THE MICROSOFT ANTITRUST CASES:
RETROSPECTIVE AND PROSPECTIVE

OPENING REMARKS BY
PROFESSOR ANDREW I. GAVIL
HOWARD UNIVERSITY SCHOOL OF LAW
AND
PROFESSOR HARRY FIRST
NEW YORK UNIVERSITY SCHOOL OF LAW

ORGANIZATION OF OPENING REMARKS

- Goals of the Book
- Principal Observations and Conclusions
- Questions for Discussion
GOALS OF THE BOOK

- Comprehensive account of Microsoft’s two decades + encounter with the global competition policy system
- Examine, analyze and assess:
  - Merits and substantive results
  - Remedies sought or secured
  - Performance of the institutions of competition enforcement
- Lessons for competition policy and global technology industries in the 21st Century

PRINCIPAL CONCLUSIONS

- The “law” was flexible, adaptable and up to the task of judging Microsoft’s conduct
- The institutions were up to the task of evaluating the economic and technical evidence, but...
  - Sometimes decision-making rightly criticized as slow
  - U.S. private “overcharge” cases speculative
  - Overall a test case for still-emerging global system
- The Remedies - a Mixed Report Card
  - Deterrence, compensation, remediation
- Impact on Microsoft and innovation?
  - No “dulling” of its competitive vigor
  - Competition rules: the natural experiment
**MULTIPLE ENFORCEMENT: WHAT IF...**

- only one US agency: case ends in 1993?
- no US State enforcement: no DOJ suit in 1998?
- no States participating in US DOJ settlement:
  - no protocol disclosure
- no US private right of action:
  - no private recoveries
- no EU:
  - no media player or server interoperability case
  - no fines
  - no effort at unbundled versioning
- no KFTC or EU (browser case):
  - no creative mechanism for enabling consumer choice

---

**MONETARY REMEDIES**

Table 1. Private settlements ($ millions)\(^a\)\(^b\)

<table>
<thead>
<tr>
<th>Consumer class actions</th>
<th>$1,900.0</th>
</tr>
</thead>
<tbody>
<tr>
<td>IBM</td>
<td>$775.0</td>
</tr>
<tr>
<td>AOL (Netscape)</td>
<td>$750.0</td>
</tr>
<tr>
<td>Sun</td>
<td>$700.0</td>
</tr>
<tr>
<td>Novell</td>
<td>$536.0</td>
</tr>
<tr>
<td>RealNetworks</td>
<td>$460.0</td>
</tr>
<tr>
<td>Gateway</td>
<td>$150.0</td>
</tr>
<tr>
<td>BeOS</td>
<td>$23.3</td>
</tr>
<tr>
<td>Daum Communications (Korea)</td>
<td>$10.0</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>$5,304.3</strong></td>
</tr>
</tbody>
</table>

\(^a\) Consumer settlements based on Microsoft FY 2013 estimated total
\(^b\) Some corporate settlements include technology licenses, not separately valued
## MONETARY REMEDIES

### Table 2. Government fines, competition law violations ($ million)

<table>
<thead>
<tr>
<th>Region</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>Europe</td>
<td>$605.0</td>
</tr>
<tr>
<td>Japan</td>
<td>$0.0</td>
</tr>
<tr>
<td>Korea</td>
<td>$33.5</td>
</tr>
<tr>
<td>United States</td>
<td>$0.0</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>$638.5</strong></td>
</tr>
</tbody>
</table>

### Table 3. Compliance penalties, European Commission ($ millions)

<table>
<thead>
<tr>
<th>Year</th>
<th>Violation</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>2006</td>
<td>Failure adequately to disclose protocols</td>
<td>$250.0</td>
</tr>
<tr>
<td>2008</td>
<td>Setting unreasonably high royalty rates for protocols</td>
<td>$1,250.0</td>
</tr>
<tr>
<td>2013</td>
<td>Violation of Internet Explorer choice screen Commitment</td>
<td>$733.0</td>
</tr>
<tr>
<td></td>
<td><strong>Total</strong></td>
<td><strong>$2,433.0</strong></td>
</tr>
</tbody>
</table>

*As reduced by General Court*
MONOPOLY PROFITS CONTINUE?

![Graph showing projections for Windows sales to PC manufacturers and enterprise customers, in billions.]

Note: Fiscal year ends in June
Source: Morgan Stanley

QUESTIONS FOR DISCUSSION & LESSONS LEARNED

- What legal precedent was established by the collective “Microsoft cases” for global technology firms?
- Are any reforms warranted for the institutions of competition law enforcement?
- How (and when) can remedies best be formulated and implemented?
- Who bears the risk of uncertainty about the but-for world in still evolving technology industries?
ALLOCATING THE RISK OF UNCERTAINTY ABOUT THE “BUT-FOR WORLD”

Predictive Error

Untimely and Hence Ineffective Remedies

THE END