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Microsoft's Antitrust Travails

Keith N. Hylton

Book Review
Microsoft's Antitrust Travails

Andrew I. Gavil and Harry First

The Microsoft Antitrust Cases: Competition Policy for the Twenty-First Century

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Reviewed by Keith N. Hylton

Andrew Gavil and Harry First's book on the Department of Justice's litigation against Microsoft will undoubtedly become one of the standard references for anyone who studies these cases in the future. This litigation has been a big enterprise in the courts, especially the landmark D.C. Circuit opinion in 2001.[1] Repercussions continue today, with new raids on Microsoft's operations in China to investigate vaguely described concerns of the Chinese government over product bundling and interoperability, issues at the core of the Microsoft litigation from the start.

Gavil and First have two goals: to provide a road map and history of the Microsoft litigation, and, more ambitiously, to determine whether the litigation achieved its aim of constraining Microsoft and whether antitrust law is up to the task of constraining similarly dominant firms in the technology industry.

This book accomplishes its narrower goal of providing a road map and history of the litigation. However, its degree of success toward the greater goal of assessing whether the litigation achieved its aim is somewhat more difficult to analyze, largely because this more distant aim depends on counterfactuals that no one will ever be able to determine. Would the world have been worse off if the DOJ had never launched its series of prosecutions against Microsoft? Anyone who claims to know the answer to this question shouldn't be listened to.

Although Gavil and First provide an excellent road map and history, from a book that focuses so heavily on the litigation process, I would have preferred to see more of the drama. For a long time I have thought that there should be a movie about the Microsoft litigation—no, not that movie called *Antitrust*, but a real movie about the litigation process. It would be an enormously useful way of teaching antitrust law and the lawyering business in general. If anyone ever gets around to writing the movie, they could rely on Gavil and First for the historically accurate account.

The movie would hopefully emphasize the funny, interesting, and dramatic moments throughout the litigation. Perhaps the first of these is the "Sporkin moment," ably if drily reviewed by Gavil and First, where District Judge Stanley Sporkin erupts with his own theory about how the DOJ should have managed its case against Microsoft and what sorts of bad acts they should have sought to punish, all in the course of a Tunney Act review of a settlement. This scene should come early in the movie as a signal to the viewer that strange events were sure to follow. For even at this opening stage of the story, the viewer would see that there was something unusual about the

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[1] United States v. Microsoft Corp., 253 F.3d 34 (D.C. Cir. 2001).

Microsoft litigation; that it got under the skin of judges, a group one would think hardened to every set of facts imaginable.

The Posner mediation—a process arranged by the judge presiding over the Microsoft trial, Thomas Penfield Jackson, to bring about a settlement, in which Judge Richard Posner served as mediator—is also described somewhat drily by Gavil and First, though with enough detail to allow the reader to infer that it must have been intense at times. Gavil and First explain that the mediation failed after Posner concluded that the state attorneys general were making demands that were too far from the common ground staked out by Microsoft and the DOJ. Surprisingly, Gavil and First suggest that Posner was too quick to declare the mediation failed and too harsh on the AGs. My impression is just the opposite. The AGs treated Posner disrespectfully, not the other way around. They acted as if Posner had no legal authority and that the mediation process was entirely a matter of getting what you can through bluster and brinkmanship. Posner was fed up with them by the end of the mediation, and for good reasons.

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As I have suggested, Gavil and First missed an opportunity with this book because the most colorful aspects of the litigation are either left out or presented in a matter-of-fact way. They do not discuss the "gotcha" moments in the trial conducted by David Boies for the DOJ. Anyone who remembers the news coverage will recall the Bill Gates deposition, which did not go well at all for Bill. The world's richest man, treated harshly, responded with exasperation and a seeming inability to understand what the lawyers were pestering him about. It was a scene that damaged Gates's reputation, and empowered the newspapers to go after him, which they did with glee. His reputation bounced back, but it took years. And there was also the famous incident of a seemingly doctored videotape exposed theatrically by Boies.

Other dramatic scenes would convey the rapid-fire pace of the litigation, the sense that the Microsoft lawyers had that they were being bombarded with legal theories they hadn't even considered. Yet the missiles came in, exploding silently without the defense lawyers realizing the damage. Judge Jackson, near the end of the trial, talked unguardedly to reporters about his feelings, comparing the demeanor of Microsoft executives to that of drug dealers he had recently sentenced—both groups equally certain that they had done nothing wrong and that the fault lay in the legal system rather than in their own actions.[2] Unsurprisingly, he ruled that the company should be split into two units, an operating system company and an applications company. That remedial order did not survive appeal.

This is not the first book on a long-running antitrust case in the technology sector, nor even the first on the Microsoft litigation. The book by Franklin M. Fisher, John J. McGowan, and Joen E. Greenwood on *United States v. IBM* tells the story of a comparably long-running litigation raising many of the same fundamental issues as the Microsoft cases.[3] William H. Page and John Lopatka's *The Microsoft Case*[4] covers much of the same ground as Gavil and First, though only up to 2007, thus missing the follow-on litigation in the United States and in the European Union, both of which are thoroughly discussed by Gavil and First.

Compared to Gavil and First, Fisher, McGowan and Greenwood's book is a far more rigorous look at the economics of antitrust and industrial organization, though not nearly as detailed on the

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[2] Ken Auletta, *Final Offer*, New Yorker, Jan. 15, 2001, *available at* http://www.kenauletta.com/finaloffer.html.

[3] Franklin M. Fisher, John J. McGowan & Joen E. Greenwood, Folded, Spindled, and Mutilated: Economic Analysis and *U.S. v. IBM* (1983).

[4] William H. Page & John Lopatka, The Microsoft Case: Antitrust, High Technology, and Consumer Welfare (2007).

litigation process. Fisher, McGowan and Greenwood is a tough and overly technical read at times, unlike Gavil and First, but in the end the reader walks away with a methodical exposure to applied antitrust economics and to some high-level theoretical issues generated by the IBM litigation, such as the economically appropriate method of measuring depreciation or of accounting for economic profits.

Page and Lopatka's discussion of the Microsoft litigation is somewhere between the approaches in Fisher, McGowan and Greenwood and in Gavil and First, combining in-depth discussions of the economics, though not at the level of depth in Fisher, McGowan and Greenwood, with a critical analysis of the antitrust doctrines examined in the Microsoft litigation. While Gavil and First focus more on the mechanics of the litigation, Page and Loptaka have more to say about the evolution of competing theories of the Sherman Act's scope, and the interplay between those theories and the litigation.

These comparisons lead to my only serious criticism of Gavil and First. I would have preferred above all to see a book that steps back from the government's case and asks whether it was based on sound economics. There is far too little of this in Gavil and First, who appear to take the government's case as entirely valid, and regard the only question to be considered as whether the litigation process worked, or was capable of working, sufficiently to help the government reach its goals in suppressing monopolization. This is a popular view in government and academia today, but serious antitrust analysis should reach beyond such a narrow perspective.

Despite this criticism, I recommend Gavil and First to anyone who wants to understand what happened in the Microsoft litigation, and how it happened. Whether one is really interested in an account of the dramatic moments, or a deep analysis of the economics, a straightforward and reliable account of how and why the litigation progressed and how it was resolved, as Gavil and First deliver, should be of great value. ●