Windows of **Opportunity**

In 1978, Bill Gates Sr. asked Bill Neukom to help his son, who was launching a software company. The rest is history. Neukom pulled the Big M through one scrape after another, pioneering technology law as he went, and now sits at the helm of Preston Gates & Ellis

By Erik Lundegaard • *Photography by Michael J. Hipple*

In a way, Bill Neukom, 63, needs the bow tie. The former general counsel of Microsoft and current chair of Preston Gates & Ellis is nothing if not dignified. He's tall and thin, with a thick head of white hair; when he speaks, his sentences are long, intricate and often dry. Imagine Henry James speaking legalese. The bow tie, then, which he began wearing in the late '60s, is both part of and antidote to this image. On the day he sat down to talk with *L&P*, his suit was charcoal gray but his bow tie was orange—a hint that, behind the serious public face, there's a dollop of fun.

Neukom became Microsoft's lead outside counsel in 1978 and its general counsel from 1985 until he left the software giant on June 30, 2002. During that time, its legal department swelled from four employees to more than 600, and Neukom and his team helped define what aspects of the computer industry were copyrightable (computer code) and not (Apple's "overlapping rectangles of information").

But he may be best remembered for the landmark antitrust *U.S. v. Microsoft* case, which he divides into three epochs: Microsoft One, which culminated with a government consent decree in 1994; Microsoft Two, in which Microsoft was accused of noncompliance with the '94 consent decree; and Microsoft Three, in which the Justice Department accused Microsoft of violating the Sherman Anti-Trust Act. This third epoch began with a bang of publicity and a June 2000 order to break the company into two parts and ended with a whimper on June 30, 2004, when the U.S. appeals court approved Microsoft's settlement with the Justice Department.

Like his former boss, Neukom is heavily involved in philanthropy. He recently contributed $22 million to his alma mater, Dartmouth, to help establish a computational science center. He and his four children run a family foundation, which funds health and human services, social justice, education and environmental causes. He is currently serving his third term as state delegate to the American Bar Association.

Although part-owner (he prefers the term "investor") of the San Francisco Giants, Neukom diplomatically admits to rooting for the Seattle Mariners in the American League. "I keep hoping for a Mariners-Giants World Series," he says.

We recently sat down with Mr. Neukom and a public-relations representative from Preston Gates & Ellis for a chat in a conference room on the 29th floor of the IDX Tower.

Could you talk to us about the early days of Microsoft? It's a kind of famous story. In 1978 Bill Gates Sr. stopped by your office at Shidler McBroom Gates & Baldwin (now Preston Gates & Ellis) and said ... what, exactly?

He said, "My son's bringing his company up here from Albuquerque, and they'll need legal counsel, and I think we will get a chance to start as their legal counsel. Would you be willing to do that?"

What did you think of computer software back then?

I thought it sounded exciting. Cutting-edge technology.

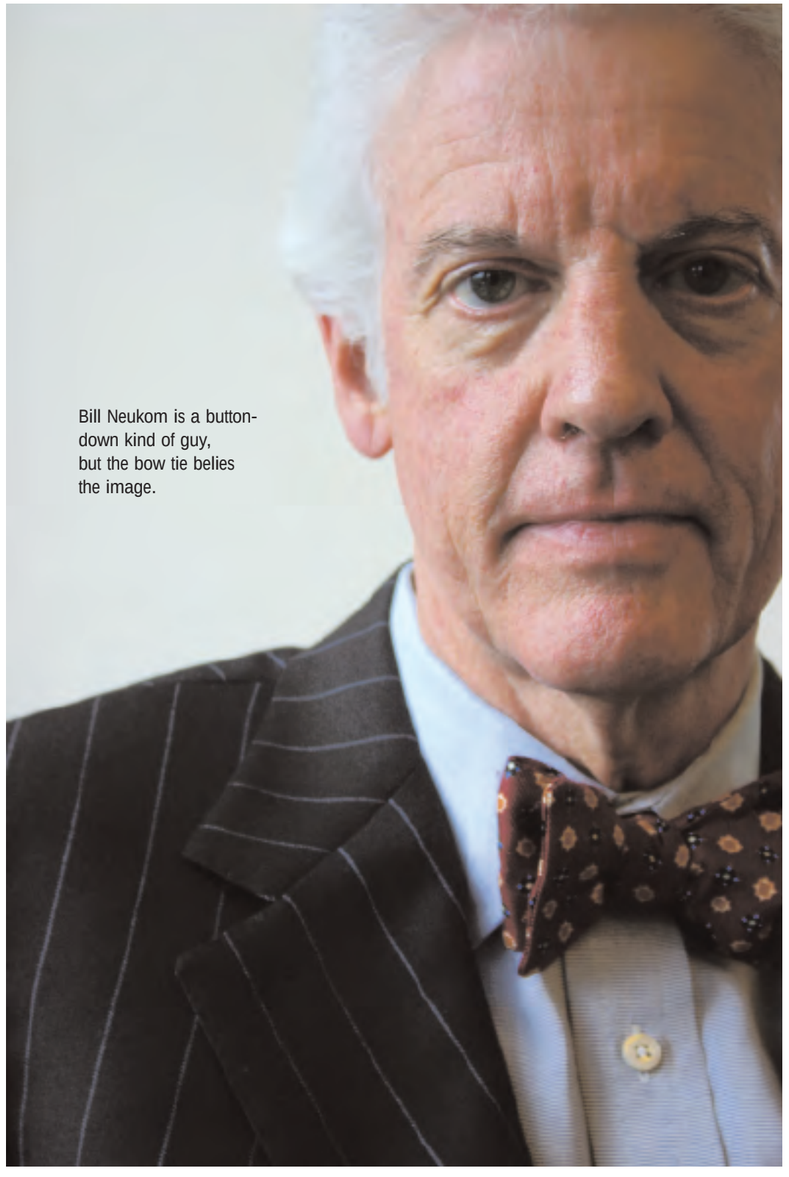
We started to work right away. They wanted 24-hour access to their office building in Bellevue, and the landlord couldn't understand [why they needed] that. The first high-profile intellectual-property enforcement case we litigated for the company was a classic piracy case, in which a small company in California was literally copying code of an important and popular product that Microsoft had created, and we caught them red-handed.

Was computer code considered copyrightable at the time?

Barely.

There'd been [the *Apple v. Franklin* case in 1983] that had established the copyrightability of software code, but not a lot of hair had grown on the notion that this new technology was copyrightable. So part of the thrill was dealing with not much law on such threshold questions as "Is this stuff copyrightable?" and "Can you avail yourselves of the copyright law in terms of protecting your commercial advantage?"

The big case early on was the Apple case. It began in '88. But the scenario started earlier. Apple was concerned when it learned that Microsoft was going to use overlapping, rectangular containers of information as a screen display generated by its Windows product. They thought they had a copyright in overlapping windows.



Bill Neukom is a button-down kind of guy, but the bow tie belies the image.

Overlapping windows means essentially ... ?

(Neukom points to the PR rep's portfolio on the conference table]

That's an overlapping window right there. She's got her portfolio on top of a pad. You're overlapping in some ways. You've got a—

... pen on my notepad. Right.

And that's the point we tried to make, and did make, successfully. The notion that ... having overlapping containers of information or implements is so generic, so idea-like and not a matter of fanciful expression that you can't expect to get a copyright in it.

In its early version, the Windows operating system product had tiled windows, where you would not have any overlap. In the course of more work with users' groups and the like, we decided that overlapping windows was a good alternative. So Windows started to use the device of overlapping displays. [Apple] challenged us and they came [to Seattle] and talked about it; and we told them we didn't think we were violating anybody's intellectual property rights, least of all a *copyright* for that idea. They sort of clawed in some other intellectual property rights abuses they thought Microsoft had engaged in, and we negotiated an agreement with them. The agreement included a license where Microsoft was entitled to use in any of its future products any of the screen displays generated by existing products. That included overlapping windows explicitly. We drafted that agreement in the fall of '85.

And in '86, out of the blue, we heard from a reporter that Apple had sued us in federal court in San Francisco for overlapping windows.

Why do you think they sued?

I think they felt threatened by Microsoft's growing market share. This was a time when Apple, understandably, wanted the Macintosh to be not just a hobbyist system but very much, if you will, a corporate IT [information technology] system. They saw the volume of licenses that Microsoft was getting for [its] DOS [disk operating system] and Windows, and they worried they were losing market share on the PC versus Macintosh split. I think it was a somewhat desperate move on their part.

You have to put yourself back in time. In the mid-1980s Apple was ... magnificent. They had wonderful public relations around it; the [Silicon] Valley was just starting to bubble and blossom and assert itself as the incubator of great intellectual property on a worldwide basis. It was just heady times. People were making fortunes and careers and achieving "immortality" in very short order, and there wasn't a lot of adult supervision. People made decisions which, in hindsight, look a little unwise. But in those days there was a sense that, if you were Apple, you kind of owned the world.

Long story short. At the end of about five years of litigation, not only did we get their

When it's time to relax, Neukom and Churro ride to greener pastures

claim dismissed by the trial clerk before going to trial, but the 9th Circuit Court of Appeals unanimously affirmed it.

But ... this was a very popular company, in a large media center, and we were, I think, viewed in a pretty hostile light. And it wasn't until we got pretty far along in the litigation that people stopped calling [Microsoft] names and realized there was a very legitimate legal basis for what we were doing.

Was the hostility from the other Silicon Valley companies or the press?

The pundits. The influentials. The lion's share of opinion was that Apple had this very valuable intellectual property and Microsoft had stolen it.

Let's talk about U.S. v. Microsoft. What's its legacy?

Well, it's still being taught in law schools. But the lessons learned are that we had to go to the court of appeals in almost every round of that litigation.

Microsoft One, if you will, was what culminated in the consent decree of '94 ... It went in front of [Judge] Stan Sporkin ... and he said in open court [paraphrased]: "I read this book, *Hard Drive;* Bill Gates is a bad guy; the company is a bad company; you, Mrs. Bingaman, as head of the antitrust division, haven't done enough. I want more restraint on this company." And he wrote this "Valentine's Day card," as I call it, in February '95, in which he just harpooned Microsoft. The Department of Justice went after us like crazy.

We took that up to the court of appeals, and the court of appeals removed him from the case. Said the consent decree was perfectly appropriate and required that it go to a new judge. Thomas Penfield Jackson, it turned out. He entered it on a very short hearing, as he should have. That was Microsoft One.

Microsoft Two began when a new head of the Justice Department antitrust division, Joel Klein, got a lot of pressure from competitors, and—

Competitors? Are you talking about Microsoft's competitors?

Yeah. Netscape, Sun, the usual suspects.

And he decided that there's reason to believe that Microsoft wasn't complying with that '94 consent decree, because we continued to add new features and functionality to our Windows operating system.

For example, one of those features is Internet access. Microsoft claims that's what an operating system does. Its job is to connect you and be a traffic cop and a clearinghouse with information wherever it may reside.

Although some people would say that Internet access could be defined as an application.

Some people *did* try to say that. And where you decide something is applicationlike or operating systemlike—there's lots of nice discussions about that.

The question is, Was there some kind of technological tying that Microsoft was engaged in there? Joel's team thought they had a case. They confronted us; we respectfully disagreed

... Now [Judge Jackson] was asked to be a finder of fact in a controversy. He came down entirely on the side of the government. We appealed that ... and [the court of appeals] threw that out in its entirety.

But before they reported that decision in June '98, Klein's team had taken the next step. Windows '98 was about to come to the market. It plainly had Internet access hardboiled into it. And so they brought a Sherman Act case. That was Microsoft Three.

So in all three battles, there were missteps at the trial court level that were corrected by the court of appeals.

The myth is [that] the Sherman Act is designed to rein in businesses. The reality is, the Sherman Act is designed to *encourage* businesses to expand their business and to compete zealously. Elbows-out competition. What the Sherman Act does is determine where the sidelines are for open competition—where the margins are—and to enforce restraints there.

What about the argument that, in the information age, there can be no such thing as a traditional monopoly? Some people said that might be the ultimate legacy of U.S. v. Microsoft. Of course it didn't work out that way. Because Microsoft was in fact ruled a monopoly, correct?

Yes. And it's another interesting myth.

You're right. Throughout the litigation, our notion was that there are virtually no barriers to entry into the operating system market. One smart woman with a PC can create the next operating system. Linux is a beautiful example. One guy created Linux. He insists it's in the public domain. It's a viable competitor to Microsoft Windows.

So it's not like owning a quarry or all the quarries in one country. It's not difficult, when it's just technology, when it comes out of the agile mind of human beings and when there are no physical or financial barriers to entry, for somebody to get into the competition. The history of software in particular is that no one's been able to sustain a strong market position very long. When you think about some of the great products—WordPerfect, like Lotus 123, like the Macintosh—leading products, none of which has been able to sustain a large market share.

Except one: Windows.

And it may eventually be the exception that proves the rule. But the fact is that, typically, monopolies have a permanence to them. And Windows has been such a different product over time that it's hard to say that its monopoly has been static.

Another indication of a monopoly is that you lead the quiet life of a monopolist. You don't have to improve your product, 'cause it's a monopoly, and you get to charge monopoly rents for your product. Microsoft, by contrast, charged very low royalties for Windows, in a very conscious way. Because it was always nervous about when it would no longer have the popularity it had.

But its profits were enormous. Mostly because of Windows.

I don't think mostly because of Windows. There were lots of other products. But that's the nature of intellectual property. Once you have created useful technology, the cost of replicating that technology and making it available to people are so low that you almost always enjoy a good profit margin.

But the fact is that, in terms of what it cost for someone to have the power of an operating system, calculated against other kinds of expenses, it was a very modest royalty. Nothing that anyone could ever claim was so-called monopoly rents.

There still is, I think, a worthwhile academic discussion of whether the kind of popularity that Windows enjoyed over time constituted a monopoly.

But the myth is this: If you're a monopolist, that's bad. And the reality is: If you're a monopolist, that's good. That's exactly what capitalism wants you to become.

The nice question under the law, and the fundamentally important question, is, What do you do with that monopoly? How do you use that? And the findings, even after the court of appeals review,

were that there were a few instances in which the court concluded that Microsoft had used its monopoly power in a way which it thought was a violation of the Sherman Act, and that was the basis for asking—requiring—Microsoft to restrain and change conduct in certain areas.

And the behavior that Microsoft got slapped for would have been fine had it been the behavior of a nonmonopolist?

I haven't gone over the decree recently, but I think that's right.

Looking back, is there anything you would have done differently in U.S. v. Microsoft? Some people talk about the infamous '98 video deposition of Bill Gates, that you should have stopped the deposition and advised him differently.

I'm sure there are things which, in hindsight, we might have done differently. The deposition was taken under one set of rules and, without any provocation from either side, Judge Jackson changed the rules.

The rules going into that deposition were: You can videotape it if you like; videotaped excerpts will not be used in trial. So it was a classic discovery deposition, where you're entitled to sit down with the witness and ask him or her all kinds of questions; the content of that might be read into the record but the actual appearance of that person on the screen will not be used in court. We suspect that—from some source—the judge learned that this was a somewhat interesting videotape and that it ought to come in. And all of a sudden the rules changed.

Did you ever talk strategy with Bill Gates?

Oh, sure. It was my job to keep him informed about strategic aspects of the case without tying him up in tactical and lesser stuff. We tried to impose upon his time as little as possible.

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>
> —Bill Neukom

It's a technology company, and the competition is largely on the merits of your technology. If you keep your eye on the ball, in the long term, it's not the Sherman Act that's going to determine the fate of your company. What's going to determine the fate of your company is how good your technology is.

To what extent do you think you and your legal team were responsible for Microsoft's success?

Companywide success? Oh, boy. You should ask Bill that.

What I do know is that it's a legally intensive business. It's important to the company's success that it have good licenses that make it easy for third parties to use Microsoft's useful technology and that are good and clear in terms of Microsoft's need to enforce them. It's important that they have good lawyers in the piracy-counterfeiting arena to be able to enforce those rights, so they're not competing against themselves. And it's important that they have smart lawyers who can establish their legal rights.

Did friends and family ever come to you and say, "Hey, I'm having trouble installing Windows. Can you help?"

[Smiles] Sure. But less and less. People understand how heavily reliant I was on the Help desk at Microsoft.

You rejoined your old law firm, now Preston Gates & Ellis, in 2002 and in January 2004 became its chair. This will sound like an undergraduate philosophy question, but what does a chair do?

Internally, the chair serves on the executive committee. In addition, the chair can be the consigliere for the managing partner: both available to the managing partner but also comfortable walking into the managing partner's office and offering a different point of view, a heads up, a constructive criticism or an "Attaboy" in tough times.

The external part, for want of a better term, is being an ambassador for the firm: locally, nationally, even internationally.

One of my responsibilities this year has been being the "buddy"—in our lexicon—of the San Francisco office, which is one of our newer offices ... A lot of Asian clients think about San Francisco as the point of contact on the West Coast. They don't think about L.A., they don't think about Seattle as much as they do San Francisco ...

Currently, more than half our lawyers are not in the Seattle office. We would measure success by the number of lawyers we have outside Seattle, in other offices, who are doing well. I keep reminding San Francisco that, in 10 to 15 years, if they are the biggest office in the network, that's great, that's a sign of success, and nobody in Seattle is jealous about that.

You certainly have enough money. Why didn't you just retire after Microsoft?

It sounds kind of sophomoric, but I really care about the law. I think the law is an essential device for making communities fairer. I was on a student court in high school, and I took the law boards in college because I had this sense that, if you were a lawyer, you would deal with getting to the truth and bringing some fair rules to bear.

And your experience hasn't contradicted that?

There are imperfections in the system, sure, but after, what, 37 years of practice, I still believe in the law and the good things it can do, and I want to improve it. It's not nearly accessible enough. Poor people don't get lawyers, don't get into court, don't have a fair shake—we don't do enough about that as a community. We need to. Part of it is allocating government resources. It ought to be part of the social contract ... If people understood the advantage of a more accessible judicial system, legal system, they'd be willing to put a few pennies into that.

Your last name: Neukom. Has it ever been a pun among your friends? You know: "Nuke 'em"?

[Smiles] Not among my friends. **L&P**