

Answers to Written Questions .  
The Senate Judiciary Committee,  
“The Microsoft Settlement: A Look to the Future”

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## QUESTIONS FROM SENATOR HATCH

1. In your book, you make the case for keeping the Internet “neutral and open.” Could you briefly describe the danger that you foresee, in both a competition and a larger policy context, as consumers migrate to higher capacity connections from our current narrowband connections?

The broadband policy of the current administration will weaken the environment for innovation on the Internet, because current policy will balkanize the Internet, and hinder the opportunity for outsiders to compete.

As consumers move from narrowband to broadband, the legal rules governing at least part of the network are changing. The narrowband Internet was governed by rules that required neutrality by the network owners over the use of the Internet. The broadband Internet will be governed by rules that increasingly allow the network owners to pick and choose the kind of innovation and content that the network will carry. This change in legal rules will shift the locus of innovation from the edge of the network to the center — away from the broad range of creators and innovators that have built the Internet so far, to the relatively few who own or who control the network. What runs well on this Internet will increasingly depend upon who the network owner is.

These changes are said to be necessary in order to support the building of the national information super highway. In my view, Congress should weigh this claim much more carefully. It is true that giving broadband providers this power to discriminate will increase their incentive to build broadband pipes. But before we sell the soul of the Internet to the network owners, a much stronger showing of need should be made. We didn't give GM the right to build the interstate highway system in exchange for GM's right to build the roads to favor GM trucks. Nor should we sell the Internet to broadband providers in exchange for their right to favor some content over others, or choose which applications will define the Internet of the future. In both cases, the strong presumption should be in favor of neutrality. Congress should weigh the costs of corrupting this principle of neutrality before it endorses a policy that permits this rearchitecting of the Internet's core.

2. One concern I have consistently raised elsewhere, including in merger and monopolization contexts, has been possible limitations being placed on consumer freedom by an access provider, whether an Internet service provider, a cable company, a satellite company, or another Internet access facilitator. Is there is a legitimate fear that an Internet mediator might — for one reason or another — decide to limit access to certain sites or drive traffic to other specified sites? If so, what do you believe to be the best method of safeguarding and preserving the freedom of the Internet?

It is right to be concerned that access providers will wrongfully constrain consumer freedom. Technology companies have already developed router technology to enable network owners to choose which content will flow quickly, and which content will flow slowly. This technology could enable the blocking of some content, or the disabling of some applications. Cable companies carrying Internet content have already indicated their intent to implement these technologies. And there is nothing this administration is doing that would slow this trend.

The concern about neutral access to the Internet is similar to the concern about access to satellite or cable broadcasts generally. But I believe it is a mistake to equate the two. The harm to innovation and creativity from restrictions to the Internet is more fundamental than the harms caused by restrictions to entertainment.

The reason is that access to entertainment competes directly with many other channels of entertainment. If the choice on cable television is too narrow, then Blockbuster or Netflix provides useful competition. If satellite stations become too expensive, then cable television, or broadcast television — or maybe even a book! — continue to compete. At some point concentration in these channels is a concern, as Jack Valenti has powerfully and rightly testified to Congress.<sup>1</sup> But that concern is different from the

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<sup>1</sup> See, e.g., *Media Ownership: Diversity and Concentration: Hearings Before the Subcomm. on Communications of the Senate Comm. on Commerce, Science, and Transportation*, 101st Cong. 611 (1989) (statement of Jack Valenti, President and CEO, MPAA).at 611 (“Therefore, in this free and loving land in which we live, our government ought never allow any tiny group of corporate chieftains or corporate entities, no matter how benignly managed, to ever reassert full dominion over prime time television,

concern I have about the Internet. The Internet is not just, or not only, another way to be entertained. It is instead a platform that will support the broadest opportunity for social and democratic engagement. The Internet is a public street, or park, or library, not a Movieplex. Restrictions on access and control of the Internet are like restrictions on access to the public streets, not like choices Sony Pictures makes about what will run in first-run theatres.

Thus, in my view, you have been right to be concerned about restrictions on access in the context of cable and satellite delivery of entertainment and news. And you have been right to be concerned that citizens generally have access to news about matters of public import. But there is an even stronger reason for you to be concerned with restrictions on access in the context of the Internet. Much more is at stake.

I am not certain about the best remedy to this non-neutrality. Network owners have a legitimate interest in selling different levels of service; the market should be allowed to experiment with different modes of delivery. Where there are many different competitors offering comparable broadband service, there is little role for government. But where competition is not adequate, then there is an oversight role for government. "Open access" requirements are one indirect response to the absence of competition. Alternatively, a simple requirement that any Internet service be implemented neutrally may suffice to remedy any anticompetitive threat.

3. As you know, on the Internet, anyone can self-publish their music, their artwork, their writings, and those who are interested in those works can have access to them, and neither the creator nor the consumer necessarily need the mediation of a publisher. Works that are important to a few, but cannot make it in a traditional publishing context, have a place for their fans on the Internet. I have said elsewhere that it would be a great shame if the wide-open access available on the Internet were narrowed down in the way the offline world often is. Could you please explain who you believe should choose where a consumer can go online, the consumer or the Internet mediator, be it an Internet service provider, a software company, or a cable or

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which is the most pervasive moral, social, political and cultural force in this country.").

**satellite company, and could you explain why this is an important question?**

Losing the freedom of choice that the original architecture of the Internet guaranteed would be far more than a “great shame.” Losing the freedom of choice that the original architecture of the Internet guaranteed would be a betrayal of the values of free speech and competition that define our political and social culture.

The original architecture of the Internet showed the world how a decentralized, market-based, neutral platform for innovation could enable the broadest range of creators to produce and exchange creative work. This was not the speculation of some utopian academic or technologist. The early Internet made this possibility a reality, and none can deny the opportunity it created.

This reality is being changed now, as the original architectural principles of the Internet become corrupted by network owners. As the Internet moves to broadband technology, broadband providers are changing the effective architecture of the original network to re-vest in them control over how innovation on this network proceeds. The original Internet vested that control in consumers and innovators; the new Internet will return that control to the network owners.

This change is happening because government policy encourages it to happen. We are selling the soul of the Internet to network providers because the network providers have convinced policy makers that this is the only way to build out a broadband network.

The network providers in my view are wrong. The policy makers who follow them are misguided. But at a minimum, whether you believe they are wrong or not, Congress has yet to consider the full cost of this corruption in the Internet’s core.

I believe fundamentally in the freedom of a network where the people, not, as you rightly describe it, “a network mediator,” choose the future. That freedom is the original Internet, which because of its “end to end” design, assured that citizens, not network mediators, controlled how the network developed. There is no good justification for permitting network providers the power to corrupt that original freedom. Yet this is precisely what current administration policy is allowing.

You have been an admirable advocate of balance, Senator Hatch. That balance is just what is needed now in this debate over the network's future.

### QUESTIONS OF SENATOR DEWINE

1. Mr. Lessig, you stated in your testimony that an appropriate remedy should try and steer Microsoft toward developing its strategy in regards to the Internet. First, why wouldn't such an objective fall outside the clear confines of the case and thus be an inappropriate goal for a remedy? And second, given the fact that a court found Microsoft to have engaged in significant violations of the antitrust laws, should we be concerned about the company attempting to leverage its operating system monopoly to become dominant at the Internet level?

If this market were stable, and technological progress slow, then it would be appropriate to confine a remedy to the retrospective harm caused by the illegal behavior of Microsoft. But this market is neither stable, and fortunately, progress is not slow. Instead, the particular wrongs that Microsoft was found guilty of are essentially irrelevant to the current competitive context. Forcing a remedy with respect to these alone would neither “unfetter [the] market from anticompetitive conduct,” “terminate the illegal monopoly, deny to the defendant the fruits of its statutory violation,” nor “ensure that there remain no practices likely to result in monopolization in the future.” *United States v. Microsoft Corporation*, 253 F.3d 54, 103 (D.C. Cir 2001).

It is for this reason that I believe that the essence of an appropriate remedy must look forward, and ask how best to steer Microsoft in a pro-competitive direction. Given the findings of liability by the District Court, and the pattern of behavior that they affirm, I do believe that you should be worried that Microsoft will try to protect its OS monopoly by leveraging it to control at the Internet level. But as I describe more fully in my written testimony, I also believe that there is a strategy that Microsoft could adopt that would not threaten competition at the Internet level, but could instead strengthen it. If a remedy could steer Microsoft to adopt this competitively benign strategy, that remedy would be a crucial gain for competition generally — even if it did not fully right the wrongs caused in the past.

2. Mr. Lessig, you stated in your testimony that an integral part of the Court's conclusion was its finding that Microsoft had "commingled code" in such a way as to interfere with the ability of competitors to compete on an even playing field. Do you believe the Justice Department's proposed final judgment adequately deals with this anticompetitive conduct?

I do not believe the proposed final judgment is responsive to this concern. The Court of Appeals recognized a second and important way in which a monopoly firm in a technology market can improperly use its power to inhibit competition. Not only can such a firm use *contracts* to restrain competition, it can also use computer *code* to constrain competition. The essence of the District Court's finding was that Microsoft had used its code strategically to disable or hinder competition rather than to give consumers a better choice. That finding was twice upheld by the Court of Appeals — both in its initial opinion, and in the opinion rejecting Microsoft's petition for rehearing.

I am particularly concerned that this aspect of the case is now being ignored by the government. In a recent interview with the Wall Street Journal, for example, Assistant Attorney General Charles James is reported to have said, in response to the observation that "various Internet features are woven more deeply into Windows, offering consumers such benefits as one-click access to the Internet from electronic mail,"<sup>2</sup>

"How would consumers be served if we forced Microsoft to remove that code? ... The market has changed."

This statement betrays a fundamental misunderstanding about the issues in this case as it was litigated and decided by the District Court. No one has ever questioned Microsoft's right to include code that would enable better functionality — in this case, the ability of a user to link from an email message to a browser. The only issue has been the decision by Microsoft to use its power over its code to inhibit consumer choice of *which* browser. Microsoft has consistently argued that it did not interfere with consumer choice. The District Court and Court of Appeals found to the contrary. See, e.g., *Microsoft*, 253 F.3d at 66. And in rejecting

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<sup>2</sup> John Wilke, *Hard Drive: Negotiating All Night, Tenacious Microsoft Won Many Loopholes*, Wall Street Journal, A1 (11/9/01).

Microsoft's request for rehearing about the "commingled code" finding, the Court of Appeals reaffirmed a central aspect of the case: That Microsoft had used its power to design its code in a way that restricted consumer choice without any compensating competitive benefit.

Nothing in the proposed remedy directly addresses this concern. But more troubling to me is that the government seems no longer to even understand it. After convincing a district and appellate court of its view about Microsoft's behavior, the government seems now to have adopted Microsoft's view of its behavior. I have seen no justification offered by the government for this reversal on a central element of its case.

**3. Mr. Lessig, you mention that there are problems with the proposed decree aside from enforcement. What are some of the other areas of concern?**

As I have just mentioned, the failure of the decree adequately to address "commingled code" is a significant problem. I also believe the failure to require disclosure in the context of security protocols is a significant weakness, as is the failure of the decree fully to define "retaliation."

These weaknesses have been adequately described, in my view, in the Nine Remaining States' December 7<sup>th</sup> filing with the district court. Except for the questions that I have raised about that filing in my written testimony, I agree generally with the concerns raised by those states.

**4. Mr. Lessig, what do you believe are the appropriate objectives of remedies in monopolization cases such as this? Do you believe the case law supports a position that monopoly acquisition cases should be treated differently than monopoly maintenance cases? Finally, do you believe this settlement fully achieves the appropriate remedy objectives? If not, in what way is it deficient?**

As the Court of Appeals rightly indicated, the objective of a remedy in a monopolization case is extremely broad. *Microsoft*, 253 F.3d at 103. In general terms, its aim is to recover from the monopolist the fruits of its illegal activity, and assure it can no longer benefit from those illegal gains.

In my view, it is impossible fully to achieve these results in a context where technologies are changing rapidly. The problem is much like trying to remedy any harm caused by the choice of the QWERTY keyboard — at this point too much has been built on the underlying technology, and any remedy that seeks to completely undo what has been done would be more costly than beneficial.

Thus, I think the appropriate distinction for the court to focus is not between monopoly acquisition and monopoly maintenance cases, but between cases where technology is relatively stable, and cases where it is changing quickly. As I've indicated, I don't believe the current remedy achieves the appropriate objectives, given the nature of the changes in the underlying technology.

### QUESTIONS OF SENATOR KOHL

1. **Professor Lessig, do you believe this settlement is adequate to restore competition in the computer software industry? Why or why not?**

The settlement is not adequate to restore competition in the computer software industry. Because the settlement has no effective mechanism for enforcement, it tempts Microsoft to continue the strategic behavior that the District Court and the Court of Appeals found violated the antitrust laws. As this case demonstrates, if it takes four years for Microsoft to “understand the [government’s] concerns,” Statement by Bill Gates, November 6, 2001, then by the time Microsoft gets it, the harm is already done.

2. **(a) Are there any restraints on Microsoft’s conduct which you think should be in the settlement but are not? If so, what are they?**

As I indicated to Senator Dewine, I do believe that there should be additional restrictions on Microsoft’s conduct, especially relating to Microsoft’s ability to “commingle code.” But those additional restrictions are secondary to an effective mechanism to enforce the decree. As I indicated in my written testimony, without an effective enforcement mechanism, the balance of the restrictions are irrelevant, and with an effective enforcement mechanism, the weaknesses in the restrictions may not matter.

2. **(b) Beyond restraints on Microsoft’s conduct, are there other deficiencies in the proposed consent decree which**

**you believe should be fixed before it is approved? If so, what are they?**

The central weakness in the decree is its failure to include an adequate mechanism to enforce the decree. Given the slowness of federal court intervention, the decree creates an effective and continuing incentive for Microsoft to behave anti-competitively. If there were an effective enforcement mechanism (such as an adequately empowered special master), then that incentive would disappear.

- 3. Critics of this proposed settlement argue that one significant loophole is that many of the provisions requiring Microsoft to permit computer users and manufacturers to install competing software and remove Microsoft software does not apply with respect to software which has distributed less than one million copies. Are you concerned with this limitation?**

I am. I do not see what legitimate interest the limitation serves. The aim of the decree generally is to enable Original Equipment Manufacturers (OEM) autonomy — to enlist OEMs in the competitive process of deciding what bundle of software makes most sense for the consumer. Any burden from new software bundled with an operating system is borne by OEMs, not Microsoft. By establishing that OEMs only have the right to bundle new software if 1,000,000 consumers have downloaded that software on its own, the decree significantly reduces the incentive OEMs have to discover and distribute new, competitive software. This is a significant loss in potential competition that does not, in my view, have any justifying benefit.