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Op-Ed

CRACKING THE MICROSOFT CASE

LARRY KRAMER AND LAWRENCE LESSIG

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Judge Thomas Penfield Jackson faces a dilemma. After finding that Microsoft has violated the antitrust laws, he must now decide upon a remedy. The government has asked for a breakup; Microsoft has asked for more time. If Jackson gives Microsoft more time, he delays the ultimate resolution of the case in the appellate courts; if he rushes the remedy, he risks imposing costs on Microsoft that might well do the industry harm. Prudence thus directs that he speed the remedy along, but prudence also directs that he take care to assure a proper remedy. As things are now, he can't be prudent in both ways.

The reason is a rule that requires appellate courts to review final judgments only. Jackson's finding of liability is not a final judgment. Until the remedy is complete, neither the Court of Appeals nor the Supreme Court can review Jackson's work.

This rule makes great sense in the vast majority of cases, but the Microsoft case is no ordinary case. Despite Jackson's best efforts, it has been pending for more than two years; it might well be two more years before the Supreme Court ultimately resolves it. This delay has caused uncertainty in the market and the industry generally. It is a burden the economy could do without.

And it is a burden that creates costly pressures on a court. Should a judge hurry the remedy stage so the appellate court can finally settle the crucial question of liability? Should he simply adopt the government's remedy to push the case along? Or perhaps, to avoid tricky questions of due process, should he adopt the defendant's proposed remedy and force the government to appeal? Or should he scrap both proposals and simply enter a large fine against the company (large enough to make it think twice in the future), leaving either or both sides to appeal that?

There is a way out of this dilemma, and it is surprising that the government has not proposed it. After Jackson's finding of liability, the government was free to ask him to enter an injunction against Microsoft. After a hearing, Jackson would be able to enter an injunction based on his findings of liability. That could be appealed immediately, either to the Court of Appeals or the Supreme Court.

In the meantime, Jackson could grant Microsoft's request for more time to consider the question of remedy. And by the time the appellate courts have done their work on liability, Jackson would be finished with the remedy. Multitasking, judicial style.

Jackson understands that his word is not final. It is that humility that drives him to push this case along. The government should give him the opportunity to speed the resolution of liability while permitting Microsoft a fuller consideration of a proper final remedy.

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