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# The Loyola Reporter

Loyola Law School Los Angeles

# The Loyola Reporter

## The Loyola Law School Student Newspaper

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**919 S. Albany St., Los Angeles, California 90015**

*"Freedom of expression is the matrix, the indispensable condition, of nearly every other form of freedom."*
**Justice Benjamin Nathan Cardozo**
*Palko v. Connecticut*, 302 U.S. 319, 327 (1937)

## A TALE OF TWO CONSPIRACIES - THE MICROSOFT INVESTIGATIONS ©

**By Rick Hornbeck**


### INTRODUCTION

Microsoft Corporation is the source of much folklore and fear. Founded in 1975 by Harvard drop-out William Gates III, Microsoft now has an estimated 90% market share in the personal computer operating systems market, and is the world's larger developer of computer software. This dominance has made Microsoft the object of Department of Justice investigations as to possible anti-competitive practices. There is strong evidence of continued anti-competitive practice as Microsoft attempts to crush competitors in the Internet software market by forcing computer resellers to load their World-Wide-Web (WWW) browser, Internet Explorer, and other related products exclusively or face sharply higher license fees. Worse, Microsoft has created a software programming language, "ActiveX", that allows anyone to directly access a user's PC while connected to the WWW, without the user's knowledge or consent.

This is the first in a series of three articles on the subject of the ongoing Department of Justice investigation of Microsoft. This first article will review the history of the investigations beginning in 1990 and leading up to the Spring of 1996. The second installment will discuss the current investigation which Microsoft confirmed on September 20 of this year, and which is probably the result of letters from Netscape, O'Reilly and Associates and several Internet Service Providers complaining about Microsoft's "anti-competitive tactics." The final article will explain in layman's terms some of the nefarious software tools such as ActiveX which Microsoft has developed. It will also explore the issue of conspiracies referred to in this article's title.

Nicholas Petreley reflects the sentiment of many in the Internet software industry when, in his weekly column, "Down to the Wire," he writes: "In the Bible, in John 8:44, it says of the devil: 'When he lies, he speaks his native language.' I'm not one of those who think Bill Gates is the devil. I simply suspect that if Microsoft ever met up with the devil, it wouldn't need an interpreter." (InfoWorld, 9/16, "When it comes to judging Microsoft products, the devil is in the details.")

### THE FTC INVESTIGATION

The Federal Trade Commission began investigating Microsoft in 1990 for its marketing practices and incentives offered to Original Equipment Manufacturers (OEMs) and resellers. OEMs are in the business of building computer systems and reselling them to other companies (resellers) who then put their own brand name on them and sell them to retail stores. OEMs frequently provide software on the systems they sell, so that resellers can then sell complete system packages directly to the consumer. According to Microsoft, the FTC's 1990 investigation focused on a wide range of practices including: (1) that Microsoft gave its developers of applications software information about its operating systems software before providing it to other applications developers; (2) that Microsoft engaged in selling "vaporware", by announcing that it was developing a non-existent version of operating system or application software to dissuade OEMs from leasing a competitor's operating system; and (3) that Microsoft required OEMs that licensed its operating system software also to license Microsoft applications. Also alleged were tie-ins between application and operating system licensing. This means that Microsoft was giving OEMs special discounts on their Windows operating system if they would agree to load other Microsoft products such as MS-Word or MS-Excel on their systems and not load their competitor's applications such as WordPerfect or Lotus 1-2-3.

### DOJ TAKES OVER

When faced with the decision whether to file a complaint against Microsoft, the FTC deadlocked 2-2, thus suspending the agency's investigation. The

**See *Conspiracies* on p. 4**

## CALIFORNIA FREEDOM SUMMER

**By Cristelle Conanan**
**1996 PILF Grant Recipient**

California Freedom Summer is a project of the National Lawyers Guild, aimed to defend civil rights in California. Through this program, students come from all over the country to work in one of three areas of focus: immigration, prisoners' rights or affirmative action. As a PILF grant recipient, I volunteered through this project to defend affirmative action at the No on 209 Campaign in San Francisco.

Prop. 209, the so-called California "Civil Rights" Initiative, is a deceptive and divisive attack on affirmative action programs. The measure claims it would eliminate discrimination, but actually would ban affirmative action programs, designed to remedy race and gender discrimination in public employment, education and contracting. The No on 209 Campaign consists of over 200 sponsoring organizations committed to saving affirmative action and all attempts to limit opportunities for people of color and women. The campaign sought to achieve its primary mission of urging Californians to see beyond the rhetoric and to consider the real dangers of Prop. 209.

In efforts to educate people on affirmative action and alert them to the pending attacks on these programs, our understaffed office worked on a wide range of jobs, from stuffing envelopes for fundraising projects to surveying California legislators to holding press conferences and coordinating houseparties. The campaign coordinated speakers for various groups and events, updated sponsors on campaign developments and sent out legislative alerts on several bills similar to Prop. 209.

As an assistant to the Northern California Campaign Coordinator, I took on several projects to fulfill and develop the campaign's strategy. I prepared legal memoranda for the research department, which sought to provide a solid and reliable source of information used to educate the public and the media. To further outreach efforts to develop campaign strategies, I surveyed public officials and private organizations to identify a network of support as well as to educate others about affirmative action and the serious legal, economic and social consequences posed by Prop. 209.

In addition to internal projects, I volunteered with a few of the campaign's sponsoring agencies. As a volunteer for Californians for Justice, I registered voters and petitioned signatures for "A Million Voices for Justice," a project aimed to educate and involve people in the fight to preserve affirmative action.

As a Filipino American, I was aware of the special issues affirmative action raises among Asian Pacific Americans, and thus extended my efforts to the Asian American community. As a member of the educational materials committee for Asian Pacific Americans for Affirmative Action, I worked with many dedicated individuals to build support among Asian Pacific Americans, countering the widespread misconception that Asian Americans have "made it" in society.

APA-AA's goals included educating Asian Americans about language discrimination and other forms of discrimination based on stereotypes. I collaborated with other Asian American agencies to develop a multi-lingual brochure that explained the legal issues involved in Prop. 209, and adopted a Southern California version for the Asian Pacific American Legal Center. APA-AA distributed the brochure at citizenship ceremonies and adapted it for use in voter guides and school mock voting programs. As part of the project, I sought out Asian American politicians and other community leaders who supported affirmative action and translators in various Asian languages. I also contributed to a more comprehensive booklet entitled, "We Won't Go Back: Asian Americans and Affirmative Action," which detailed myth-breaking facts about affirmative action and Asian

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# First Annual Loyola Law School Public Interest Concert

By Pezhman Ardalan

Background:

I am a first year evening student and the evening SBA Social Chair. I am responsible for all student social activities on or off campus. Recently, I have unified the day and evening SBA social activities, so that any off campus activities for day students are now combined with the evening students events. This is to promote unity and communication between the evening and day students. I used to promote concerts and dance clubs about six years ago and have extensive experience in organizing activities as the one I am proposing. I ceased promoting when I began work as a paralegal and started college. However, during the last few months I have utilized my promoting skills in my duties as social chair by organizing 4 mixers at local dance clubs and lounges without using any SBA funds. I negotiated waiver of cover charges and got drink specials for the students. Our Halloween Party brought in over 400 Loyola students. The mixers have been extremely successful in promoting networking between different students. This proposal has been well researched and thought out.

**Goal:**

This event is designed to accomplish the following goals:

.Raise funds to donate to public interest groups with which our school is affiliated with. (e.g.: Public Counsel, Operation Role Model, etc.)

.Promote good publicity for Loyola Law School and place the school as a leader in community involvement in the public eye.

.Provide Internet access for Loyola Law students.

There are also several messages we would like to deliver to the public:

.Loyola is the leading law school in Los Angeles for community advancement and public interest.

.The concert will attempt to represent many of the ethnic and racial communities of Los Angeles. This will provide the message of unity between a multi-cultural community and exemplify the diversity of our school.

.Bonding through music. Music has been one of the oldest, most traditional means of celebration and bonding.

.No dream is beyond your reach. This is more of a personal message that I would like to deliver. Should this concert go through, it will be proof of that statement. It began with a vision from a 1st year law student. Acting upon that vision, with motivation, drive, and persistence is what will make it become a reality. This is the whole goal of education. This message will provide an incentive and motivation to students around the nation that they can make a difference. Our community will be a better place if every person sees themselves as a significant factor that can be responsible for something positive. If I could make this vision a reality, then there may be thousands of students that may make that step towards making their visions a reality also. It will promote community involvement and advancement through action.

**Structure:**

This is to be a three hour concert held at the main Loyola Marymount Campus. I imagine an outdoor concert in spring at the Sunken Gardens. It will hold over 6,000 people. From 6:00 to 9:00 we can have the outdoor concert. We will then move everyone into the gym for a dance party hosted by a popular radio station until about 1:00 a.m. The tickets should cost about $30 per person. They will be made available to the Loyola law students, undergraduate students and alumni before we open ticket sales to the general public.

**Artists:**

I have made great progress on this part of the planning. My goal is to have ***Sheryl Crow*** perform. She is active in public interest. I have contacted her booking agent and they asked me to fax a proposal. Also, I have found a 2nd year law student who works for Sheryl Crow's attorney. The attorney speaks to Ms. Crow personally on a daily basis. This law student has agreed to put me in contact with the attorney and it looks optimistic. I have furthermore, through discussion of my idea, been approached by many students who work in the entertainment and music industry who have offered assistance in getting celebrities. Lynette Y. Green, Externship/ Pro Bono Sr. Secy. Of Loyola, has put me in contact with a very popular African American group called ***For Real.*** I have also met with a fellow student that works for a record label. She told me that she will bring famous artists that will play for free. A popular group called ***The Lovin' Miserys*** have recently agreed to play for free if the concert goes through. Their lead singer was from a group called The Rave-ups who were in the movie "Pretty in Pink" and the drummer is from Concrete Blonde (very famous rock band). I have also met a student that works for the popular radio station **102.7 (KIIS FM)** who said that he can have them M.C. and D.J. the dance party and have it live on air. This will be invaluable publicity. I feel extremely confident that I can get the artists and the radio stations to participate in this event. The student support is extremely encouraging and goes back to the message that when we work together, no dream is beyond one's reach. Furthermore, I am sure we can get T.V. publicity through news clips and specials since our school is well connected with the media.

**Costs:**

The amazing part of this proposal is that it should not cost Loyola a thing. I am looking for sponsors and have found some already. All the artists and radio stations have agreed to play for free, with the exception of Sheryl Crow and For Real. However, Sheryl Crow charges about $30,000 for a full concert. We only need her to play for about 45 minutes, which is like a half concert. Being for public interest, if she refuses to play for free, I will attempt to negotiate her to accept between $10,000 to $15,000 **contingent upon ticket sales.** Since we will be selling advance tickets, we could agree as soon as we reach the agreed amount, we will pay her charge. I do not anticipate any other costs that I could not get sponsored.

There is also the issue of security at the concert. I am unsure whether the campus security would be ample. Should the cost of security become an issue, I may be able to get a sponsor to cover the cost.

**Disbursement:**

We can reserve 500 tickets to be given away over the air by radio stations and for V.I.P. guests. Another 5,500 tickets will be sold at $30 a piece. This will bring in about $165,000. Even if $30,000 of that was deducted in costs[1], there would still be a net of $135,000. Of that we can give up to 70% to the public interest groups and earmark 30% for student related funds. This year we would like to have that 30% given towards gaining home Internet access to the students. As you may be aware, we are one of the only schools that is lagging far behind in providing this service to students. The SBA has been rallying for this cause for some time and we understand that there are some funds set aside for this. We would like to provide an incentive to get the Internet by matching your budget with the estimated $40,000 to $45,000 we anticipate having earmarked from the concert. This service will not only allow more access for students to the school but promote many of the organizations on campus. It will give evening students who are not at school during the days a link to the faculty and school organizations through e-mail and web pages. We have voiced these needs to the people from Edutech who came on the campus and interviewed students and faculty in regards to this issue. They said they will be writing a report for the Dean outlining our concerns and needs.

**See Concert on page 6**

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## Schedule of Classes

### San Diego • LIVE LECTURES

✧ Sunday, November 24, 1996
9:00 am to 1:00 pm
**CONTRACTS I-U.C.C**
(Formation, Defenses, Breach, Remedies, Third Party Beneficiaries)

✧ Sunday, November 24, 1996
2:30 pm to 6:30 pm
**TORTS I**
(Intentional Torts, Defenses, Negligence-Causation Emphasis, Damages, Defenses)

✦ Monday, November 25, 1996
6:30 pm to 10:30 pm
**REAL PROPERTY I**
(Concurrent Interests, Future Interests, Adverse Possession, Class Gifts, Easements, Landlord/Tenant Handout)
ROOM 2F

✧ Tuesday, November 26, 1996
6:30 pm to 10:30 pm
**CIVIL PROCEDURE I**
(Jurisdiction, Venue, Choice of Law, Pleadings, Joinder, Summary Judgment, Collateral Estoppel, Res Judicata)

All **live** courses will be held at California Western School of Law, 350 Cedar Ave., San Diego.
✧ Sunday and Tuesday courses held in the Auditorium ✦ Monday course held in Room 2F

**Pre-Registration Guarantees Space & Outline • $50.00 per Seminar • $45.00 Group Rate***
(**Group Rate available to groups of 5 who register together** at least one week before the desired seminar.)
**Registration at Door** (*If space available*): **$55.00**

### San Diego • VIDEO LECTURES

Friday, December 6, 1996
6:00 pm to 10:00 pm
**REAL PROPERTY I**
(Concurrent Interests, Future Interests, Adverse Possession, Class Gifts, Landlord-Tenant)

Saturday, December 7, 1996
10:00 am to 2:00 pm
**EVIDENCE I**
(Relevance, Opinion, Character, Impeachment, Best Evidence, Types of Evidence, Burdens/Presumptions, Judicial Notice)

Saturday, December 7, 1996
3:00 pm to 7:00 pm
**WILLS**

Sunday, December 8, 1996
10:00 am to 2:00 pm
**CONSTITUTIONAL LAW I**
(Justiciability, Commerce Clause, Federal/State Conflicts, Separation of Powers, Due Process, Equal Protection)

Sunday, December 8, 1996
3:00 pm to 7:00 pm
**TRUSTS**

**The Registration Price for Each Video Seminar is $25.00** (*Half Price*)

All courses will be given at The First National Bank Center
401 W. "A" Street (*in the Conference Room*) Downtown San Diego.

### Orange County • LIVE/VIDEO LECTURES

Saturday, Nov. 16, 1996
1:00 pm to 5:00 pm
**CONTRACTS II-U.C.C.**
(Assignments/Delegations, Third Party Beneficiaries, Conditions, Breach, Remedies)
VIDEO ROOM 215 A

Saturday, Nov. 16, 1996
6:30 pm to 10:30 pm
**TORTS I**
(Intentional Torts, Defenses, Negligence-Causation Emphasis, Damages, Defenses)

Saturday, Nov. 16, 1996
6:30 pm to 10:30 pm
**CIVIL PROCEDURE II**
(Class Actions, Discovery, Summary Judgment, Attacks on the Verdict, Appeal, Collateral Estoppel, Res Judicata)
Video: Room 215 A

Sunday, Nov. 17, 1996
1:00 pm to 5:00 pm
**EVIDENCE II**
(Hearsay, Privileges)
Video: Room 215 A

Sunday, Nov. 17, 1996
6:30 pm to 10:30 pm
**CONTRACTS I-U.C.C.**
(Formation, Defenses, Third Party Beneficiaries, Breach, Remedies)

Sunday, Nov. 17, 1996
6:30 pm to 10:30 pm
**REAL PROPERTY II**
(Sale of Land, Recording Act, Easements, Profits & Licenses, Covenants, Equitable Servitudes, Eminent Domain)
Video: Room 215 A

Monday, Nov. 18, 1996
6:30 pm to 10:30 pm
**CONSTITUTIONAL LAW I**
(Justiciability, Commerce Clause, Federal/State Conflicts, Separation of Powers, Due Process, Equal Protection)

Tuesday, Nov. 19, 1996
6:30 pm to 10:30 pm
**EVIDENCE I**
(Relevancy, Opinion, Character, Impeachment, Best Evidence, Types of Evidence, Burdens/Presumptions, Judicial Notice)

Wednesday, Nov. 20, 1996
6:30 pm to 10:30 pm
**REAL PROPERTY I**
(Concurrent Interests, Future Interests, Adverse Possession, Class Gifts, Landlord/Tenant)

Thurs., Nov. 21, 1996
6:30 pm to 10:30 pm
**CIVIL PROCEDURE I**
(Jurisdiction, Venue, Choice of Law, Pleadings, Joinder, Class Actions)

Friday, Nov. 22, 1996
6:30 pm to 10:30 pm
**REMEDIES I**
(Tort Remedies: Damages, Restitution, Injunction Emphasis)

✧ Saturday, Nov. 23, 1996
10:00 am to 2:00 pm
**CRIMINAL PROCEDURE**
Room 215 A

Saturday, Nov. 23, 1996
1:00 pm to 5:00 pm
**TORTS II**
(Negligence Defenses, Strict Liability, Vicarious Liability, Products Liability, Nuisance, Misrepresentation, Business Torts, Defamation, Invasion of Privacy)
VIDEO ROOM 106

Saturday, Nov. 23, 1996
6:30 pm to 10:30 pm
**CORPORATIONS**
Video: Room 106

Sunday, Nov. 24, 1996
1:00 pm to 5:00 pm
**CRIMINAL LAW**
Video: Room 215 A

*All live courses (✧ except **Criminal Procedure**) will be held at Pacific Christian College, 2500 E. Nutwood Ave. (at Commonwealth), Fullerton (across from Cal State University Fullerton)* **Room 205**
*Recent **Criminal Procedure** Room 215 A: All video courses will be held at Pacific Christian College, 2500 E. Nutwood Ave. (at Commonwealth), Fullerton (across from Cal State University Fullerton)* **Room 215A/Room 106**

**Pre-Registration Guarantees Space & Outline: $50.00 per Seminar · $45.00 Group Rate***
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(*Group Rate available to groups of 5 **who register together** at least one week before the desired seminar.)

*Course Lecturer:*
## PROFESSOR JEFF A. FLEMING
*Attorney at Law • Legal Education Consultant*

For the past fifteen years, Professor Fleming has devoted his legal career towards the development of legal preparatory seminars designed solely to aid law students and Bar Candidates in exam writing techniques and substantive law.

Professor Fleming's experience includes the Lecturing of Pre-Law School Prep Seminars and First, Second and Third Year Law School Final Reviews. He is the Organizer and Lecturer of the Baby Bar Review Seminar and the Founder and Lecturer of the Legal Examination Writing Workshop. Both are seminars involving intensive exam writing techniques designed to train the law student to write the superior answer. He is the Founder and Lecturer of Long/Short Term Bar Review. In addition, Professor Fleming is the Publisher of The Performance Exam Solution, Creator of the Exam Solution Tape Series, which aids law students in exam preparation, the Author of the First Year Essay Examination Writing Workbook, Second Year Essay Examination Writing Workbook, and the Third Year Essay Examination Writing Workbook. These are available in Legal Bookstores throughout the United States.

Professor Fleming has determined that the major problem for most law students is weak analytical skills. Most students can learn the law, but application of the law is a stumbling block under exam conditions. Professor Fleming has structured his programs to include both substantive law and legal analysis training. This provides the combination necessary for the development of a more well prepared and skillful law student and Bar candidate. These courses have made it possible for thousands of law students to improve their grades and ultimately pass the Bar exam.

## REGISTRATION FORM (*Please Type or Print*)

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Address: _____

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Telephone: (_____) _____

Law School: _____ Semester in Which Currently Enrolled: _____

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## *DON'T KILL THE MESSENGER...*

**by Darren M. Salvin, first year student**

It has come to my attention that my article "My First Bar Review" published in the last edition of the Loyola Reporter was read, not as a dose of comic relief as was intended, but as a prose supporting the humiliation and degradation of women. In fact, my article was likened to the mindset of a rapist who considers his female victims nothing but subservient objects of desire, somehow deserving of their fate. To be honest, I had no idea that my article, written with about the same amount of exacting attention that one gives to their professor during an 8:30 a.m. class, would stir so much offense. Clarification of both my personal beliefs and the intent of my ill-fated article is necessary.

To set the record straight, I do not subscribe to the belief that women are property, meat, or any other dehumanizing metaphor. I have always believed that the only difference between men and women are those obvious characteristics that can be seen by looking in a mirror. In fact, anyone who believes to the contrary ought to be branded a fool. I am sorry if my article persuaded you to reach another conclusion.

With regard to the article's content, the crux of controversy seems to center around the imagery I chose to use, namely men drooling over scantily-clad women as would a buzzard over fresh road-kill. While these words are highly suggestive and inflammatory, they are, however, completely warranted and I will not apologize for their use. Reality can be, and oftentimes is, very disturbing. No one is proud to announce that animalistic encounters like the one described exist between men and women, especially between the "learned and refined" men and women in law school. But reality tells a different story. Anyone who has frequented a bar can not honestly say that such behavior does not occur. So you have every right to be upset with the current state of affairs. It is not desirable nor applaudable. However, please do not kill the messenger who brings such news.



***Conspiracies*** (cont. from p. 1)

Antitrust Division of the DOJ then initiated its own investigation using the FTC's extensive investigatory file as its starting point. The Department issued 21 Civil Investigative Demands to Microsoft and third parties, reviewed over one million pages of documents, and conducted over 100 interviews. The Department also deposed 22 persons, including Microsoft Chairman Bill Gates.

In July 1994, the Department filed a civil complaint under the Sherman Act, charging Microsoft with unlawfully maintaining a monopoly of operating systems for IBM-compatible PCs and unreasonably restraining trade of the same through anticompetitive marketing practices.

### JUDGE SPORKIN OF THE U.S. DISTRICT COURT DENIES THE MOTION

The U.S. District Court for the District of Columbia denied the Government's motion to approve the consent decree on February 14, 1995, after holding a series of three hearings with the parties during the preceding six months. In the opinion, Judge Stanley Sporkin stated the Court denied the motion because it did not find the terms of the decree to be in the "public interest" as required by the Tunney Act (15 U.S.C. Sec. 16). Commenting on Microsoft's practice of marketing "vaporware" the opinion stated, "This Court cannot ignore the obvious. Here is the dominant firm in the software industry admitting it preannounces products to freeze the current software market and thereby defeat the marketing plans of competitors that have products ready for market. Microsoft admits that the preannouncement is solely for the purpose of having an adverse impact on a competitor's product. Its counsel states it has advised its client that the practice is perfectly legal and it may continue the practice. This practice of an alleged monopolist would seem to contribute to the acquisition, maintenance, or exercise of market share."

The opinion also expressed Judge Sporkin's disapproval of the Government's inability to deal with Microsoft's monopolistic practices.

*"Microsoft is a company that has a monopolist position in a field that is central to this country's well being, not only for the balance of this century, but also for the 21st century. The Court is mindful of the heroic efforts of the Antitrust Division to negotiate the decree. There is no doubt its task was formidable. Here is a company that is so feared by its competitors that they believe they will be retaliated against if they disclose their identity even in an open proceeding before a U.S. District Court Judge.*

*The picture that emerges from these proceedings is that the U.S. Government is either incapable or unwilling to deal effectively with a potential threat to this nation's economic well being. How else can the four year deadlock in investigation conducted by the FTC be explained? What is more, the Justice Department, although it labored hard in its follow up investigation, likewise was unable to come up with a meaningful result.*

*It is clear to this Court that if it signs the decree presented to it, the message will be that Microsoft is so powerful that neither the market nor the Government is capable of dealing with all of its monopolistic practices. The attitude of Microsoft confirms these observations. While it has denied publicly that it engages in anticompetitive practices, it refuses to give the Court in any respect the same assurance. It has refused to take even a small step to meet any of the reasonable concerns that have been raised by the Court."*

The District Court explicitly rejected the proposed consent decree for the following four reasons: (1) the Government has failed to provide the Court with information it needs to make its public interest determination, (2) the scope of the decree was too narrow, (3) the decree does not address certain anticompetitive practices which Microsoft states it will continue to employ, and (4) the enforcement and compliance mechanisms in the decree are not satisfactory.

### COURT OF APPEALS REMANDS AND REASSIGNS

Another hearing was scheduled for March 16, 1995. However, in an unusual move, both the DOJ and Microsoft appealed the matter to the Court of Appeals, District of Columbia Circuit which, on February 23, 1995, agreed to hear the appeal.

In its March 14 Order canceling the March 16 hearing, the District Court took strong objection to several supposedly inaccurate and disparaging public remarks made by the Attorney General's Office regarding the Court and its decision. For example, the Order states that, "The Attorney General has characterized this Court's refusal to approve the decree as an improper infringement on the government's prosecutorial discretion. . . . Approval of the decree is in every respect an appropriate judicial function."

Chief Judge Edwards and Circuit Judges Silberman and Buckley of the Court of Appeals heard oral arguments on April 24. On June 16 Judge Silberman filed the court's opinion which remanded the case to the chief judge of the district court, with instructions that it be assigned to another district court judge. The Court of Appeals found that (1) the District Court exceeded its authority under the Tunney Act by denying decree based on allegations beyond those in complaint; (2) remedies in decree were adequate; (3) denial could not be justified for any ambiguity or for inadequate compliance mechanisms, and, in a Per Curiam opinion, directed that the action be reassigned on remand.

The Appeals Court's finding that Judge Sporkin demonstrated actual bias against Microsoft and "would have difficulty putting his

(cont. on page 5)

**Conspiracies** (cont. from p. 4)

previous views and findings aside" was not arrived at lightly. Its review of the transcript made it "patently obvious" the Judge's wide-ranging inquiries resulted from his acceptance of accusations made against Microsoft in "Hard Drive," a book which is critical of many of its practices. Judge Sporkin sought to address issues in the consent decree that had not been raised by the government, simply because he had read about them in "Hard Drive." The Appeals Court remarked that "The book's allegations are, of course, not evidence on which a judge is entitled to rely, . . . "

Other bias examples included the Judge's belief the decree should seek to fundamentally alter the Microsoft culture, perhaps even reduce its competitive zeal. This Court found that "those objectives exceed any legitimate concerns about actual compliance with the decree." Lastly, the District Court allowed several companies to proceed anonymously as "Doe" parties to this lawsuit. The Court of Appeals stated, "We are not aware of any case in which a plaintiff was allowed to sue a defendant and still remain anonymous to that defendant. Such proceedings would, as Microsoft argues, seriously implicate due process." Apparently, Judge Sporkin believed he was protecting the anonymous software companies from Microsoft's retribution.

**DOJ ANNOUNCES ONGOING INVESTIGATION**

In spite of the Appeals Court's June 16 Order to remand and reassign, DOJ continued its investigation. Microsoft fought DOJ's requests for information during the summer of 1995, saying they were impeding the company's progress in getting Windows 95 and MSN finalized and to market in August as planned. According to Microsoft attorneys, the DOJ's frequent demands for information were "neither fair nor appropriate" as they were too big to meet in the allotted time.

On August 8, 1995 DOJ issued a statement which read, "The Department of Justice said today that its investigation into the Microsoft Network and other issues associated with possible anticompetitive practices relating to Windows 95 is ongoing. The Department does not expect to complete its investigation or reach a decision on possible enforcement action prior to August 24, 1995." The DOJ took no action to stop the release of Windows 95.

**FINAL JUDGEMENT**

Finally, on August 21, 1995 Judge Jackson of the District Court of the District of Columbia ordered a final judgment granting the Government's motion to approve the consent decree. The final judgment, and Microsoft's duty to abide by the terms of the decree, will expire on the seventy-eighth month after its entry.

**MICROSOFT ALSO ENTERS INTO DECREE WITH EUROPEAN UNION**

The Sherman Act reaches foreign restraints of trade having a "direct, substantial and reasonably foreseeable" effect on U.S. export trade. Since 1992 it has been the policy of the Antitrust Division to challenge restraints that restrict U.S. export opportunities regardless of whether these restraints also harm U.S. consumers directly. In 1994 Congress enacted the International Antitrust Enforcement Assistance Act which authorizes the Antitrust Division and the FTC to negotiate with foreign antitrust agencies to permit the exchange of information relevant to civil and criminal investigations.

In speeches, Assistant Attorney General Anne K. Bingaman specifically emphasized two characteristics of the present-day economy "of particular concern to antitrust enforcement - continuing globalization and the pervasive importance of intellectual property." In outlining her policy, Ms. Bingaman stressed the importance of antitrust enforcement directives designed to create an "environment in which competitors spur each other to faster innovation." She has also stressed the importance of international cooperation, including cooperation with European antitrust enforcement authorities in negotiating the Consent Decree with Microsoft. The DOJ cooperated with the Directorate-General IV of the European Commission ("DG IV"), the European Union's antitrust enforcement authority and Microsoft consented with the DG IV to comply with provisions virtually identical to those in the consent decree.

**TERMS OF THE CONSENT DECREE - PROHIBITION OF ILLEGAL TYING**

The consent decree, Paragraph IV(E)(1) prohibits Microsoft from licensing Windows 95 under terms that are "expressly or impliedly conditioned upon the licensing of any . . . other product." Similarly, the following paragraph of the Decree, Paragraph IV(E)(2) states that the licensing of Windows 95 cannot be expressly or impliedly conditioned upon the OEM "not licensing, purchasing or distributing any non-Microsoft product." These terms deal with Microsoft's historic pattern of restricting competition through "tying arrangements" with its customers.

In 1922, in United Shoe Machinery Corp. v. United States, (258 U.S. 451 (1922)) the Supreme Court recognized that "tying arrangements" between a manufacturer and its customers that had the practical effect of preventing the use of a competing manufacturer's products violated the Clayton Act, one of the key Federal antitrust statutes.

In 1958, in Northern Pacific Railway v. United States, (78 S.Ct. 514 (1958)) the Court defined "Tying" as "an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier . . . [Tying arrangements] are unreasonable . . . whenever a party has sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product . . ."

The competitive evil the courts find in tying arrangements is that a company's market power (which may well be perfectly legitimate) in one product is leveraged into another product line where the company otherwise does not have market power, so that competition in the second product line is reduced. Court's concern over this abuse of market power is substantial; courts will generally not buy economic rationalizations of tying arrangements, but instead find a company guilty of an antitrust offense whenever an objectionable tying arrangement is shown.

**THE WINDOWS 95 LAUNCH**

At the Windows 95 launch ceremony in August 1995, Chairman Gates was asked what Microsoft would do if courts were to ultimately decide MSN could not be bundled with Windows 95. He replied, "You've asked if we can rearrange the bits on CD and floppy disks. Given enough time we could rearrange the bits. The icon could be put somewhere else . ." Gates' statement reflects his disdain for the DOJ's meddling into his affairs. Further it completely ignores the underlying issue that would be the basis for such a court ruling. In Gates' mind the courts have no right to tell him what software he can bundle together, but if forced he will comply with the letter of the ruling. The implication is that he would attempt to circumvent the "spirit" of the hypothetical unbundling ruling by packaging Windows95 and Internet Explorer in such a manner as to avoid the perception of bundling while still making them readily available for consumers to acquire and install at the same time. This could be achieved through various technological means, which in effect, would simply require that Microsoft "rearrange the bits on CD and floppy disks." One Wall Street analyst speculated in Barron's late in September that it would cost Microsoft perhaps five cents a share in earnings over the next year if it had to modify the code in Windows 95 to make MSN connectivity more indirect.

**DOJ's OTHER INVESTIGATIONS OF MICROSOFT**

1995 was a banner year for DOJ investigations of Microsoft. In addition to the consent decree related activities, the DOJ also investigated Microsoft's planned merger with Intuit, Inc. Although Microsoft ultimately decided to forego its purchase of Intuit in the face of a DOJ lawsuit, DOJ gained a great deal of insight into the benefits to Microsoft of combining operating system software and application software. DOJ also investigated Microsoft's bundling of The Microsoft Network's (MSN) online and Internet service with Windows 95. Although no action was taken, Microsoft did not put the full MSN client into the initial Windows 95 release. Apparently the decision had little if any effect on sales. During its first two months on the market, 7 million copies of Windows 95 were purchased.

The DOJ's concern regarding MSN would probably be that Microsoft is attempting to use its roughly 90% market share in the PC operating system market as leverage into the on-line commerce market, where it has no particular presence.

During the summer of 1996 Microsoft announced it would begin changing its direction for MSN from that of an ISP in direct competition with AOL, CompuServe and Prodigy, to an Internet-based "content mall." This may be Microsoft's way of conceding to DOJ and ending the "tying" matter, at least in the U.S. This change in direction has not relieved any competitive pressure on ISPs however. As recently as October 31, 1996 AOL announced a more competitive pricing structure, $19.95 per month for unlimited access.

**NEW COMPLAINTS**

New issues were added to the fray in early September 1995. PC Week reported that users who upgrade from Windows 3.1 to Windows 95, and then use MSN, will have a critical piece of on-line access software (the WINSOCK program) renamed and replaced with a Microsoft version that does not work with Netscape and other access software. I had this same problem when I installed Windows95. However, when I contacted MSN's on-line technical support staff they quickly provided me with a multi-step "fix" which though effective, required extra effort on my part.

Then, on November 21, 1995 PC Week reported the Department had stepped up its antitrust probe in response to further complaints from online providers that Microsoft was now bundling MSN with Windows NT (another Microsoft operating system for businesses) and Microsoft Office.

**OEMs REPORT POSSIBLE ONGOING VIOLATIONS OF CONSENT DECREE**

Beginning in 1996 many OEMs privately reported to Netscape marketing practices by Microsoft which might still be in violation of the consent decree. They complained that these practices are forcing them into an intolerable position. In some situations Microsoft has threatened to increase licensing fees if OEMs did not allow its web browser, Internet Explorer, to be loaded onto the PCs and keep Netscape's browsers off. The OEMs complain that "It's hard to balance the needs of our customers with our need to maintain margin. But this makes it harder for users to select the browser they may want unless they install it themselves." Netscape has documented these complaints in its August 1996 open letter to the Justice Department.

The issue is not clear cut, however. "Even if you put all of Netscape's charges together and take them as being true, it is not clear if Microsoft violates any antitrust legislation," said John Briggs, past chairman of the

**Conspiracies** (cont. on p. 7)

## STAR TREK: FIRST CONTACT OR FIRST BLUNDER?

### Movie Critique For Those Familiar With Star Trek
### By Dale Reicheneder—Trekker

This was the worst Star Trek movie ever made.

From the outset, I couldn't help but get the impression that Paramount wanted to make a cheap, low-cost, budget film.

For those thinking we were, at last, going to see a Star Trek movie that would finally get out of the "higher meaning" concept and just have a good old blast fest against the tough Borg—forget it, wishful thinking. The battle scene lasts only a few minutes at the beginning of the film. The Borg's 2-in-1 ship presented little threat, which is a far cry from their invincibility we were shown six years ago in the Next Generation series. The last episode of the Next Generation still remains as the best battle sequence. The remaining fighting is lame, hand-to-hand "combat" with Borg drones, not exciting but cheap to do.

The bottom line, the special effects were lousy and unimaginative. Weekly episodes of the Next Generation had better effects, and more of them.

Can you say claustrophobia? Jonathan Frakes (Cmdr. William Riker) fails as director. After a few minutes of film, I started yearning for some wide, panoramic shots—none came. Not once do we get to see the short fight with the Borg ship far enough back to get a full view of the entire battlespace. Instead, it's like *watching the entire movie with binoculars. Even the scenes that take place on earth are shown in narrow, microframes of vision. I felt like I was* trapped in a box peeping out of a tiny little pin-hole during the whole movie.

The set on earth was cheap also. I guess there was a sale on cardboard somewhere.

The Enterprise "E", to be fair, is awesome. Finally a starship with fearsome looks and a battle ready bridge is patrolling Federation space. Unfortunately, we mostly are exposed (no thanks to Frakes' poor directing) to small compartmentalized hallways filled with roaming Borg. And several minutes of film dedicated to showing gloved hands turning three dials was unbelievably useless, purposeless, and mindless on Frakes' part. Simply a waste of film and time.

The crew of the Enterprise is changing. Picard looks to old to be a formidable presence. It's time Cmdr. Riker took over the helm.

Lt. Cmdr. Worf is getting too civilized, he had an opportunity to give Picard a healthy swat and didn't take it. Perhaps Worf is either becoming too human of a Klingon, or he really is, as Picard stated, a coward.

Lt. Cmdr. Data is also becoming too human, but after all, that's his mission in life. But Data's makeup artist stunk, he made Data look like a grease monkey, but he came through in the end, as he usually did.

Lt. Cmdr. La Forge no longer wears his eye visor. Hmmmm, during the Next Generation series, a whole episode was used to showcase La Forge's desire to keep his visor as is. I guess he had a change of heart.

Counselor Troi had a minimal part. Thank God. She was ugly with her new hair style and gaunt face that made me wonder whether she's been using cocaine to fill up her free time since the Next Generation series ended. It was no coincidence, I suppose, that her biggest scene portrayed her as a drunk.

Zefram Cochrane, the fearless pilot, acted out an overused scenario of drunken brilliant/crazy scientist—the professor in Back to the Future was far better.

Beverly Crusher, the good doctor, had a minimal part, but she's actually learning how to act—slowly; but, at least, she looked good.

Lily Sloane, Cochrane's sidekick. I kept asking myself, what the hell is she doing in this movie? She was nothing but an annoyance that Picard should have just punched out. Kirk would have. Instead, Sloane wanders around the Enterprise with a phaser pointed at Picard for what seemed like forever. With the Enterprise 80% assimilated, Picard takes five minutes out to explain what's happening to this hysterical *woman! Sloane was terrible. The only good thing is that unless the Enterprise time travels again, we'll* never have to see Sloane again. Finally, if they wanted someone to play Whoopie's character, why not Whoopie. Sloane was a cheap imitation.

Captain Picard...will never come close to being a captain as great as Kirk. Riker is proving himself to be better than Picard and should take over in the next movie. But first, take away Frakes' director's license.

Lastly, the script. If time travel is such a simple endeavor for the Borg, so easy in fact, that they can pinpoint their destination to the exact day they want 300 years in the past, why didn't (or why don't) the Borg first travel back in time, then proceed to earth—the Federation wouldn't be around yet? Why did they first travel to Federation space to battle it out, lose their cubic skeletal ship and then go back in time...it made no sense whatsoever. And then the movie concluded, is the Enterprise trapped in the year 2063, or is time travel for the Federation a ho-hum thing too? Time travel is the wrong subject matter for Star Trek—it raises more questions than it can answer in 112 minutes of film.

This movie was a blunder from start to finish. And the great Borg concept has been ruined by Brannon Braga, Rick Berman, and Ronald Moore.

# SUBMISSION DEADLINES for THE LOYOLA REPORTER

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| FEBRUARY 1, 1997 | FRIDAY, JANUARY 24, 1997 |
| MARCH 1, 1997 | FRIDAY, FEBRUARY 21, 1997 |
| APRIL 1, 1997 | FRIDAY, MARCH 21, 1997 |
| MAY 1, 1997 | FRIDAY, APRIL 18, 1997 |

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## Freedom Summer (cont. from page 1)

Americans. The campaign taught me about the challenges as well as the benefits of diversity. The No on 209 Campaign was a campaign for diversity, which consisted of a coalition of organizations that were themselves diverse. From the ACLU to "Hollywood Celebrities Against CCRI," the coalition displayed a wide range of political viewpoints. However, despite these differences, they all shared a common commitment to combat persisting discrimination against minorities in education, employment and contracting.

Supporting affirmative action with the No on 209 campaign this summer proved to be a rewarding and memorable experience. Working in the heart of the campaign not only challenged me on the legal issues of affirmative action, but more importantly, helped me to articulately address those issues to educate others. I thank the Public Interest Law Foundation at Loyola Law school and its supporters for affording me this opportunity to interact with so many talented people. Their commitment to equality for minorities and women has inspired me to continue to work for human rights.

## Concert cont. from p. 2

Conclusion:

Overall, this is a concert that will not only benefit our community, but in doing so it will also benefit our school and our students. There is virtually no cost to the school. All I ask for is the opportunity to make this vision into a reality. I need the school's approval on this matter and access to the main campus for the site of the concert. Upon receipt of such approval and access, I may begin booking artists and getting sponsors for the event. However, time is of the essence and performers may make other arrangements unless I get a commitment from them early.

If you are skeptical about my ability to accomplish this feat, I ask you to give me a chance to prove myself. Give me approval of the concert and access to the main campus. If I am unable to book the artists, then there will be no concert. The school will have nothing to lose and everything to gain.

I hope that this will become a tradition and a legacy that will place Loyola as a leader within our community and at the same time help our students accomplish their goals. I look forward in hearing from you soon and will be more than happy to meet with you and answer any questions you may have in regards to this matter.

**Conspiracies**
(cont. from p 5)

American Bar Association's section on antitrust and a partner at Howrey and Simon in Washington.

Microsoft's position has always been that its bundling practices do not amount to illegal tying. Russ Siegelman, Microsoft's on-line services general manager, was quoted in Computer Reseller News in early August 1996 as saying, "Tying means you've got to buy one thing before you buy something else. We are not forcing OEMs to pay for Microsoft Network clients." I believe it was Don Vito Corleone's policy never to force anyone to cooperate either.

OEMs on the other hand, have a different opinion about Microsoft's alleged strong arm tactics. In Netscape's open letter to DOJ, an OEM is quoted as saying, "Microsoft gave me a deal I couldn't refuse. Free dialer, browser [Internet Explorer], developer's kit, free distributable, etc. . . . I know Netscape is better, but $0 v. $18K is impossible to beat."

"Microsoft has gone so far as to offer us free Web servers and free support [but they required] an exclusivity clause that would have prevented us from recommending Netscape," said Gene Diveglia, vice president of information services at Intelligent Network Online Inc., in Clearwater, Florida. Intelligent Network Online does not recommend any particular company's Internet software to their customers.

An official at one major ISP said Microsoft tried in several ways to convince the company to distribute Internet Explorer 3.0 exclusively. A second ISP said *Microsoft offered products and services, but with an exclusivity clause.*

Not satisfied with domination of the U.S. market, Microsoft offered a European telecommunications provider free copies of MSN and Internet Explorer and $3.00 for every copy of Netscape they removed from their internal corporate PCs.

William Neukom, senior vice president of law and corporate affairs at Microsoft, vehemently denied that Microsoft offered any financial incentives to PC makers and denied all charges made by Netscape in their letter to the Justice Department. Offering no apologies in regards to dealings with ISPs Neukom simply said that there is nothing illegal about aggressive promotions.

Microsoft's near-monopoly over the operating systems market enables it to flood the market with free products, crushing competitors. An insight into Bill Gates' perspective on this matter is revealed in the following comment he made to Financial Times this June: "Our business model works even if all Internet software [Microsoft's and Netscape's] is free. We are still selling operating systems. What does Netscape's business model look like [if that happens]? Not very good. [Netscape does not sell operating systems.]"

A Microsoft representative openly admitted that Microsoft's strategy was domination of the Internet software industry during a program sponsored by Motorola: "Our intent is to flood the market with free Internet software and squeeze Netscape until they run out of cash."

Although this cut-throat attitude is entrenched in businesses such as bond trading, many believe both the nascent Internet software industry and the consumer will suffer unfairly if Microsoft is allowed to go unchecked. If the market were to remain open it is far more likely that innovative developments will come from small competitors than from Microsoft. To the extent Microsoft does try to innovate, it will likely do so only under the spur of competition. Still others believe that given Microsoft's delayed entry into the Internet software market resulting in arguably somewhat inferior products, that Microsoft might believe that forcing its competition out of business is the only way for it to survive.

**THE MARKET'S RESPONSE**

The major on-line Internet service providers (ISPs) - America On Line (AOL), Prodigy and CompuServe - have all complained about the bundling of MSN with Windows 95, and it is widely assumed their concerns formed a good portion of the basis for DOJ pursuing its investigation in the summer of 1995. AOL's response has been to flood consumers with their software, as have Prodigy and CompuServe to a lesser degree. They assert that having MSN bundled as an application in a monopoly operating system does not give other ISPs equal opportunity to compete. Windows 95 buyers will not have to take additional steps to get on-line, they only have to click on the MSN icon. This results in Microsoft having an unfair competitive advantage, according to the other on-line services.

**CONCLUSION**

The next article will explore Microsoft's escalating assault on the Internet software industry through so called "aggressive promotions" in apparent disregard for its own consent decree with the DOJ. The third and final article will place Microsoft's insidious Internet software products under a microscope and explore their dangerous capabilities. It will also consider a possible conspiracy scenario as the reason for these pernicious products.

A few examples of Microsoft's treacherous tactics include: (1) claiming that WebServer software can only run on the Windows NT "server" operating system because the Windows NT "workstation" operating system is not "powerful" enough and then having it disclosed by computer experts that the NT Server operating system is really identical to the NT workstation, and was really not more powerful at all. However, in spite of the fact they were identical, because it was supposed to be more powerful, Microsoft sold NT Server for $1,100 and NT Workstation for $400; (2) creating secret undocumented 'hooks' in the Windows NT operating system so that Digital Equipment Corporation (DEC) and only two other vendors can use them to gain performance advantages over their competitors; (3) creating Internet software that can do anything from reformatting a user's hard drive to copying all their e-mail or files back to the website, without the user's authorization or awareness and without any way to trace the cause back to its source.