninstalls easily" (JA 1088, 1365, 1553-58, 1610-11, 1694-97). Microsoft offered no evidence suggesting that OEMs could not implement these procedures or that Microsoft could not easily provide OEMs with a version of OSR 2 from which Internet Explorer 3 had been "uninstalled." Indeed, Microsoft's subsequent agreement to permit OEMs to exercise that option (JA 1780) demonstrates that compliance with the injunction imposes no hardship. See Socialist Workers Party v. Illinois State Bd. of Elections, 566 F.2d 586, 587 (7th Cir. 1977) (upholding entry of permanent injunction without an evidentiary hearing because facts defendant claimed it was improperly denied the opportunity to present, "if proved, would [not] have altered the result"), aff'd, 441 U.S. 173 (1979).

There is also no merit to Microsoft's assertion that it had "no opportunity" to introduce evidence that "the fragmentation that would result from allowing OEMs to decide what portions of the operating system to install on their computers would undermine the utility of Windows 95 as a stable and consistent development platform" (Br. at 19). To the contrary, Microsoft introduced several declarations in support of that argument. And these declarations, which the court was entitled to assume further "testimony would . . . have duplicated," Ty, 132 F.3d at 1171, actually demonstrated that, because tens of millions of PC users operate prior versions of Windows and lack the latest versions of Internet Explorer, significant "fragmentation" would exist whether or not Microsoft forced OEMs to license Internet Explorer (JA 611, 616, 966; see also JA 1166). Thus, the United States explained, "all the declarations Microsoft has submitted from application developers state that their products include the necessary services provided by Internet Explorer 3.0 or 4.0 to ensure that the products will run whether or not Internet Explorer is pre-installed on any particular user's computer" (JA 997-98; see also JA 944, 949, 953, 965-66, 1168-69).

Because Microsoft's own evidence demonstrated that the preliminary injunction did not "undermine the utility of Windows 95 as a stable and consistent development platform" (Br. at 19), the court was entitled without further proceedings to conclude that Microsoft's argument did not preclude a preliminary injunction. See Campbell Soup, 47 F.3d at 471-72; Herbert Rosenthal, 428 F.2d at 554. Indeed, Microsoft had long permitted end users to "uninstall" Internet Explorer 3, even if OEMs provide it (JA 1696), so the preliminary injunction, which Microsoft complied with by permitting OEMs also to uninstall Internet Explorer 3, did not increase the uncertainty application developers confront.

4. Finally, Microsoft's reliance on the district court's statement that "disputed issues of

technological fact, as well as contract interpretation, abound as the record presently stands" (JA 1294) is misplaced. The court did not mean that the parties's arguments on the merits presented genuine issues of material fact. Rather, as the next paragraph made clear, the court determined that exploration of other avenues might be appropriate before issuing a definitive ruling on the merits. The court also recognized that the government's request for more extensive permanent relief raised factual issues (JA 1294-95). Neither of these matters, however, precluded a preliminary injunction, and the court committed no reversible error in entering such relief on the record before it.

. Microsoft Received Adequate Notice

Microsoft's argument (Br. at 17-18) based on the district court's failure to notify the parties that it intended to issue a preliminary injunction is without merit. Microsoft relies on Rule 65(a). The Rule's purpose, however, is to permit a party "to marshall the evidence and present arguments against the issuance of the injunction." 11A Charles A. Wright, et al., Federal Practice and Procedure § 2949, at 213 (2d ed. 1995). Microsoft did just that.

Although Microsoft now argues that only a request for an Order to Show Cause was before the district court (Br. at 17), Microsoft did not treat the proceeding as so limited. Instead, it filed a voluminous response replete with assertedly relevant evidence, and joined issue on both the merits of the United States' Petition and the request for permanent injunctive relief. Because the "standard for a preliminary injunction is essentially the same as for a permanent injunction with the exception that the plaintiff must show a likelihood of success on the merits rather than actual success," Amoco Prod. Co. v. Gambell, 480 U.S. 531, 546 n.12 (1987), Microsoft's response to the United States' request for permanent relief effectively addressed the factors that govern the issuance of a preliminary injunction.

The request for injunctive relief gave Microsoft notice, and the scope of its response demonstrated that such notice was adequate.

Microsoft argues that it had "no reason to anticipate" that the court might issue a preliminary injunction because "a final judgment ha[d] already been entered in this action" (Br. at 17). It is not "unorthodox" (id.), however, for a court to enter a preliminary injunction to enforce a consent judgment. See, e.g., International Brotherhood of Teamsters v. Teamsters Local Union 714, 109 F.3d 846 (2d Cir. 1997) (per curiam); Xerox Fin. Servs. Life Ins. Co. v. High Plains Ltd. Partnership, 44 F.3d 1033 (1st Cir. 1995); cf. Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561, 587 (1984) (O'Connor, J., concurring). Nor is it "inappropriate" (Br. at 17) for a court to enforce an outstanding court order, including a consent judgment, on its own motion when the circumstances so warrant. See, e.g., Alberti v. Klevenhagen, 46 F.3d 1347, 1365-66 (5th Cir. 1995) (holding that a court has the discretion "regardless of the parties' silence or inertia, to modify a decree," that is, to act "sua sponte," "when the court sees that the factual circumstances or the law underlying that decree has changed").

In any event, "surprise alone is not a sufficient basis for appellate reversal; appellant must also show that the procedures followed resulted in prejudice." Socialist Workers, 566 F.2d at 587; see also D. Patrick Inc. v. Ford Motor Co., 8 F.3d 455, 459-60 (7th Cir. 1993) (same); cf. Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, 28 F.3d 1388, 1398 (5th Cir. 1994) (finding failure to provide notice prior to granting summary judgment sua sponte harmless error). Here, the court's failure to inform Microsoft that it intended to issue a preliminary injunction was, if error, harmless. Microsoft has pointed to no new significant, relevant evidence or argument that it would have brought to the court's attention; and subsequent events confirm that the preliminary injunction imposes no burden on Microsoft and, therefore, that the court's balancing of the equities was correct. See supra pp.23-25. "A more formal notice," in short, "would not have provided [Microsoft] with a greater opportunity to alter th[e] result." Socialist Workers, 566 F.2d at 587.

C. The District Court Fully Complied With Rule 52(a)

Microsoft is also wrong that the "District Court entered [the] preliminary injunction without making any findings of fact" (Br. at 22). "The purpose of Rule 52(a), pertinent to injunctions, is to provide the appellate court with a clear understanding of the decision." Wynn Oil Co. v. Purolator Chem. Corp., 536 F.2d 84, 85 (5th Cir. 1976). Accordingly, contrary to what Microsoft implies (Br. at 22), there is "fair compliance with Rule 52(a)," Mayo v. Lakeland Highlands Canning Co., 309 U.S. 310, 316 (1940), when a "court's opinion, read in conjunction with the record of the proceedings below" provides a "sufficient basis for the court to consider the merits." McCawley v. Ozeanosun Compania Maritime, S.A., 505 F.2d 26, 30 n.4 (5th Cir. 1974); see also Wynn Oil, 566 F.2d at 85-86. See generally 9A Charles A. Wright, et al., Federal Practice and Procedure § 2580, at 549-50 (2d ed. 1995).

Here, the court's Memorandum Opinion more than adequately discloses the "underlying rationale," Inverness Corp. v. Whitehall Labs., 819 F.2d 48, 51 (2d Cir. 1987) (per curiam), for entering the preliminary injunction. The district court addressed each of the four pertinent factors; the court succinctly explained its reasons for finding that each factor pointed toward the injunction's entry; and (as discussed throughout this Brief) the facts supporting the district court's findings are readily apparent from the record. No more was required. See Applewood Landscape & Nursery Co. v. Hollingsworth, 884 F.2d 1502, 1503 (1st Cir. 1989) ("[T]he judge need only make brief, definite, pertinent findings and conclusions upon contested matters; there is no necessity for over-elaboration of detail or particularization of facts." (internal quotations omitted)).

Microsoft's specific complaint -- that the district court acknowledged that the parties were "sharply divided on numerous material issues of fact" (Br. at 22) concerning whether Microsoft was violating the decree, but nevertheless entered a preliminary injunction without making findings of fact -- is twice flawed. First, as explained above, the district court faced no genuine issues of material facts in ruling on the merits. Second, the district court's basis for concluding that the United States had a reasonable probability of success on the merits is apparent from its opinion and the record. See infra pp.34-40. This is not a case where the court of appeals must "speculate as to the basis of the district court's ruling." TEC Engineering Corp. v. Budget Molders Supply, Inc., 82 F.3d 542, 545 (1st Cir. 1996).

. The Preliminary Injunction Properly Preserves The Competitive Status Quo And The Court's Ability To Fashion Meaningful Relief

Microsoft further errs in contending that the district court abused its discretion by issuing an injunction without applying a "heightened standard" (Br. at 24). Microsoft argues that such a standard is required simply because a preliminary injunction grants "substantially all the relief [the United States] could have obtained after a full trial on the merits" (Br. at 23). To the contrary, as explained in the very case Microsoft cites: "If the use of a heightened standard is to be justified, the term 'all the relief to which a plaintiff may be entitled' must be supplemented by a further requirement that the effect of the order, once complied with cannot be undone." Tom Doherty Assocs., Inc. v. Saban Entertainment, Inc., 60 F.3d 27, 34-35 (2d Cir. 1995). That is plainly not the case here. The preliminary injunction concerns Microsoft's ongoing licensing to OEMs; if Microsoft were to prevail on the merits, the preliminary injunction would not thereafter prevent Microsoft from again compelling OEMs to license both Windows 95 and Microsoft's web browser.[13] Moreover, the preliminary injunction, as previously explained, provides less extensive relief than the government requested.

Nor was the preliminary injunction a "mandatory" injunction that "radically alter[ed] the status quo" (Br. at 23-24). With regard to Internet Explorer 4, the injunction simply preserved the status quo. OEMs had not previously been required to license Internet Explorer 4, and Microsoft responded to the preliminary injunction by promising that "[i]nstallation of Internet Explorer 4.0" would remain "optional" (JA 1403).[14] The conclusion is the same with respect to Internet Explorer 3 because Microsoft could have complied, and eventually did comply, with the preliminary injunction simply by declining to enforce its licensing agreements to prevent OEMs from "uninstalling" that product (JA 1423-29, 1780). Permitting OEMs to take advantage of the "uninstall" option that Microsoft makes available to end users required from Microsoft no "positive act" (Br. 23).

Indeed, even if the injunction were "mandatory" or altered the status quo, no heightened standard follows. See Aoude, 862 F.2d at 893 (explaining that the "status quo doctrine is one of

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[13]The stipulation entered on January 22, 1998, requires Microsoft to offer OEMs the option of licensing Windows 95 without Internet Explorer web browsing functionality for 90 days following termination of the preliminary injunction (JA 1780-81). This requirement, to which Microsoft consented, demonstrates that the preliminary injunction is not burdensome.

[14]As explained above, at about the time of the district court's hearing, Microsoft began distributing Internet Explorer 4 to OEMs on the OSR 2.5 CD-ROM. OSR 2.5 contained certain "updates" to OSR 2 (JA 1390, 1400), and the United States expressed concern that including such updates only with OSR 2.5 altered the status quo by effectively conditioning an OEM license to a fully updated Windows 95 on an OEM's licensing Internet Explorer 4 (JA 1426). Microsoft agreed to resolve these concerns by making the updates available to OEMs licensing OSR 2 (JA 1781).

equity, discretion, and common sense, not woodenly to be followed"); Tanner Motor Livery, Ltd. v. Avis, Inc., 316 F.2d 808, 809 (9th Cir. 1963) (same). A traditional function of a preliminary injunction "is to prevent irreparable injury." Ross-Whitney Corp. v. Smith Klein & French Labs., 207 F.2d 190, 199 (9th Cir. 1953). As then-Judge Taft explained: "it sometimes happens that the status quo is a condition not of rest, but of action, and the condition of rest is exactly what will inflict the irreparable injury . . . . In such a case courts of equity issue mandatory writs before the case is heard on the merits." Toledo, AA & NM Ry. v. Pennsylvania Co., 54 F. 730, 741 (C.C.N.D. Ohio), appeal dismissed, 150 U.S. 393 (1893).[15]

The district court confronted threatened irreparable injury here. Failure to impose a preliminary injunction might have undermined the court's ability to fashion appropriate final relief. As the court explained, if "Microsoft continues with its 'integration process' in the expectation that its licensing practices will continue to make it ever more profitable to do so, the cost of compulsory unbundling of Windows 95 and [Internet Explorer] in the future could be prohibitive" (JA 1297).

Moreover, Microsoft's licensing practices threatened irreparable harm to the competitive status quo. Because the United States sought to enforce an antitrust consent decree designed to prevent potentially anticompetitive conduct, such harm may be presumed. See United States v. Siemens Corp., 621 F.2d 499, 506 (2d Cir. 1980) (presumption invoked when government showed a likely Clayton Act Section 7 violation); but the court did not rest on the presumption. As Microsoft's own documents

[15]Precisely because a traditional function of a preliminary injunction is to prevent irreparable harm, distinguishing between the standard for issuing mandatory and prohibitory injunctions "has been subject to academic and judicial criticism." Eng v. Smith, 849 F.2d 80, 82 (2d Cir. 1988). See 11A Charles A. Wright et al., Federal Practice and Procedure § 2948, at 137-38 (2d ed. 1995).

revealed (JA 261-62, 318, 321, 328, 337; CJA 152, 249, 371, 414), and the district court tentatively found (JA 1297-98), the success of competing web browsers might erode Microsoft's PC OS monopoly, and Microsoft viewed its forced licensing of Internet Explorer as a weapon with which it might prevail in its "battle" against the Netscape Navigator browser. Thus, as the district court concluded, "the probability that Microsoft will not only continue to reinforce its operating system monopoly by its licensing practices, but might also acquire yet another monopoly in the Internet browser market, [was] simply too great to tolerate indefinitely until the issue is finally resolved" (JA 1298).

E. The Preliminary Injunction Should Remain In Place Even If A Remand Is Necessary

The district court properly entered the preliminary injunction. But even if the court had committed reversible error, this Court should not, as Microsoft insists (Br. at 14), vacate the preliminary injunction. This Court has equitable discretion to keep the injunction intact during the district court's reconsideration of its issuance. See Rosen v. Siegel, 106 F.3d 28, 33 (2d Cir. 1997) (injunction held in place despite district court's "failure to give notice and opportunity to be heard" or to include "specific findings"); see also United States v. Marine Shale Processors, 81 F.3d 1329, 1360 (5th Cir. 1996) (insufficient findings); Inverness Corp. v. Whitehall Labs., 819 F.2d 48, 51 (2d Cir. 1987) (per curiam) (same). This power is appropriately exercised when traditional equitable criteria support the injunction's issuance or it is otherwise inequitable to vacate the injunction. See Rosen, 106 F.3d at 33; Inverness, 819 F.2d at 49.

Here, there are compelling reasons to uphold the injunction. "On the record developed to date, there are sufficiently serious questions going to the merits to be a fair ground for litigation and the balance of hardships tip[s] decidedly" in favor of issuing the injunction. Inverness, 819 F.2d at 51. The district court correctly determined that the United States has a substantial probability of success on the merits. See infra pp.34-40. Compliance with the preliminary injunction imposes on Microsoft no significant burden, see supra pp.23-25, and Microsoft did not even seek a stay. The preliminary injunction also serves the public interest by ensuring that competition on the merits determines which web browsers OEMs license. There is little reason to vacate the preliminary injunction when the district court, based on these considerations, will in all probability reinstate it.

Microsoft, moreover, does not come to this Court with clean hands. Although Microsoft inveighs that the preliminary injunction suffers from numerous procedural defects and "radically alter[ed] the status quo" (Br. at 24), Microsoft neither sought a stay of the district court's order nor asked the court for clarification. Nor did Microsoft bring its objections to the district court through a motion for reconsideration. Rather, "mak[ing] its own determination of what the [injunction] meant," McComb v. Jacksonville Paper Co., 336 U.S. 187, 192 (1949), Microsoft read the Order to require it to offer a product that would not work (JA 1729-30); and Microsoft knew that this would effectively require OEMs wishing to license Windows 95 also to license Internet Explorer web browsing functionality, thereby turning the preliminary injunction on its head and "for all practical purposes[] render[ing it] a nullity," United States v. Greyhound Corp., 508 F.2d 529, 533 (7th Cir. 1974). Having caused the very mischief for which it now blames the district court (Br. at 21), Microsoft should remain subject to the preliminary injunction if the district court is required to reconsider it.

III. THE DISTRICT COURT CORRECTLY DETERMINED THAT THE UNITED STATES HAS A SUBSTANTIAL LIKELIHOOD OF SUCCESS ON THE MERITS

The district court properly determined that the United States has a substantial likelihood of success on the merits. Microsoft's construction of Section IV(E)(i) contravenes fundamental interpretive principles by rendering the provision's prohibition meaningless. By contrast, the United States' reading of Section IV(E)(i) gives meaning to each of the section's terms, is faithful to its purposes, and is consistent with the extrinsic evidence to which Microsoft points.

A. Section IV(E)(i) Prohibits Microsoft From Conditioning An OEM Windows 95 License On An OEM's Licensing That Which Microsoft Treats, And Antitrust Tying Jurisprudence Defines, As A Separate Product

1. The language, structure, and applicable context of Section IV(E)(i) make clear that its purpose is to prohibit Microsoft's use of tying arrangements. Section IV(E) originated in allegations that Microsoft tied MS-DOS to Windows 3.1 to the detriment of competing OSs (JA 751-55). As ultimately adopted, the decree's "anti-tying provision" (Br. at 31) does not simply proscribe that particular tie. Rather, Section IV(E)'s two subsections broadly prohibit what in antitrust parlance are certain "positive" and "negative" tying arrangements and categorically bar such arrangements for the very reasons the Sherman Act may condemn them. As explained in the CIS, a document from which a court may glean "the parties' jointly intended purposes in entering [into] the Decree," United States v. Western Elec. Co., 894 F.2d 1387, 1391 n.7 (D.C. Cir. 1990), Section IV(E) was designed to prevent Microsoft from "attempt[ing] to extend or protect its monopoly in any covered product" (JA 231). This, of course, restates a principal vice antitrust tying doctrine seeks to guard against. See, e.g., Grappone, Inc. v. Subaru of New England, Inc., 858 F.2d 792, 795-96 (1st Cir. 1988) (Breyer, J.).

2. Notwithstanding that Section IV(E)(i) plainly was intended to prohibit Microsoft's use of certain potentially anticompetitive tying arrangements, Microsoft insists upon a construction of the provision that would effectively nullify its "anti-tying" prohibition. According to Microsoft, Section IV(E)(i)'s proviso -- which permits Microsoft to "develop[] integrated products" -- exonerates from the decree Microsoft's forced licensing to OEMs of any product that Microsoft deems to be "integrated" into the covered OS product. Microsoft thus argued explicitly that the proviso gives it "unfettered liberty" to create whatever "packages" of products it chooses and to compel OEMs to license those packages (JA 458, 467). This reading of Section IV(E)(i), which Microsoft repeats in more muted terms here (Br. at 31-33), would render Section IV(E)(i) meaningless because it would permit Microsoft to defeat its operation whenever Microsoft chooses to do so. As the district court recognized, however, a consent decree, like any other contract, ought not to be read in a manner that renders a substantive prohibition "essentially meaningless" (JA 1293). See, e.g., Shakey's Inc. v. Covalt, 704 F.2d 426, 434 (9th Cir. 1983); United States v. ASCAP, 157 F.R.D. 173, 201-02 (S.D.N.Y. 1994) (refusing "to condone" application of antitrust consent decree provision in a manner that essentially rendered it "illusory" and thus "nullif[ied] the necessary protection from restraint of trade that the [provision] offers").

3. Because Microsoft's construction of Section IV(E)(i) flouts elementary principles of interpretation, and because Section IV(E)(i), as explained above, was intended to prohibit certain potentially anticompetitive tying arrangements, the district court properly concluded that it should turn to tying law principles for guidance in determining whether there is an "other product" to which a license to a "covered product" has been conditioned within the meaning of Section IV(E)(i). This does not, as

Microsoft contends, improperly read the decree by "reference to the legislation the [plaintiffs] originally sought to enforce" (Br. at 30 (internal quotations omitted)). A consent decree, like any contract, must be read in light of "the circumstances surrounding [its] formation," including "the purpose of the provision in the overall context of the judgment at the time the judgment was entered." Western Elec. Co., 894 F.2d at 1390-91 (internal quotations omitted); see also Western Elec. Co., 12 F.3d at 233; White v. Roughton, 689 F.2d 118, 119 (7th Cir. 1982). In the case of an antitrust consent decree entered following judicial scrutiny under the Tunney Act, those purposes include the parties' intended resolution of antitrust issues. See Western Elec., 894 F.2d at 1390-92.

Microsoft objects that "if Section IV(E)(i) did incorporate general tying concepts -- requiring case-by-case analysis to determine whether conduct violates the Consent Decree -- then it would be invalid for failing to specify with the requisite clarity the conduct it describes" (Br. at 31). Microsoft is wrong. A Sherman Act decree may contain prohibitions that require case-by-case application. See, e.g., United States v. Crescent Amusement Co., 323 U.S. 173, 185-87 (1945) (revising decree fashioned after judgment to prohibit certain acquisitions "except after an affirmative showing that such acquisition will not unreasonably restrain competition" (internal quotations omitted)).[16] A decree is invalid for excessive generality only if it is "unintelligible" or "defies comprehension." International Longshoremen's Ass'n v. Philadelphia Marine Trade Ass'n, 389 U.S. 64, 76 (1967) (cited in Br. at 31). That is plainly not true of the objective tying-law criteria that determine whether there is one product or two. If Microsoft believes its obligations unclear, Microsoft may seek a clarification of the

[16]Similarly, decrees prohibiting a party from violating certain statutes, which inherently require case-by-case analysis, are also unobjectionable. See, e.g., McComb v. Jacksonville Paper Co., 336 U.S. 187, 191-92 (1949) (Fair Labor Standards Act).

decree's operation; the possible need for clarification, however, does not render a decree invalid. See, e.g., Western Elec., 12 F.3d at 230-33.

4. Finally, the district court's conclusion that the United States is likely to prevail on the merits neither renders illusory Section IV(E)(i)'s "developing integrated products" proviso nor is inconsistent with Microsoft's account of the decree's negotiating history. Microsoft is permitted by the proviso to develop any integrated product it wishes without violating Section IV(E)(i). Microsoft "develop[s an] integrated product" within the meaning of Section IV(E)(i), for example, when it incorporates new features (even if they might otherwise comprise a distinct product for tying law purposes) into an OS product and offers the new product to OEMs. Microsoft would obviously not violate Section IV(E)(i) if it gave OEMs the option of taking the OS without the new features. And the proviso ensures that Microsoft will not be held to violate the decree simply by its decision to incorporate the features into the OS (that is, to "develop" the "integrated" product), even if it does not offer OEMs the "unbundled" option of the OS without them.[17]

But the proviso does not permit Microsoft to require OEMs to take the OS and other features as part of a package when Microsoft simultaneously treats those other features as, and antitrust law regards them as, a distinct commercial product. In such circumstances, OEMs would be forced to license the functional equivalent of what they would receive if compelled by Microsoft to license two distinct products as part of an ordinary commercial tie. Such forced licensing is not the "develop[ment

[17]The proviso also ensures that Microsoft would not violate Section IV(E)(i) simply by designing Windows 95 to be incompatible with a rival's browser or other product -- a form of "technological tying" -- and thereby implicitly requiring OEMs to take Microsoft's competing browser or other product.

of an] integrated product[]." This distinction between forced licensing and product development not only gives meaning to each of Section IV(E)(i)'s terms, but also is faithful to its anti-tying purposes. The core Section IV(E)(i) concern, that Microsoft might "extend or protect its monopoly power" in Windows through conditioned licenses, is at its zenith when Microsoft not only forces OEMs to take with Windows 95 what in antitrust terms is a separate product, but also markets that separate product in different channels and for other OSs.

This reading of Section IV(E)(i) also comports with the pertinent extrinsic evidence on which Microsoft relies. That evidence shows that Section IV(E)(i) was included in the Final Judgment in response to allegations that Microsoft conditioned licenses to Windows 3.1 on licensees taking MS-DOS 6 -- a product which, like Internet Explorer, Microsoft marketed as a distinct commercial product in its own right (JA 751, 754). By contrast, as Microsoft argues (Br. at 31-32), Windows 95 was the paradigmatic case of the development of an "integrated product" because it did not simply bring together the preexisting Windows 3.1 and MS-DOS 6 products; rather, Windows 95 incorporated into a single, new product a new graphical user interface and new MS-DOS component, neither of which Microsoft marketed separately as distinct products.[18] The response to public comments to which Microsoft points (Br. at 33 n.9) similarly did not involve Microsoft's distribution of

[18]Microsoft (Br. at 32) relies on an affidavit reporting several years after the fact that one of its negotiators asserted that "nothing in section IV(E)(i) could be construed to limit Microsoft in the area of product design" (JA 761). Assuming this statement, which does not appear in the affiant's contemporaneous notes (JA 915-18), is properly considered, it must be read in the context of the negotiator's prior statement (which does appear in those notes) that Microsoft intended by the proviso "to make explicit that Microsoft retained the absolute right to offer 'merged product' or products embodying 'integrated technology' (such as Chicago [the code name for Windows 95])" (JA 761). As explained, the United States's reading permits precisely such integration. In any event, this proceeding raises no issue about Microsoft's freedom "in the area of product design."

a product simultaneously with and without the OS.

B. The District Court Properly Determined That Internet Explorer And Windows 95 Are Separate Products

Microsoft further errs in asserting that the district court misapplied tying law principles in finding that Internet Explorer and Windows 95 comprise separate products. Microsoft does not contest the district court's finding that there is separate demand for browsers (including Internet Explorer) apart from OSs (including Windows 95) -- and for good reason. The United States adduced ample evidence demonstrating the existence of such demand. Web browsing software, including Internet Explorer, is independently marketed directly to end users through a variety of channels. See supra p.4; see also e.g., JA 378. This is evidence from which antitrust courts commonly find separate demand. See generally 10 Phillip E. Areeda et al., Antitrust Law ¶¶ 1744-45, at 194-224 (1996).

Rather, Microsoft quarrels with the district court's finding of "separate demand for OSs that do not provide web browsing functionality" (Br. at 34). But Microsoft's own documents showed that it designed Internet Explorer 3 to be "uninstalled" from Windows 95, a procedure which eliminates the end-user's ability to browse the web. That Microsoft, a monopolist, voluntarily created this option is particularly telling evidence of separate demand for a browserless OS. See 10 Areeda, supra, ¶ 1744g, at 206. Confirming this, Microsoft's own witness explained at the contempt hearing that Microsoft developed the "uninstall" feature for Internet Explorer 3 precisely because consumers demanded Windows 95 without the ability to browse the web (JA 1685-87, 1691).

In support of its contrary contention, Microsoft points to a declaration asserting that "all modern computer operating systems include Web 'browsing' functionality" (JA 596). But the existence of substantial demand for OSs with web browsing functionality obviously does not preclude the existence of sufficient demand for OSs without such functionality, to which a competitor's product might be added. See In re Data General Corp. Antitrust Litig., 490 F. Supp. 1089, 1104 (N.D. Cal. 1980) ("[T]he relevant inquiry is not whether the two items must be used together but whether the two items must come from the same seller."). To the contrary, consumers commonly use web browsers other than those preinstalled on their PCs (JA 374, 1088; CJA 353, 372, 396). This, along with Microsoft's development of the "uninstall" option, readily evidences the requisite separate demand. See Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 22-23 (1984); In re Data General, 490 F. Supp. at 1108-09 (CPU and memory boards found distinct products, among other reasons, because consumers replaced memory boards with those obtained from competitors).

To the extent Microsoft implies that, even if separate end-user demand for an OS without the ability to browse the web exists, there is no such separate demand by OEMs (Br. at 19, 34-35), Microsoft is wrong. The United States' evidence demonstrated that OEMs have expressed interest in obtaining from Microsoft a version of Windows 95 without operational Internet Explorer web browsing functionality so that OEMs could highlight competing web browsers (JA 156-57, 215-18). This is plainly evidence of OEM demand for a browserless OS. See Jefferson Parish, 466 U.S. at 22-23; In re Data General, 490 F. Supp. at 1108-09.

Indeed, what animates this action is precisely the concern that competition on the merits should determine which web browsers OEMs license. This case does not, as Microsoft contends, involve an attempt "to turn Microsoft into a regulated company" or to impede Microsoft's ability to "innovate" (Br. at 35-36). Microsoft is free to offer any combination of products it chooses; it simply must, as the decree requires, provide meaningful options to ensure that consumer demand -- rather than Microsoft's OS monopoly -- determines whether those products are purchased. Thus, far from serving "[n]o procompetitive purpose" (Br. at 21 n.3), the United States' present action strives to hold Microsoft to the promise it made not to distort competition by compelling OEMs to license what Microsoft itself treats as a separate product.

CONCLUSION

For the foregoing reasons, the Court should affirm the December 11, 1997, Order entering the preliminary injunction and remand the case for further proceedings.

Respectfully submitted.

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I hereby certify that the foregoing Brief of Appellee United States of America contains no more words than permitted by D.C. Circuit Rule 28(d)(1).

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