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1. *Judgment Calls Comment*

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Judgment Calls Comment

Daily Deal (New York, NY)

February 2, 2000 Wednesday

Section: JUDGEMENT ***CALLS***

Length: 356 words

Byline: by Lawrence ***Lessig***
Highlight: Harvard Law School professor Lawrence ***Lessig*** on the Sherman Act and software tying, excerpted from an amicus curiae brief filed with U.S. District Judge Thomas Penfield Jackson on Feb. 1

Body

Harvard Law School professor Lawrence ***Lessig*** on the Sherman Act and software tying:

C ourts considering claims that software products are tied have hesitated before doing so directly. . . . The Court of Appeals decision in United States vs. Microsoft . . . Microsoft II , if it can be read to define the law of tying for the Circuit, is just one, if prominent, manifestation of this uncertainty.

This hesitation comes from a reluctance by courts to investigate the intricacies of software design. Despite the fact that in other contexts, courts routinely review design decisions . . . the apparent feeling among a number of courts and commentators is that code is different: That the task of evaluating design decisions involved in technological products is uniquely beyond the ken of federal courts.

As a matter of judicial policy, I believe it is a mistake to fetishize code in this way. While I agree that an overly invasive anti trust policy can stifle innovation, I am not a skeptic of courts' ability to understand how software functions; nor do I believe that software technology is so benign that it is advisable for courts to ignore the competitive impact of code-based restraints. Nevertheless, my aim in this brief is to evaluate how the law of the D.C. Circuit applies to ties of software products, and ultimately, how it might apply to the government's . . . tying claim in this case.

The answer, in my view, depends upon whether the test articulated by the Court of Appeals in Microsoft II is the law applicable to this case. If it is, then it is my view that given the findings of this Court, the government has not made out a claim of tying under Section 1 of the Sherman Act. If Microsoft II does not apply, then it is my view that under the best reading of the Supreme Court's tying jurisprudence, the government has made out a claim of tying under Section 1 of the Sherman Act. Whether or not Microsoft II applies to this case is a question I consider but offer no opinion about.

Excerpted from an amicus curiae brief filed with U.S. District Judge Thomas Penfield Jackson on Feb. 1

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