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

No. 00-5212

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

MICROSOFT CORPORATION,

Defendant-Appellant

No. 00-5213

STATE OF NEW YORK, EX REL. ATTORNEY GENERAL
ELIOT SPITZER ET AL.,

Plaintiffs-Appellees

v.

MICROSOFT CORPORATION,

Defendant-Appellant

PLAINTIFFS' JOINT RESPONSE TO THE COURT'S REQUEST FOR THE PARTIES' VIEWS REGARDING THE PROPOSED REVIEW SESSION

On October 18, 2000, the Court issued a Notice requesting the parties to respond to a proposal that Dr. Michael H. Hites conduct a review session for the Court. Plaintiffs believe that, if properly conducted, such a session could assist the Court in familiarizing itself with basic computing concepts.

The Notice makes clear that the Court's intention is to conduct a session providing background information about the "fundamentals" of computer technology, and not to hear submissions bearing on "any of the issues presented in these appeals." With this understanding, plaintiffs have no objection to the proposal, although we suggest some clarifications below. We are prepared to consult with Dr. Hites and Microsoft on the content of the review session, and we hope to reach agreement on a presentation that would be appropriate and helpful to the Court.[1]

1. The Notice specifies that "the review session would not address any of the issues presented in these appeals." This limitation is critically important to protect this Court's role as an appellate tribunal. As the Court's Notice contemplates, the appellate record must, of course, govern the Court's consideration of the disputed issues, *see* Fed. R. Civ. P. 52(a); Fed. R. Evid. 201(b) ("A judicially noticed fact must be one not subject to reasonable dispute . . . ."); *Melong v. Micronesian Claims Comm'n*, 643 F.2d 10, 12 n.5 (D.C. Cir. 1980).

We note that the record in this case contains a substantial amount of background information directed to disputed issues. There was testimony offered to help the district court

[1]In September 2000, the Department of Justice entered into a contract with the IIT Research Institute, an independent research and development organization associated with Illinois Institute of Technology, to complete the independent technical review of the computer-based Carnivore system. See <http://www.usdoj.gov/opa/pr/2000/September/565jmd.htm>. The IITRI team performing the review includes the Dean and an Associate Dean of the Chicago-Kent School of Law, which is a part of IIT. We have confirmed with IITRI that Dr. Hites has no involvement in the Carnivore review.

understand the technical issues presented,[2] and the district court distilled that evidence into findings of fact, including a "Background" section that defines many of the relevant terms.[3]

By precluding the presentation from addressing "any of the issues presented in these appeals," the Court has appropriately recognized that Dr. Hites' ability to present an overview of the fundamentals of computer technology must be constrained to some degree, in view of the appellate posture of the case. Indeed, in our view, the limitation must be understood to exclude not only explicit discussion of the issues presented on appeal, but also presentation of background material that bears closely on disputed issues. For example, plaintiffs' primary claim in this litigation is that Microsoft violated the antitrust laws through a course of conduct designed to maintain its monopoly power in personal computer operating systems. Consequently, significant evidence in the record below focuses on the nature of operating systems and on the interaction of operating systems with other software. Plaintiffs understand the Notice to contemplate that Dr. Hites could address operating systems at the level of generality that this Court has provided in prior decisions involving these parties,[4] but a fuller discussion of operating systems runs the risk of making statements that bear closely upon issues disputed below.

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[2] *See, e.g.*, Felten ¶¶ 11-18; Farber ¶ 11; Gosling ¶¶ 7-11; Tevanian ¶¶ 8-9, 12; Warren-Boulton ¶¶ 20-25; Barksdale ¶¶ 69-70; GX 1050 (Microsoft Press Computer Dictionary).

[3] Findings of Fact 1-17, 84 F. Supp. 2d 9, 12-14 (D.D.C. 1999).

[4] *See United States v. Microsoft Corp.*, 147 F.3d 935, 938 (D.C. Cir. 1998) ("An operating system is, so to speak, the central nervous system of the computer, controlling the computer's interaction with peripherals such as keyboards and printers."); *United States v. Microsoft Corp.*, 56 F.3d 1448, 1451 (D.C. Cir. 1995) ("Operating systems software controls the operation of the computer and manages the interaction between the computer's memory and attached devices such as keyboards, printers, display screens and disk drives.").

We believe that it would be appropriate and helpful for the Court's order to state, consistent with our understanding of the Court's intention, that Dr. Hites' presentation and any supplemental written materials are not only to exclude explicit reference to the issues on appeal, but also to avoid discussion of matters bearing closely on the disputed issues. Because the appeal has not yet been briefed, and the Court is not in a position to determine whether a particular matter bears closely on disputed issues, we believe that this limitation can only be enforced, as a practical matter, by restricting the review session to material on which all parties agree.

2. We also believe that to facilitate agreement on the content of the review session -- and to prevent the review session from becoming an occasion for briefing and argument unconstrained by the appellate record and beyond the scope of the Court's October 11, 2000 scheduling order -- the Court should clarify and limit the role of the parties. As we understand the Court's intent, the parties are to ensure that the presentation does not touch upon matters in dispute in this case. We do not believe that it would be appropriate for the parties to use the occasion to offer arguments, or evidence outside the record, or otherwise to provide their views on disputed issues. Thus, we believe that the Court should specify that its invitation to the parties to attend the review session does not permit any party to present factual material or arguments to the Court.

Indeed, we believe it important that the Court expressly limit a party's participation in the review session to the right to interrupt and request a brief conference with Dr. Hites and the other parties if it appears that the presentation is venturing into areas on which the parties have not agreed. The role of the technical representatives should be limited to advising counsel for the parties; they should not present information directly to the Court. Allowing technical representatives of parties to the case to present information directly to the Court could risk

creating the appearance that the Court had impermissibly broadened the record on appeal and raise serious questions about the nature of the proceeding.

We note that, given the time constraints involved, it is likely to be necessary to select a technical representative who already understands the relationship between the technical matters that might come up in a background presentation and the specific issues in this case. Plaintiffs may therefore need to rely on one of their trial witnesses, who not only has broad expertise in computer technology, but also possesses the familiarity with the disputed issues necessary to help ensure that Dr. Hites' presentation properly avoids those issues. So long as the parties' technical representatives do not address the Court in the review session, and Dr. Hites' presentation is limited to information on which all parties agree, plaintiffs' expert's previous role as a trial witness should not raise concerns.

Absent exceptional circumstances, the Court should not permit the parties to file written submissions in response to the review session. The proper course for a party concerned about Dr. Hites' presentation would be to raise the issue with Dr. Hites and counsel for the other parties at the review session, so that Dr. Hites could avoid further discussion of the point or, if necessary, inform the Court that he had inadvertently made comments that counsel believed to relate to a disputed issue.

3. We agree with the Court's suggestion that the parties should confer with Dr. Hites to reach agreement on a presentation that does not bear closely on disputed issues. We further believe that the Court should specifically direct Dr. Hites to omit from his oral presentation and any supplemental materials any information as to which the parties do not all agree.

We propose the following procedure for these consultations: (1) The parties should have an initial discussion with Dr. Hites to discuss the possible scope and content of the presentation and to bring to his attention areas likely to raise disputed issues. (2) Dr. Hites should provide the parties with a detailed outline of his proposed presentation, along with copies of any supplemental materials he proposes to provide to the Court. (3) The parties should confer with Dr. Hites about any modifications necessary to ensure that all parties agree to the presentation and materials in their entirety prior to the review session, so that the session does not address disputed issues.

4. Although we do not believe that the parties, absent extraordinary circumstances, should be permitted to file supplemental submissions after the session, it may be appropriate to permit Dr. Hites to provide supplemental information in response to questions from the Court, if all parties agree on that information.

5. The Court's Notice provides that "two representatives of each side" may be present at the review session. In our view, the State Plaintiffs collectively and the United States, as separate parties, should each be permitted a set of two representatives.

6. We believe that the review session should be recorded or transcribed.

CONCLUSION

The Court should issue an order that: (1) specifies that the review session and any supplemental materials are to be limited to material that all parties agree does not bear closely on disputed issues; (2) directs the parties to confer with Dr. Hites to reach agreement on a presentation, and directs Dr. Hites to omit from his presentation and any supplemental materials any information as to which all parties do not all agree; (3) limits the parties' participation in the

review session to the right of counsel to interrupt and request a brief conference with Dr. Hites and the other parties; (4) permits Dr. Hites to provide supplemental information, if all parties agree on that information, after the review session in response to questions from the Court; (5) permits the State Plaintiffs collectively and the United States each to have a set of two representatives at the review session; and (6) provides that the session will be recorded or transcribed.

Respectfully submitted.

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October 25, 2000

CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of October, 2000, I served a copy of the foregoing PLAINTIFFS' JOINT RESPONSE TO THE COURT'S REQUEST FOR THE PARTIES' VIEWS REGARDING THE PROPOSED REVIEW SESSION on the following:

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