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Section 9: Looking Ahead: Upcoming Issues

Institute of Bill of Rights Law at the William & Mary Law School

LOOKING AHEAD

In this Section

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THE MICROSOFT CASE: In August, Microsoft announced that it was appealing the ruling in its antitrust case to the United States Supreme Court.

Antitrust and Verify; Will Microsoft Admit It Has Lost?

The New Republic

July 23, 2001

Lawrence Lessig

Lawrence Lessig is professor of law at Stanford University. His forthcoming book, The Future of Ideas: The Fate of the Commons in a Connected World, will be published by Random House.

Late last month, the Court of Appeals for the D.C. Circuit unanimously found that Microsoft had violated America's antitrust laws. In an unsigned opinion, the court held unequivocally that Microsoft was a monopolist that used its power to protect itself against nascent competition.

Yet that's not the way Microsoft--and, in turn, the press--spun it. "Microsoft spared: appeals court overturns breakup order, assails trial judge," proclaimed The San Francisco Chronicle in a typical headline. "Gates wins a round in court," blared a follow-up piece in the Houston Chronicle. That spin isn't just wrong; it signals something dangerous. Much as he did after settling the government's first antitrust case with a consent decree in 1994, Bill Gates has been arguing that this latest ruling permits Microsoft to go on as if nothing had happened. That's not true. And now the Bush administration and the states need to deliver that message very clearly to Chairman Gates.

In April 2000, Judge Thomas Penfield Jackson found Microsoft guilty of multiple violations of antitrust law. After refusing to grant Microsoft a hearing on remedies, Jackson ordered the company split. The swiftness of the remedy surprised all concerned. Jackson seemed keen to let the appellate courts first decide whether the findings of liability were correct; after that question was resolved, he figured, the remedy would be easier to revisit--which is what will happen now.

The findings of liability were essentially in three parts. First, and most importantly, Jackson found that Microsoft had engaged in "defensive monopolization"--that it had used its monopoly power to protect itself against competitors that might threaten its dominance in the PC operating-system market. Second, Jackson found that Microsoft had engaged in illegal tying by bolting its Web browser, Internet Explorer, to its monopoly operating system, Windows. And, third, Jackson found that Microsoft had attempted to monopolize the browser market with Internet Explorer.

Microsoft challenged all three conclusions. If you count these as three separate

arguments, the Court of Appeals unanimously rejected two out of three. By my count of the actual number of decisions the court made in its 125-page opinion, Microsoft lost 36 of 49. But if you look at the substance of what the Court of Appeals decided, then Microsoft might as well have lost all 49. For on every important question of liability, the government prevailed.

Yes, the order to split the company was reversed--both because Microsoft did not get the hearings it deserved and because the rules of liability were changed by the Court of Appeals in the course of its opinion. And it is true that Microsoft prevailed on the third charge, the "attempted monopolization" of the browser market though it was always hard to view that charge as anything more than the government piling on. But on the rulings that matter most to the question of liability, the government won big.

First, on the claim of monopolization, the court found that Microsoft's licenses with computer manufacturers such as Compaq were anti-competitive. It found that the integration of Internet Explorer with Windows was anti-competitive. It found that Microsoft's agreements with Internet access providers and independent software vendors were anticompetitive. And while the court found that Microsoft's Java strategy--improving Java in ways that tilted it toward Windows--was not wholly anti-competitive, it clearly affirmed Jackson's finding that the core of Microsoft's behavior with respect to Java was illegal.

Likewise, Microsoft largely lost on the question of tying. While the court did reverse the finding of liability, it did not adopt Microsoft's liability standard--i.e., permitting a tie whenever the bundle provided a "plausible benefit." Microsoft had argued that this was the appellate court's own test from its consent decree case in 1998. The court flatly rejected that argument. Instead, it sketched a modified test for determining whether there is a tie involving "platform software" (roughly, software upon which other software runs). Rather than presume anti-competitive effects from a platform-software tie (as the Supreme Court's rule for ordinary products would), the Court of Appeals now requires that anti-competitive effects be shown. Given that the government has already shown similar effects in establishing the "defensive monopolization" claim, it is quite likely it would be able to show anti-competitive effects under the court's new test. But the appellate court wasn't entirely sure, so it sent the claim back to give the lower court another chance.

These two holdings reaffirm an important antitrust principle: A platform monopolist such as Microsoft may not use its power over the platform to stifle innovation that threatens it. This is true whether the monopolist exercises its power through contracts or through the design of its code. Together, the holdings make clear that competition must be on merit and not through bundling tricks.

But has Microsoft gotten the message? From the beginning of this case, the company's leaders have insisted on a single, simple argument: Their behavior did not violate the law. Was there "any limit" to what Microsoft could put into its operating system? Said Microsoft President Steve Ballmer last month, "$(A$)s a matter of law, no." As Ballmer insisted, Microsoft was "one hundred percent" innocent.

And there's reason to believe Microsoft's leadership still feels exactly the same way. For without even pausing to acknowledge

the essence of the court's opinion--without even a hint that, in fact, the company and its chairman have been proven wrong--Microsoft has launched a massive publicity campaign to convince the world it has won. Not just that the order to split the company has been reversed, but that, on the merits of liability, Microsoft's "freedom to innovate" has been affirmed. Immediately after the decision, Gates told the press: "There's nothing in today's ruling that changes our plan for our future products." When a swooning Lou Dobbs of CNN asked Gates if the finding of monopolization was "purely an academic finding," Gates replied, "Well, although that wasn't the central issue, it does touch on some licensing practices," and those, Gates allowed, would have to be reviewed.

We've heard this before. When the government first sued Microsoft in 1994 and then settled the suit with a consent decree, the ink wasn't dry before Gates essentially announced to the world that the decree wouldn't matter. Indeed, he used practically the same words: "None of the people who run those divisions are going to change what they do or think or forecast," he said then. "There's one guy in charge of licenses. He'll read the agreement."

In the fall, Microsoft will launch the first versions of its vision of the future--.Net, Hailstorm, and a new version of its operating system, Windows XP. The bundling of disparate software elements into these new products makes the bundling of Windows and Internet Explorer look like child's play. This week, Microsoft freed computer manufacturers to bundle a different browser with Windows XP. But this concession does not begin to address the questions about bundling raised by the court's opinion. Microsoft has bet the company on a strategy of tying together a vast range of products into a single Microsoft platform. From authentication to instant messaging, Windows-flavored code will do it all. No doubt some of this bundling is perfectly OK under the appellate court's test. And it is possible that the bunch together could be developed consistently with the law. But, given the vast range of functions being tied to the operating system, it is impossible to believe that a fair reading of the court's opinion would not raise questions about some--perhaps much--of it.

Microsoft's refusal, however, even to acknowledge the principle in the court's opinion--or to acknowledge that this principle is different from the "freedom" it has consistently espoused--forces the government's hand. Were Microsoft willing to talk honestly about the rule the court has set, then relatively simple remedies, perhaps even a fine, would be enough. But when the company insists that black is white--that its "freedom to innovate" has been unaffected by this loss--then it is hard for a government charged with enforcing the law to ask for anything less than the strongest remedy possible--including a breakup. If the company with the greatest power over the Internet's future won't even acknowledge the law, then the government must make sure it can't use its power illegally to direct that future anymore.

LOOKING AHEAD:

AFFIRMATIVE ACTION IN HIGHER EDUCATION: There are contradictory rulings involving the University of Michigan's undergraduate and law school admissions programs which have been appealed to the 6th U.S. Circuit Court of Appeals.

Focus on Affirmative Action in Mich.

The Associated Press

Tuesday, June 26, 2001

Alexandra R. Moses

Though the U.S. Supreme Court let stand a ruling that led Texas to abandon a raced-based admissions policy at its colleges and universities, it may not be the court's last word on the subject.

Two separate appeals winding their way through the courts involve University of Michigan policies that consider race when evaluating applicants to its undergraduate and law schools.

Some experts believe Michigan's debate is headed to the high court.

On Monday, the nation's highest court declined to hear Texas' appeal to a 1996 ruling that its law school affirmative action program discriminated against whites.

The Michigan cases offer "very well-written opinions going in different directions, which always helps," said Doug Kmiec, dean of the Catholic University of America law school.

In March, U.S. District Judge Bernard Friedman struck down the Michigan law school's affirmative action policy saying the admissions criteria were not clearly defined and relied too heavily on race. The university is continuing to use the policy pending appeals.

Friedman's ruling contradicted that of U.S. District Judge Patrick Duggan, who in December affirmed Michigan's undergraduate admissions standards, in place since 1999. Duggan ruled that diversity on a public college campus is a compelling state interest and a valid admissions criterion.

Both cases are being appealed to the 6th U.S. Circuit Court of Appeals in Cincinnati. Oral arguments are scheduled for October.

Kmiec said the Supreme Court needs a new case to move the issue of race-based admissions policies forward from its 1978 Bakke case, which allowed consideration of race in university admissions but outlawed racial quotas.

"The court has already staked out its general principal and that is race shouldn't be used for public decision-making without a compelling governmental interest," Kmiec said.

"The case that the court wants for the next round is not a case that just allows

those high-level thoughts ... but rather a case that allows those high-level thoughts ... and applies (them) to a concrete real-world situation."

But others argue it is hard to read too much into Monday's action because the Supreme Court agrees to hear few cases.

"Nobody should read anything into it except the fact that the Supreme Court was not prepared to address the issue at this time." said Robert Sedler, professor of constitutional law at Detroit's Wayne State University.

"There's just no margin in reading the tea leaves of the Supreme Court," added Liz Barry, University of Michigan deputy general counsel. "This doesn't say anything about how the Supreme Court will affect our case."

Michigan's law school relies on grades and exam scores but considers applicants who have low scores but "may help achieve that diversity which has the potential to enrich everyone's education."

Applicants to the undergraduate school are graded on a 150-point scale. Blacks, Hispanics and American Indians get 20 points for their race - equal to raising their grade-point average a full point on a 4-point scale.

Whatever case it chooses, the Supreme Court needs to address affirmative action in admissions policies, said Curt Levey, spokesman for the Center for Individual Rights, a conservative legal group which brought the lawsuits in the Michigan and Texas cases.

"It's an issue of national importance. The U.S courts of appeal are so divided, and there's a lot of confusion concerning the Bakke decision," Levey said. "They sort of owe it to the public."

LOOKING AHEAD:

AID TO PAROCHIAL SCHOOLS: The 4th U.S. Circuit Court of Appeals issued a ruling in July in favor of parochial schools receiving some public funding. Other circuits have ruled that this practice is unconstitutional. President Bush's administration has spoken out in favor of providing vouchers for "faith-based" education.

Courts Say Sectarian Schools May Receive Public Funding

The Washington Times

Monday, July 2, 2001

Larry Witham

New federal court rulings agree that a "pervasively sectarian" organization may receive public funds as a matter of government neutrality toward religion, a reversal of Supreme Court thinking from the 1970s.

The latest ruling came June 26, when the 4th U.S. Circuit Court of Appeals in Richmond said Columbia Union College, a Seventh-day Adventist school in Takoma Park, must be given access to Maryland state funds provided to other schools.

The court said that despite the college's close ties to a church, providing funds to it under the state's Father Sellinger Program does not establish religion in violation of the Constitution.

The First Amendment "requires government neutrality, not hostility, to religious belief," the appeals court ruling said.

The result in the 9-year-old case adds to a new trend in court thinking, advocates say. Now, the court is less concerned whether an organization is "pervasively sectarian," or very religious, and is more concerned that government not penalize such groups in comparison to other organizations.

Last year, in a 6-3 ruling that allowed Louisiana Catholic schools to receive state funding for secular materials such as computers, Supreme Court Justice Clarence Thomas said in the majority opinion that a history of prejudice was behind penalizing overtly religious organizations.

"It was an open secret that 'sectarian' was a code for 'Catholic,"' he wrote. "This doctrine, born of bigotry, should be buried now."

In the new ruling, the federal appeals court cited Justice Thomas' assertion in the so-called Mitchell case in Louisiana.

"The 4th Circuit has now interpreted that Mitchell, in fact, is saying the 'pervasively sectarian' doctrine is dead," said Curt Levey, legal director for the Center for Individual Rights, which defended Columbia Union. "It has been replaced by something the court has called 'neutrality plus."' That was a term other justices used in the Mitchell decision on the Louisiana

schools.

Mr. Levey said the new federal appeals court ruling is likely to play a major role in the courts if the so-called charitable choice intitiative expands and critics begin to file lawsuits against welfare ministries that take federal funds.

"Everyone is assuming that this ruling is what will apply to the welfare-providing groups," he said.

Under a 1996 charitable choice law, ministry groups may bid for welfare funds without stripping away their religious identity or governance. Opponents, however, say the law violates separation of church and state.

During Senate Judiciary Committee hearings this month, Justice Department lawyer Carl Esbeck said the doctrine of "neutrality" will make it legally "irrelevant" whether a ministry that produces effective welfare results with government funds is "pervasively sectarian" or not.

In the Supreme Court opinion last year, Justice Thomas traced the "pervasively sectarian" doctrine to the early 1900s, when a predominantly Protestant political system sought to restrict Catholic schools, which boomed under high immigration.

The term was used in state laws and courts and then was adopted in the 1970s by the Supreme Court.

The Columbia Union case has roots in the 1971 Sellinger Program, in which Maryland allowed education funding for aspects of its Catholic colleges and universities. The American Civil Liberties Union sued the state to stop the funding, but the Supreme Court's 1976 ruling in Roemer v. Maryland set guidelines for such funding to continue.

In 1992, Maryland's attorney general said Columbia Union was so religious that it had "more formal ties to the church and less institutional autonomy" than required to receive funds, even for secular subjects and materials.

After the ruling in favor of the Seventh-day Adventist college, its president, Randal Wisbey, lauded Maryland's financial aid to independent schools. "We look forward to putting this matter behind us and moving on," he said.

LOOKING AHEAD:

VIRGINIA'S MOMENT-OF-SILENCE: The 4th U.S. Circuit Court of Appeals issued a ruling in July that upheld the constitutionality of Virginia's moment-of-silence law as long as it does not encourage nor discourage religion.

Judges Embrace a Silent Tread on Freedoms

The Washington Post

Thursday, July 26, 2001

Marc Fisher

Even the judges who this week embraced Virginia's moment of silence law agree that for it to be constitutional, it must neither encourage nor discourage religion.

So how in the world did a 2 to 1 majority on the 4th U.S. Circuit Court of Appeals give thumbs up to a law that forces public school children to start each day with a minute in which the state suggests they "meditate, pray, or engage in any other silent activity"?

Well, simple, wrote Judge Paul V. Niemeyer in the majority opinion. The state legislator who proposed the silent minute, Sen. Warren E. Barry (R-Fairfax), said he did so "out of the frustrations that many of us have felt based on the violence in some of our schools." The intent wasn't to promote prayer, so the law's okay. Next case.

Ah, but listen to another statement the very same Sen. Barry made about his intent: "This country was based on belief in God, and maybe we need to look at that again." Hmmm. What was that about encouraging religion?

Calm yourselves, civil libertarians. It turns out that Barry made that latter comment to a reporter, not on the floor of the Senate. Therefore, the court is going to put its collective paws over its ears and hum loudly and look eagerly back to that other bit about curbing violence in the schools.

Courts too often do not deal in reality. It's so much easier to parse precedent, obey orders and find the words you need to support your position. The majority must have grown giddy when they found that Supreme Court Justice Sandra Day O'Connor once said, "It is difficult to discern a serious threat to religious liberty from a room of silent, thoughtful schoolchildren."

All the appeals court judges had to do now was conclude that every child in Virginia, from kindergarten to high school, is thoughtful and respectful, and that every teacher will rigorously enforce the neutrality of the moment of silence, and we're all off to the prayer room -- um, classroom.

"The silence is designed to be undirected and unthreatening," Niemeyer wrote. "It

is designed to exert no coercion except that of maintaining silence."

Such a law might be fair for educated, tolerant adults, but those who do not toil in the hushed confines of mahogany courtrooms know that not every classroom is perfectly respectful of different religious traditions or, God forbid, of those who want nothing more from school than rigorous learning and sharp, good-hearted teachers.

The children who went to court to fight the moment of silence know well that some of their peers are hungry to use that minute to promote the majority faith. There are already reports statewide of teachers encouraging children to pray aloud. If the behavior of the authority figure has no coercive effect on a first-grader, then pray tell, what does?

Niemeyer calls this a "speculative" fear and comforts himself that the moment of silence is splendidly neutral because "what transpires in the mind cannot be known by others."

But Judge Robert B. King, in a dissent that good high school teachers might want to have kids read during the moment of silence, accuses the state of "invading . . . the hearts and minds of Virginia schoolchildren in an effort to once more usher state- sponsored religion into public schools."

King sees the silence law for what it is: a "Trojan Horse, a hollow guise" for state-sponsored prayer. The "secular" purpose of the law is, King says, "patently insincere." Far from protecting free exercise of religion, Virginia's law -- which requires students to stay seated and silent -- prevents Catholics such as anessa Brown of Fairfax from kneeling or standing as she prays and stops Amy Cohen of McLean, who is Jewish, from praying through song.
The Supreme Court has said repeatedly that, as Justice John Paul Stevens put it, "nothing in the Constitution prohibits any public school student from voluntarily praying at any time before, during, or after the schoolday." But that's not enough for zealots who would stomp on those who pray a different way, or not at all.

Virginia's moment of shame is headed for the high court. Until then, the state's children must suffer the selfish whims of those who cannot comprehend our basic freedoms.