Andrew I. Gavil and Harry First, The Microsoft Antitrust Cases: Competition Policy for the Twenty-First Century (MIT Press 2014)

The monopolization and abuse of dominance cases against Microsoft in the United States and the European Union were the Super Bowl or World Cup of competition law depending on which jurisdiction you were in. For a twenty year period beginning in 1994, the U.S. Justice Department, the European Commission, other jurisdictions, and hundreds of private damage cases in the U.S. sought a variety of remedies from Microsoft in connection with the design, development, and licensing of computer operating systems.

The story of Microsoft’s market dominance and the role of competition law in seeking to tame that dominance has been told in three waves. The first wave was more journalistic in nature helping people understand the issues in real time. The second wave was the legal analysis as the cases in the United States were unfolding in order to to make sense of what the agencies and courts did and the consequences of their decisions in the real world.

However, it is only with the passage of time that one can look back at the full global proceedings and analyze what Microsoft, the enforcement agencies, and the courts have wrought. This is where Professors Gavil and First’s 2014 book shines as the leading example of the most recent wave of scholarship about Microsoft’s market behavior and the role of competition law.

Gavil and First weave a comprehensive and sophisticated analysis of the facts, law, procedures, and institutions which affected both public and private enforcement efforts against Microsoft. The first four chapters detail the investigation, litigation, settlement, and remedies in the cases brought by the U.S. Justice Department and its fellow state government plaintiffs. Chapter five analyzes the more than two hundred private damage cases brought in the U.S. by competitors, direct purchasers in federal court, and indirect purchasers in state courts. Chapter six is a shorter, but still comprehensive, look at the abuse of dominance cases in the European Union and Korea. Chapter seven examines the challenge of remedy and why the various remedies imposed may have ended specific unlawful practices, or provided compensation, but failed to restore competition in the relevant markets. Chapters eight and nine discuss the
importance of institutional diversity and the lessons drawn from this twenty year enforcement effort.

The authors do a magnificent job of explaining what happened and why it mattered in a little over four hundred pages of text and notes. They reject the narrative spun by Microsoft and its supporters that the cases were primarily driven by politics, jealousy, or governments and courts becoming the pawns of less successful rivals. The best expression of the author’s conclusion is found late in the final chapter where they state:

“The cases against Microsoft, therefore, cannot be fairly viewed as misguided efforts to impose liability on a dominant but innovative firm. They were prompted not by any “innovative” product strategy, but rather by Microsoft’s all-out counter-strategy to preserve its Windows monopoly by impeding competition from its more innovative rivals.” (328)

This book is a must for understanding this crucial chapter in modern competition law and in guiding its future application to dominant firms.

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