

A Reply
to
Professors Slawson and Chemerinsky
Lawrence Lessig

Professors W. David Slawson and Erwin Chemerinsky (“the Amici”) have offered a brief to Judge Jackson in *United States v. Microsoft*. Their brief criticizes my own in the case, as well as the government’s, for “overlook[ing] ... *United States v. Loew’s*, 371 U.S. 38 (1962).” I don’t know Professor Slawson, but I do know Professor Chemerinsky. That such a careful and serious scholar could so miss the point of my argument makes me believe that I have done a poor job in explaining it.

In *Loew’s*, the Supreme Court upheld a finding of liability for a tie of films, and in the section of the opinion relied upon by Amici, it offered a “trivial remedial gloss,” as Justice Harlan described it, *id.* at 56, of a district court’s decree after finding liability. The essence of that decree, as the Amici read it, is that if a supplier offers the bundled products separately, appropriately priced, then there is no forcing for purposes of antitrust tying. From this the Amici conclude that “the central issue ... is *not* whether Microsoft should be enjoined from integrating its two products — and *not* simply whether Microsoft should be ordered also to offer the two products separately.” Motion to Reconsider at 2. It is instead, in the view of the Amici, whether Microsoft should be required “also to offer the products separately.” *Id.* at 4.

This is to put the cart before the horse. Before a court enjoins a defendant, the court must determine whether “two products” have been tied. That is the inquiry that my brief addresses. If in fact two products have been tied, only then does a court reach the question of remedy. Under the reasoning of *Loew’s*, it may well be the case that the defendant can comply with the law by offering properly priced products separately. But where a defendant is not offering the products separately (as Microsoft is not), a court must first answer the question, “Are there two products?”

The Amici say that my argument would lead the Court to commit “reversible error” because it does not embrace the option of requiring Microsoft to offer the products separately. Understandably the Amici were rushed in submitting their brief,

for they have apparently overlooked the part of my brief where I state directly that the test I propose should provide a safe harbor when the defendant offers the products separately — because, as the Amici argue, there would therefore be no “forcing.” Lessig Brief at 48.

The Amici spend a considerable amount of time repeating the argument I make about *Jefferson Parish*'s separate demand test, apparently believing I reach a different conclusion from their own. Brief 9-10. The Amici have missed the structure of the argument in my brief. As I thought I had made clear, I agree with them about the outcome of the case decided under the separate demand test of *Jefferson Parish*. It is under that test (assuming *Microsoft II* does not apply) that I recommend the Court decide this case. Lessig Brief at 25-26. I am therefore unsure how I have committed a “fatal error[],” Brief at 7, if I have come to the same conclusion that the Amici have.

I have suggested that as well as deciding the case under *Jefferson Parish* directly, the Court should use this opportunity to sketch a “single product test” adapted to the special circumstances of software. This modified version of the Areeda test would find a software tie where the tied product is a partial substitute for the tying product, *except where the defendant offers separable products*. Under the facts of this case, this again comes to the same result as the Amici suggest. The only difference would be in cases where the bundles are not partial substitutes. But that issue is not before the Court, so again, I am unsure how the difference between the position I have advocated and the Amici's could produce “error.”

Finally, the Amici charge that I have mischaracterized the *Jefferson Parish* test for determining “efficiency,” by arguing that “efficiency” is determined indirectly. In the section they quote, I said:

The core of the inquiry is whether it is “efficient,” as *Jefferson Parish* and *Eastman Kodak* put it, to provide the products separately. *Jefferson Parish*, 466 U.S., at 22; *Eastman Kodak*, 504 U.S., at 462. “Efficiency” is determined indirectly. *Jefferson Parish* does not instruct courts to evaluate the costs and benefits of separating two products. Rather, the aim is to identify proxies for efficiency that are sufficient to indicate that a defendant should be forced to offer two products separately.

Brief at 8. This, the Amici say, is “incorrect.” Indeed, they state that it is “not even an accurate paraphrase of what the Supreme Court said.” *Id.*

Indeed it is not a paraphrase. It is a quote. But following ordinary citation conventions, the quote is in the text *preceding* the citation, not *following* it. At the pages cited, the Court does say that the question is whether separating the products is “efficient.” My claim that the method is indirect is a description of the method the Court applies. I don’t offer a citation for that proposition, but I certainly could have. It is not a point original with me. See X PHILLIP E. AREEDA, EINER ELHAUGE, & HERBERT HOVENKAMP, ANTITRUST LAW ¶1745, at 207 (“the single product inquiry [of *Jefferson Parish*] does not judge the policy question directly ... but indirectly with more easily obtained evidence regarding actual market practices and market structure.”)