

She survived this brain injury and was asked later, "Why did you, while you were in this ambulance suffering from a serious injury, ask to be taken to the hospital that was further away?" She said, "Because I had read a lot about the hospital that was closest, and it was all about profit and loss, all about the bottom line. I didn't want to be wheeled into an emergency room in that hospital and have someone look at me in terms of dollars and cents, in terms of profit and loss. That is not the way I wanted to be treated as a patient."

Our Patients' Bill of Rights says that every patient has a right to know all the medical options available for treatment of their disease, not just the cheapest option. Our Patients' Bill of Rights says that people have a right to go to an emergency room when they have a medical emergency. You think that is something that is understood across this country? It is not. There are plenty of instances when people are not getting coverage for emergency room visits.

Our Patients' Bill of Rights says that when someone is in need of a specialist to treat their disease, he or she has a right to see that specialist. You think that is routine in managed care organizations today? I am sorry to say it is not.

And our Patients' Bill of Rights—unlike the bill that was unveiled just yesterday, I believe, in the other body—says patients have a right to sue their health plan if its decision harms them. We take away the special exemption that is given these organizations so that when a health plan makes medical judgments that can deny someone like Phyllis the cancer treatment she needs the folks who made that decision are made to take responsibility for it. That is why President Clinton and a good many in Congress, Republicans and Democrats, say it is time to do something about this issue.

I suppose that one can make the case, "Well, there's only so much money in the system." Doctors make the case that they want to practice medicine in the doctor's office, in the hospital room.

I have met with a good many doctors in my State to talk to them about the health care system. Increasingly, they tell us that managed care organizations are taking the decisions out of the doctors' offices and out of the hospital rooms, and making them instead in some insurance office hundreds of miles away by someone who knows nothing about the patient and nothing about the patient's needs.

Doctors are angry about that, and justifiably angry in my judgment. It is time—long past the time—to pass a piece of legislation that says to these organizations, there are certain basic rights that ought to be available to every American when they are ill, when they are in need of help from the health care system.

Among those rights, as I just mentioned, is the right to understand, from

your health care provider, all of the options available to you to help treat you, not just the cheapest option available that the managed care organization is willing to provide. Those are the kinds of things that we will address and discuss and hopefully deal with when we bring a Patients' Bill of Rights to the floor.

Again, I am pleased to say this is not one of those issues that is a partisan issue. There are Republicans and Democrats who feel strongly and have spoken aggressively on the floor of the Senate and the House about this issue.

The power to schedule here in the Congress is a very important and very significant power. We hope that those who have the power to schedule will put on the agenda of the U.S. Senate the Patients' Bill of Rights. No, not some watered down, lukewarm version like was introduced yesterday that is designed only to allow Congress to say it dealt with this issue. I am talking about a real Patients' Bill of Rights, one that addresses and solves the health care problems that Americans are forced to deal with every day and that, regrettably, Jerry Cannon and his poor wife Phyllis discovered a few years ago in a very tragic way.

We can solve these problems, and we should. We owe it to Phyllis and Jerry and the other families around this country who confront this every day in the doctors' offices and in the hospital rooms.

Mr. President, I yield the floor.

The PRESIDING OFFICER. Under the previous order, the Senator from Utah, Mr. HATCH, is recognized to speak for up to 10 minutes.

JUDICIARY COMMITTEE'S MICROSOFT INQUIRY

Mr. HATCH. Mr. President, I rise this morning to speak for just a few moments on the Senate Judiciary Committee's progress with respect to our Microsoft inquiry and, more specifically, to share my perspectives on how Microsoft has conducted itself before the committee; to discuss some important developments from this past week; and to discuss the committee's upcoming plans with respect to the Microsoft issue.

This week has been a significant one. Just yesterday, Windows 98 was rolled out to consumers. I might note that, contrary to Microsoft's emphatic protests last month that a federal lawsuit would have catastrophic consequences for the PC industry, the Justice Department did file suit, and, lo and behold, the sky has not fallen on either Microsoft or the computer industry. Meanwhile, the Department of Justice encountered a set back in its original consent decree case. And, something which got less attention in the midst of these other developments, the Software Publisher's Association, the 1,200 member software industry association of which Microsoft is a member, released a report describing how, if allowed to

proceed with its tried and true market practices, Microsoft will extend its current desktop monopoly to control the market for network servers—a technology which provides the foundation for the Internet and corporate intranets. So this is important. Microsoft is attempting to extend its current monopoly of 90 percent of the underlying operating system to control all the market for network services, both the Internet and corporate intranets.

So, for those who have looked seriously at the Microsoft issue, I believe it is clear that the issue is about much more than just the browser. In fact, I have never thought that the browser issue was the most important issue at all, although it is important if you look at all of the ramifications of the browser problems.

It is about whether one company will be able to exploit its current monopoly in order to control access to, and commerce on, the Internet; whether one company will control the increasingly networked world in which we are coming to conduct our businesses and in which we are coming to lead our lives.

Indeed, the reach of Microsoft's monopoly power is on the verge of extending well beyond markets which we have traditionally thought of as software or technology markets, and the effects of this expansion will be felt not just by the software companies who have traditionally competed with Microsoft, but by a broad swath of U.S. consumers. As The New York Times yesterday observed,

Right now Microsoft is expanding into myriad Internet businesses, including news, entertainment information, banking, financial transactions, travel bookings and other services. Since consumers have no choice but to buy the Windows operating system when they buy personal computers, Microsoft is in a position to give such a big advantage to its own software that any other software maker would not be able to compete.

I agree with the Times's conclusion. They went on to say: "It is not healthy for the courts to grant Microsoft a permanent chokehold over the entire expanding world of the Internet." I ask unanimous consent that this New York Times editorial be printed in the RECORD.

There being no objection, the editorial was ordered to be printed in the RECORD, as follows:

[From the New York Times, June 25, 1998]

A MISTAKEN MICROSOFT RULING

One month after the Justice Department filed its sweeping antitrust suit against Microsoft, a Federal appeals court has issued a deeply flawed ruling that may weaken the Government's case. The three-judge panel seemed to adopt Microsoft's arrogant claim that it has the right to incorporate its browser, or any other software, into its Windows operating system as long as doing so offers certain advantages to consumers. But if the thinking behind this decision prevails, it could permit Microsoft to use its monopoly power to crush competitors throughout the Internet. The Justice Department thus needs to mount a vigorous counterattack invoking the full force of antitrust laws.

The Justice Department can argue that the appeals court ruling need not determine

the outcome of its larger antitrust case against Microsoft. That is because it was based on a narrow case brought by the Justice Department last year, when it charged that Microsoft violated a 1995 consent decree affecting the marketing of Windows 95. In that decree, Microsoft agreed not to condition its sale of Windows to computer makers on the sale of other software, but could improve Windows by integrating other functions into it.

In December a Federal district judge ordered Microsoft to split off its browser, the software used to navigate the World Wide Web, from Windows 95. Now the appeals court has said the browser can be included, because with it Windows became a new and improved integrated product.

The problem with the appeals court's reasoning is that virtually any new form of software can be integrated into the basic Windows system, arguably improving it. Right now, Microsoft is expanding into myriad Internet businesses, including news, entertainment information, banking, financial transactions, travel bookings and other services. Since consumers have no choice but to buy the Windows operating system when they buy personal computers, Microsoft is in a position to give such a big advantage to its own software that any other software maker would not be able to compete.

Because the court of appeals ruling was based on the meaning of the 1995 consent decree, the Justice Department has a chance to reverse its thinking in its larger case against Microsoft, which is to come to trial in September. In that case, the judge will be asked to look beyond the consent decree to the broad principles of antitrust law, and to look as well at Microsoft's predatory practices. The department has assembled impressive evidence that Microsoft deliberately used its monopoly in Windows to crush its rival Netscape, which was selling a browser that many consumers preferred to the one made by Microsoft.

The appeals court's decision referred to the general "undesirability of having courts oversee product design." Judge Patricia Wald, in her dissent, correctly warned that the decision "would seem to permit" Microsoft to incorporate "any now-separate software product into its operating system by identifying some minimal synergy" as a result. It is not healthy for the courts to grant Microsoft a permanent chokehold over the entire expanding world of the Internet.

Mr. HATCH. I believe this is one of the more important policy issues of our day, one which will have far reaching ramifications for years to come, and that it would be remiss for lawmakers and law enforcers not to be paying close attention to these issues. So, when we return from the July recess, I plan to hold further hearings on competition in the digital age. In particular, I plan for the committee to examine market practices and developments in the so-called "enterprise" or back office software market, and more generally to examine practices and developments affecting access to, and transactions on the Internet. Specific hearing dates and witness lists will be released when finalized.

While I will reserve comments regarding Microsoft's tactics in these markets until after we learn more about this issue next month, I do have a few comments regarding Microsoft's tactics in Washington over the last several months. In a nutshell, I would

offer my view that Microsoft has, regrettably, seen fit to deploy a massive pr campaign grounded in spin control and misdirection, as opposed to engaging the American public, on the basis of the facts and the merits surrounding all of these issues.

For starters, I find it rather surprising that any one company would, rather than seeking to prevail on the merits, instead have the hubris to try and use the appropriations process to "go on the offensive" and seek to restrain a federal law enforcement agency that has an obligation to enforce the laws, as was recently reported. I trust that my colleagues in this Chamber would have little difficulty in seeing this as anything but an effort to interfere with an ongoing law enforcement action. I can certainly appreciate my colleagues wanting to go to bat for their constituent, but I would find it surprising and disturbing were they or any other Senators swayed to permit this body to seriously consider such an effort to interfere with the appropriations system hope and cut out funds for the Justice Department division on antitrust. I hope that they don't continue in those efforts if those reports are true.

More fundamentally, though, I am troubled that Microsoft has seen fit to engage in a game of hide the ball, as opposed to putting their best case forward on the facts and on the merits. This issue has nothing to do with the government trying to design software. It is about trying to preserve competition and innovation—the hallmark of a free market—in an area that is absolutely critical to the future of our economy and I guess you have to pay the world. It is critical to our economy, as well. It is about getting to the bottom of the true facts here so as to understand how best to accomplish this fundamental objective. Frankly, if the facts truly aren't so bad, I would expect Microsoft to be happy to explain them.

One of the issues I have been concerned with since last fall, for example, happens to be the restrictive contracts Microsoft has imposed on various Internet firms seeking placement on the ubiquitous Windows desktop. Rather than admit that they have indeed imposed such terms, and explain to us why we should not find them objectionable, Microsoft has consistently sought to avoid the existence and implications of these contract terms. When pressed on the issue, Microsoft announced on the eve of our March hearing that it would no longer enforce these restrictive covenants or these restrictive contract provisions, instead of explaining why these provisions were legal. But, when the Justice Department filed its suit nearly three months later, we learn not only that these restrictive and exclusionary provisions existed, but that Microsoft in fact continues to enforce them with respect to the biggest Internet firms such as AOL and Compuserve, notwithstanding

Microsoft's prior representations to the Committee that these very provisions had been removed from its contracts "on a worldwide basis."

These are just a few examples where Microsoft has been less than one hundred percent candid and forthright. There are others. Committee staff has prepared a brief report outlining some of the areas where I believe Microsoft could and should have been more forthright with the Committee.

As the Committee continues its inquiry, I plan to give Microsoft a fair opportunity to be heard on these issues. But I think they should be heard on the record, rather than through carefully orchestrated, multi-million dollar pr campaigns that are more concerned with blurring the true facts than explaining them. So I hope that, when given the opportunity to be heard on the record, Microsoft chooses to be somewhat more candid with the American people than it has been so far.

I ask unanimous consent that a report prepared by the majority staff of the Senate Judiciary Committee, dated June 26, 1998, be printed in the RECORD.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

[A Report Prepared by Majority Staff, Senate Judiciary Committee, June 26, 1998]

MICROSOFT STATEMENTS TO THE UNITED STATES SENATE JUDICIARY COMMITTEE

INTRODUCTION

Throughout the course of the Senate Judiciary Committee's ongoing inquiry into competition in the software industry, Microsoft has continually sought to steer the Committee away from important but potentially damaging areas of inquiry. At times, Microsoft has relied on factually misleading or inaccurate statements to accomplish this objective. A sampling of such statements, and a brief assessment of their accuracy, are provided in the following report.

I. EXCLUSIONARY LICENSES WITH INTERNET SERVICE PROVIDERS

At the Committee's November 4, 1997 hearing, Senator Hatch raised concerns about the exclusive nature of Microsoft's licenses with Internet Service Providers (ISPs) that appeared to have the effect of limiting ISP's freedom to promote and distribute competing browsers. Senator Hatch specifically cited a number of provisions in Microsoft's license with Earthlink.

In response, Microsoft Senior Vice President William Neukom wrote Senator Hatch, stating that: "The implication at the hearing that Microsoft's agreement with Earthlink was somehow directed at locking out competing software is plainly refuted by the facts.

"... the ISP is free at all times to distribute and promote any browser software to any customers not referred by Microsoft."¹

¹Footnotes at end of report.

In addition, Microsoft Chairman Bill Gates testified at the Committee's March 3 hearing that Microsoft's ISP agreements "are not exclusive."² and reiterated Mr. Neukom's suggestion that those restrictions Microsoft did impose on ISPs only applied to customers referred to the ISP by Microsoft.³

When pressed by Committee staff to square these assertions with the plain language of the Earthlink license, Microsoft officials stated that staff was overlooking the fact that the Committee's version of the contract

contained redactions. The redactions referred to, however, turned out to be largely irrelevant and Microsoft's assertions cannot be squared with the unredacted language of the contracts.

First, Microsoft's restriction on an ISP's freedom to promote competing browsers plainly is not limited, as Messrs. Neukom and Gates suggested, to customers referred to the ISP by Microsoft. Microsoft's contracts include blanket prohibitions, not limited to customers referred by Microsoft, stating that the ISP "shall not advertise or otherwise promote any non-MS browser more than 10 to 20% of total impressions," and that the ISP "shall not display any logo for, or maintain a link to, a non-MS web browser on [ISP's] home page for the ISP Service, on the Start Page, or on any [ISP] home page for any other Internet access service offered by [the ISP]." ⁴ (Emphasis added). Messrs. Gates and Neukom's assertion that "the ISP is free at all times to . . . promote any browser software to any customers not referred by Microsoft" is simply false.

Second, and more importantly, Microsoft required its ISP licensees, in order to avoid being removed from the Windows ISP referral, to ensure that a high percentage (between 75% and 85%) of total browser shipments were Internet Explorer. ⁵ Independent of other restrictions in Microsoft's ISP contracts, an ISP which is obliged to guarantee that 85% of the browsers it distributes are Microsoft browsers clearly is not, as Mr. Neukom stated, "free at all times to distribute . . . any browser software to any customers not referred by Microsoft."

In sum, it is inconceivable how licensing provisions that prevents ISPs from promoting competing browsers, and actually require that ISPs ensure that 75-85% of its browser shipments are Microsoft's, are not "exclusive" and directed precisely at "locking out competing software." Indeed, this conclusion is only buttressed by the fact that, as a top strategic priority aimed at "Winning the Internet platform battle," Microsoft executives directed its sales force to sign "[e]xclusive licensing of Internet Explorer to top 5 [Internet] Access providers." ⁶

II. WITHDRAWAL OF EXCLUSIVE ISP LICENSING PROVISIONS

When the Committee persisted in questioning how these ISP contract provisions were anything other than exclusionary and designed to "lock out competing software," Microsoft, instead of providing any plausible, substantive response, stated that it had agreed to remove these provisions from its contracts. On the eve of the Committee's March 3 hearing, Microsoft provided the Committee with a letter stating that the contract provisions at issue had been deleted from its ISP agreements "on a worldwide basis." ⁷ When questioned on the subject by Senator Hatch at the March 3 hearing, Mr. Gates states that "we agreed to waive" the ISP contract provisions that had raised concerns. ⁸ The clear implication of Microsoft's letter to the Committee, and Mr. Gates's testimony, was that Microsoft would no longer prevent firms that provide Internet access from promoting or distributing alternative browsers as a condition of gaining placement on the Windows desktop.

Notwithstanding Mr. Gates's testimony, and Microsoft's assertion to the Committee that it had removed these restrictive contract terms "on a worldwide basis," Microsoft had apparently continued to enforce the most restrictive of its contract terms with the largest Internet access firms, including AOL, CompuServe and Prodigy. ⁹ In fact, the firms still restricted from distributing and/or promoting non-Microsoft browsers represent over 53% of North American Internet

users. ¹⁰ Given the fact that more than half of U.S. consumers accessing the Internet are still subject to Microsoft's restrictive and exclusionary contract terms, Microsoft's failure to, at a minimum, qualify or clarify its officially asserted waiver of these provisions can be considered nothing other than a sleight of hand.

III. ABILITY TO SWITCH BROWSERS

In his testimony before the Judiciary Committee, Mr. Gates sought to limit the relevance of any restrictions it might impose on ISPs by suggesting that, regardless of what browser was bundled by an ISP, the ISP's customers "could always go out and switch their browser. There is no product that is easier to switch in the world today than a browser. It takes about five seconds to go up and click and go get the Netscape browser or the Microsoft browser or any other browser that is out there on the Internet." ¹¹

In reality, it is simply not possible to switch browsers in five seconds. To execute the procedure referred to by Mr. Gates, a user would have to launch Internet Explorer, find that Netscape homepage, find an option for downloading, Netscape Navigator, and execute the download. Using a typical 28.8 K modem, it took the Committee systems administrator over two hours merely to complete the download process. The reality is that all but the most sophisticated Internet users are likely to forego the time and effort necessary to download a browser off the Internet when they can instead use the browser which comes bundled with their Internet service of PC. Thus, Mr. Gates's attempt to minimize the exclusionary impact of its ISP contracts is misleading at best.

IV EXCLUSIVE LICENSING PROVISIONS WITH CONTENT PROVIDERS

Microsoft has also imposed restrictions on the ability of firms providing Internet content ("content providers" or "ICPs") to promote, distribute, or render payment of non-Microsoft browsers. Here again, Mr. Gates has been less than candid about these restrictions. At the Judiciary Committee's March 3 hearing, for example, Mr. Gates testified: "At far as Internet content providers go, let me be very clear about that. There is nothing that restricts anybody who has content relationships with use from developing sites that exploit any browser out there in the marketplace. Those people are free to do as they choose in terms of developing sites, and they have lot of ways they can promote the other sites that they do." ¹²

This statement, however, glossed over the very significant fact that, while Microsoft might not have been able to explicitly prohibit a content provider from developing content that can be retrieved with using nonMicrosoft browsers, it did manage to split its leverage over content providers, to get them to agree, as a condition for obtaining placement on the Windows desktop, to various restrictions designated at "locking out" competing browser platforms. For example, the Justice Department learned that, contrary to Mr. Gates's testimony, Microsoft's contracts with the largest and most popular ICPs in fact do require those ICPs to promote their Microsoft channel exclusively, and do restrict the ICPs' abilities to deal with "Other Browsers." As the Justice Department's brief explains:

ICPs are not allowed to compensate in any manner a producer of an "Other Browser"—including by distributing its browser—for the distribution, marketing, or promotion of the ICP's content, effectively precluding payment for a channel on Netscape's competing Netcaster product;

Even if an "Other Browser" (namely Netscape) distributes—without compensa-

tion—an ICP's content through Netcaster, the ICP is still prohibited by its Microsoft contract from promoting or advertising the existence of its Netcaster channel and from licensing its logos to Netscape in order for Netscape to promote and highlight the existence of that content for Netcaster;

ICPs are not allowed to promote any "Other Browser" products;

Microsoft restricts the distribution of "Other Browsers" by requiring that the ICP "distribute Internet Explorer and no Other Browser as an integral part" of an ICP Channel Client for the Win32, Win16 or Macintosh platforms; and

ICPs must create channel content exclusively viewable with Internet Explorer, and optimize many of their websites to take advantage of Internet Explorer—specific extensions to web standards (such as HTML) and Windows-specific technology (such as Active X). ¹³

Thus, Mr. Gates's testimony that Microsoft does not restrict content providers' ability to develop for, or promote, competing browsers, is flatly contradicted by the evidence unearthed by the Justice Department. Moreover, when pressed on this issue at the Committee's March 3 hearing, Mr. Gates went to great lengths to avoid conceding that Microsoft imposed such restrictions, even when posed with direct questions and asked to give a "yes-no" answer. For example, when Senator Hatch repeatedly questioned whether Microsoft prevented any of its content partners from advertising or promoting Netscape, Mr. Gates persisted in giving non-responsive answers and avoiding the simple "yes" or "no" answer that was requested. Only after Senator Hatch, visibly frustrated, repeated the question for a fifth time, did Mr. Gates finally concede albeit in a grossly incomplete fashion, that Microsoft did in fact impose restrictions on Internet Content Providers. The colloquy was as follows:

Q: Mr. Gates, you have been somewhat hard to nail down on a very specific question, and I would appreciate just a yes or no, if you can. Do you put any limitation on content providers that limit them . . . for advertising or promoting Netscape? Yes or no, if you can.

A: Every Internet content provider that has a business relationship with Microsoft is free to develop content that uses competitors' platforms and standards.

Q: But my question is do you put any limitations on content providers that limit them . . . for doing any advertising or promoting of Netscape?

A: Well, understand, there are more people in the Netscape channel guide than there are on the Microsoft channel guide.

Q: How about Microsoft: Do they put limitations or restrictions on people from advertising and promoting Netscape?

A: I am not aware of any limitation that prevents them from doing content that promotes Netscape.

Q: Do you use your exclusive arrangement with the companies—do you use that as leverage to stop them from advertising or promoting Netscape?

A: I don't—we don't— . . .

Q: Does Microsoft then limit—place any limit on any content providers that limits them . . . for advertising or promoting Netscape or any other competitor?

A: I said earlier that on the pages that you link to through the channel guide—that on those pages you don't promote the competitive product, but that is a unique URL. You are free to promote their content in quite a variety of ways, but not off the specific page that we link to. ¹⁴

Mr. Gates's steadfast refusal to answer Senator Hatch's question prevented the

Members of the Committee from discovering what would be revealed in the Justice Department suit nearly three months later—a broad range of exclusionary restrictions that Microsoft imposes on content providers. Indeed, contrary to Mr. Gates's testimony, it appears that Microsoft does, in fact, restrict content providers from promoting content developed for competing browsers, and from promoting or distributing other browsers. These practices all are, to use Mr. Neukom's own words, clearly designed at "locking out competing [browser] software."

V. STRATEGIC MOTIVATION BEHIND "INTEGRATION" OF WINDOWS AND INTERNET EXPLORER

An issue central to understanding the "browser wars" and the nature of competition in the software industry generally is whether Microsoft's decision to link its browser to Windows was a response to consumer demand and preferences, or an effort to lock competing browsers out of the market. A December 20, 1996 email by Microsoft Senior Vice President Jim Allchin appears to shed light on this question. It reads as follows: "Ensuring that we leverage Windows. I don't understand how IE is going to win. The current path is simply to copy everything that Netscape does packaging and product wise . . . My conclusion is that we must leverage Windows more, Treating IE as just an add-on to Windows . . . [is] losing our biggest advantage—Windows market share . . . We should first think about an integrated solution. That is our strength?"¹⁵

In follow-up questions to the Committee's March 3 hearing, Senator Hatch inquired whether Mr. Allchin was "urging that Internet Explorer be integrated into Windows as a strategic marketing measure intended to compete with Netscape Navigator by ensuring that all Windows users would automatically receive Internet Explorer as well." In his written response, Mr. Gates claimed that this interpretation was inaccurate, stating that "Mr. Allchin's e-mail had nothing to do with the distribution of Internet Explorer. . . ."¹⁶

Mr. Gates' assertion is puzzling at best. Mr. Allchin's questioning "how IE is going to win" and criticism of Microsoft's current plan "simply to copy everything that Netscape does packaging and product wise" certainly appears to be concerned with nothing other than "the distribution of Internet Explorer." Indeed, Mr. Allchin's view that Microsoft should tie Internet Explorer to Windows in order to gain an advantage over Netscape is abundantly clear in an E-mail he wrote only two weeks after the above-quoted E-mail. In this second E-mail, Allchin wrote: "You see browser share as job 1 . . . I do not feel we are going to win on our current path. *We are not leveraging Windows from a marketing perspective. . . . We do not use our strength—which is that we have an installed base of Windows and we have a strong OEM shipment channel for Windows.* Pitting browser against browser is hard since Netscape has 80% marketshare and we have 20% . . . I am convinced we have to use Windows—this is the one thing they don't have. . . . (emphasis added)"¹⁷

Indeed, Allchin's view was echoed by other Microsoft employees.

Christian Wildfeuer, for example wrote as follows: "It seems clear that it will be very hard to increase browser market share on the merits of IE 4 alone. It will be more important to leverage the OS asset to make people use IE instead of Navigator."¹⁸

It is, in short, difficult to accept Mr. Gates' summary assertion that "Mr. Allchin's e-mail had nothing to do with the distribution of Internet Explorer."

VI. THE WINDOWS MONOPOLY

Notwithstanding the fact that Microsoft has a 90% plus market share in the market

for personal computer operating systems, Mr. Gates denies that Microsoft enjoys a monopoly in this market. In an effort to support his position, Mr. Gates has repeatedly made reference to the fact that prices in the computer industry have been falling. For example, in his oral testimony before the Judiciary Committee, Mr. Gates stated that: "Another sign of a healthy, competitive industry is lower prices. The statistics show that the cost of computing has decreased ten-millionfold since 1971."

(Mr. Gates repeated this statistic in a recent Economist piece, where he also stated that the price of Windows has remained "relatively stable.")²⁰ And, in his written testimony, Mr. Gates proudly declared that "Prices for personal computers continue to fall, even as PC's become more powerful and offer greater features than ever before . . . Microsoft has been an active participant in providing the incredible price/performance gains that distinguished the computer industry."²¹

What Mr. Gates fails to mention, however, is that the price of Windows has steadily increased since its introduction to the marketplace. According to one news report, the price Microsoft charges OEMs for a PC operating system has risen from \$12-\$15 per copy of DOS, to \$35 for Windows 3.x, to approximately \$60-\$70 for Windows 95.²² Four OEMs have reported that Microsoft will further raise the price of Windows 98²³ and it is expected that Windows NT 5.0 (which eventually will replace Windows) will cost OEMs approximately \$130 per copy.²⁴ Thus, while the cost of computing has "decreased ten-millionfold," the price of a Microsoft operating system has increased roughly tenfold—from \$12 to \$130. This market departure from an overwhelming industry trend of decreasing prices is a classic sign of monopoly power.

While it is, of course, true that new features and functionality have been added to Microsoft's operating systems over this period, the same clearly can be said of other computing components and computing generally. Whereas a single transistor cost \$5-\$6 in 1959, today \$6 will buy a 16 megabit DRAM chip with sixteen million transistors.²⁵ And, while Intel's first Pentium chip, with 3.1 million transistors and a speed of 60 megahertz, sold for \$878 in 1993, the Pentium II, with 7.5 million transistors and a speed of 233 megahertz, now sells for \$268.²⁶

Thus, Mr. Gates's use of the fact that the price of computing has fallen dramatically to imply that Microsoft operating systems are priced competitively is quite misleading. In fact, Microsoft's monopoly power in the operating system market has enabled it not just to raise operating system prices while the price of other computing components has dropped precipitously, but in fact has allowed Microsoft to reap huge monopoly profits. According to the Wall Street Journal, for example, Microsoft earns a staggering 92% gross and 50% operating margin in its Windows business.²⁷

VII. COMPETITION AND CHOICE IN THE PC OPERATING SYSTEM MARKET

In another effort to rebut the seemingly self-evident proposition that Microsoft's 90%-plus market share for PC operating systems amounts to a monopoly, Mr. Gates also stated to the Committee that, "if Microsoft attempted to raise its prices beyond competitive levels, powerful operating system competitors like IBM, Sun Microsystems, Novell, Apple or a new entrant to the business could satisfy consumer demand instantly."²⁸

This sweeping statement is plainly at odds with the economic reality, attested to by OEMs, that, given Microsoft's monopoly and

the fact that such a vast majority of desktop applications are written for Windows,²⁹ computer manufacturers clearly do not have the choice of turning to an operating system other than Windows. Indeed, numerous representatives from computer manufacturers have testified that they simply have no choice but to ship computers with Windows, and that there is no other operating system which a computer manufacturer could or would use as a substitute to Windows.

Packard Bell executive Mal Ransom testified that there were no "commercially feasible alternative operating systems" to Windows 98.

Micron executive Eric Browning asserts: "I am not aware of any other non-Microsoft operating system product to which Micron could or would turn as a substitute for Windows 95 at this time."

Hewlett Packard executive John Romano testified that HP had "absolutely no choice" except to install Windows on its PCs.

Gateway executive James Von Holle testified that Gateway had to install Windows because "We don't have a choice."

Mr. Von Holle has testified that if there were competition to Windows, he believed such competition "would drive prices lower" and promote innovations.³⁰

FOOTNOTES

¹ November 12, 1997 Letter to Chairman Hatch from William H. Neukom, Microsoft Senior Vice President, Law and Corporate Affairs. (Appendix A)

² Senate Judiciary Committee Transcript of Proceedings, "Market Power and Structural Change in the Software Industry," March 3, 1998, p. 78. (Appendix B)

³ Senate Judiciary Committee Transcript of Proceedings, "Market Power and Structural Change in the Software Industry," March 3, 1998, p. 62. (Appendix C)

⁴ Provision 7 of Earthlink License Agreement, see February 18, 1998 Letter to Manus Cooney, Chief Counsel and Staff Director, Senate Judiciary Committee, from Marc Berejka, Federal Regulatory Affairs Manager, Corporate Attorney, p. 3. (Appendix D)

⁵ *U.S. v. Microsoft Corporation*, Memorandum of the United States In Support of Motion for Preliminary Injunction, May 18, 1998, at 30. (Appendix E)

⁶ Brad Chase Memo, "Winning the Internet Platform Battle," April 4, 1996, p. 1. (Appendix F)

⁷ February 28, 1998 Letter to Manus Cooney, Chief Counsel and Staff Director, Senate Committee on the Judiciary, from Jack Krumholtz, Director Federal Government Affairs, Senior Corporate Attorney. (Appendix G)

⁸ Senate Judiciary Transcript of Proceedings, p. 62. (Appendix C)

⁹ *U.S. v. Microsoft Corporation*, Memorandum of the United States In Support of Motion for Preliminary Injunction, May 18, 1998, at 31 and note 25. (Appendix H)

¹⁰ *Id.*, note 25. (Appendix H)

¹¹ Senate Judiciary Committee Transcript of Proceedings, p. 62 (Appendix C)

¹² Senate Judiciary Transcript of Proceedings, p. 62-63. (Appendix C)

¹³ *U.S. v. Microsoft Corporation*, Memorandum of the United States In Support of Motion for Preliminary Injunction, May 18, 1998, at 35-36. (Appendix I)

¹⁴ Senate Judiciary Transcript of Proceedings, p. 176-179. (Appendix J)

¹⁵ Response of Bill Gates to Supplemental Questions from Senator Hatch, p. 15. (Appendix K)

¹⁶ Response of Bill Gates to Supplemental Questions from Senator Hatch, p. 16. (Appendix K)

¹⁷ *U.S. v. Microsoft Corporation*, Complaint, May 18, 1998, at 8. (Appendix L)

¹⁸ *U.S. v. Microsoft Corporation*, Memorandum, at 25. (Appendix M)

¹⁹ Senate Judiciary Committee Transcript of Proceedings, p. 19. (Appendix C)

²⁰ The Economist, <http://www.economist.com/editorial/freeforall/current/sf10077.html>. (Appendix N)

²¹ Statement of Bill Gates before the Senate Judiciary Committee, p. 2-3. (Appendix O)

²² ZDNet, "OS Pricing: The Crux of the Matter," February 2, 1998. (Appendix P)

²³ Business Week, "Just How Much Does Windows 98 Cost?," June 15, 1998, p. 50. (Appendix Q)

²⁴ ZDNet, February 2, 1998. (Appendix P)

²⁵ Wall Street Journal, "Microsoft's Windows Bucks the Pricing Trend," March 23, 1998. (Appendix R)

²⁵ Wall Street Journal, "Microsoft's Windows Bucks the Pricing Trend," March 23, 1998. (Appendix R)

²⁷ Ibid. (Appendix R)

²⁸ Response of Bill Gates to Supplemental Questions from Senator Hatch, p. 11. (Appendix S)

²⁹ *U.S. v. Microsoft Corporation*, Memorandum, at 17, and note 10. (Appendix T)

³⁰ *U.S. v. Microsoft Corporation*, Memorandum, at 2-3. (Appendix U)

Mr. HATCH. I suggest people who are interested in this issue not only listen to what I have to say here today but that they read this. I think they will find that this is a group that basically disassembles on many issues. Frankly, I don't think they need to disassemble. All they have to do is come in and tell their case forthright and in a fair and reasonable manner and do it on the merits. If you read this, I think you will realize this is a much more serious set of problems than some in the media make it, especially some of those who seem to think there should never be an enforcement of the antitrust laws.

You don't get people from the left to the right, or right to the left—from Bork to you-name-it on the left—saying that there are things that are wrong here, that there is an exploitation of the monopoly power of 90 percent of the operating system and the desktop operating systems throughout the world to crush competition and to do a number of other things that basically are violative of our laws, without their being some heat to some of the arguments that they are making.

I have to say, our committee hearings have shown that there are some things that are wrong here. It is a matter of getting people in the software industry to have the guts to come forward and tell their stories. For instance, the OEM, the original equipment manufacturers, are terrified because they depend totally on Microsoft's underlying operating system to run their machines. All Microsoft has to do is to delay the delivery of that underlying operating system or anything else they do to the OEMs by 1 week and they could be multimillions of dollars in the hole as others get an unfair advantage. We have had people come in and tell us, who are afraid to testify for fear they would lose their business, that they have been warned they better not cooperate with the committee or they better not tell the story.

This happens in a wide variety of things according to people who have come to us. Now I think they have to have the guts to get in front of the committee and tell their stories and let the chips fall where they may. If they are true, if what they have been alleging to us and to the Justice Department is true, then we ought to find out about it and Microsoft ought to have some answers for it.

I yield the floor.

The PRESIDING OFFICER. The Senator from Michigan.

NOMINATION OF VICTORIA ROBERTS

Mr. LEVIN. Mr. President, in a few moments we will be voting on two judges for the Federal court. The second of those judges is Victoria Roberts, a woman who I recommended for nomination to the President of the United States. She is exceedingly well qualified by temperament, by experience, to be a district court judge. She is only the second person in our history in Michigan who has been elected both president of the State bar of Michigan and the Wolverine Bar Association.

I just thank Senator HATCH, the members of the Judiciary Committee, Senator ABRAHAM, for their support of Victoria Roberts. I am delighted that her name has been recommended to the Senate and that we will be voting upon her confirmation in a few minutes.

I thank the Chair, and I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

Mr. THOMAS. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER (Mr. SESSIONS). Without objection, it is so ordered.

Mr. THOMAS. I ask that I may speak for 3 minutes as in morning business.

The PRESIDING OFFICER. Without objection, it is so ordered.

A BIENNIAL BUDGET

Mr. THOMAS. Mr. President, I would like to just mention again, as we enter into the real depth of appropriations, one of the things that we have talked about a great deal that I feel very strongly about, and I think we ought to think about as we do that, is a biennial budget.

Each year in this institution we spend about half or more of our time dealing with appropriations, which leaves us very little time to do the other things that are very necessary—particularly oversight. Almost all legislative bodies in this country have biennial budgets, which gives an opportunity, first of all, for the agencies to have two years with which to know what their spending will be. Secondly, it allows the institution to have time to oversee the spending that is authorized.

Rather than take more time to talk about it, I just raise the question again and urge the leadership to give some consideration to a biennial budget, where we would make a budget for two years and then have a chance for oversight, have a chance for the agencies to know what they are doing longer, and have a chance to do some of the other business that properly comes before this body.

CONCLUSION OF MORNING BUSINESS

The PRESIDING OFFICER. Morning business is closed.

EXECUTIVE SESSION

NOMINATION OF A. HOWARD MATZ, TO BE U.S. DISTRICT JUDGE FOR THE CENTRAL DISTRICT OF CALIFORNIA

The PRESIDING OFFICER. Under the previous order, the Senate will now go into executive session for the consideration of executive calendar No. 574, which the clerk will report.

The legislative clerk read the nomination of A. Howard Matz, to be U.S. District Judge for the Central District of California.

Mrs. BOXER. Mr. President, I am very pleased that the Senate is considering today the nomination of A. Howard Matz to be U.S. District Judge for the Central District of California.

With all the support Mr. Matz has from both Democrats and Republicans, I know the Senate will agree he is eminently qualified to sit on the U.S. District Court for the Central District in California.

I first recommended Mr. Matz for this seat on the federal bench on July 23, 1997, and said then that Howard Matz is an exceptional attorney and person. His experience, intelligence, and integrity make him extremely well-qualified for the Federal bench.

Howard Matz is currently a partner in private practice. He represents largely business clients in civil and white-collar crime matters. His clients have included IBM, Walt Disney Co., the cities of Anaheim and Riverside, Yale University and numerous individuals, partnerships, lawyers, and law firms. I would like to note here that I am not related to Joel Boxer, a partner in Howard's firm.

Mr. Matz received his undergraduate degree from Columbia University and his law degree from Harvard University. In addition to working in various law firms, early in his career he clerked for U.S. District Court Judge Morris Lasker. As an Assistant U.S. Attorney in the Criminal Division, in charge of the Los Angeles Fraud and Special Prosecutions team, he has always believed the punishment should fit the crime. Mr. Matz is highly regarded in the legal community, having written many articles on legal topics and having served as a speaker and panelist on legal matters numerous times. He has received many awards and other distinctions from representatives of the Securities and Exchange Commission, the Federal Bureau of Investigation, the Department of Health and Human Services, and the Internal Revenue Service for cases he handled as a prosecutor.

Complementing his exceptional legal career, Matz also engages regularly in pro bono work and is very active in his