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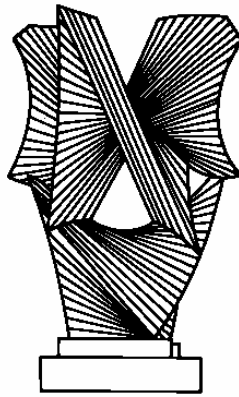
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Review of Hovenkamp, *The Antitrust Enterprise: Principle and Execution*

Randal C. Picker

Herbert Hovenkamp, the Ben V. & Dorothy Willie Professor of Law and History at The University of Iowa College of Law, is best known to the antitrust bar for his role as the senior surviving author of the multi-volume *Antitrust Law* treatise originated by Philip Areeda and Donald Turner. The treatise is the standard reference in antitrust, and the common-law nature of antitrust in the United States makes the treatise particularly influential. Hovenkamp has also written more broadly, and my personal favorite has always been his 1991 business history, *Enterprise and American Law 1836-1937*. Now Hovenkamp has written a new single-volume overview of U.S. antitrust law titled *The Antitrust Enterprise: Principle and Execution*.¹

Of course, the gold standard for this genre is Robert Bork's *The Antitrust Paradox* and I push my students towards Richard Posner's *Antitrust Law*, a second edition of which was issued in 2001.² Like those books when they were published, it is easy to say that any serious antitrust participant should buy and read *The Antitrust Enterprise*. The book is a highly readable, integrated perspective on the state of antitrust law in the United States, written by someone who has both a

1 HERBERT HOVENKAMP, *THE ANTITRUST ENTERPRISE: PRINCIPLE AND EXECUTION* (2006).

2 ROBERT BORK, *THE ANTITRUST PARADOX* (1993); RICHARD A. POSNER, *ANTITRUST LAW* (2nd ed. 2001).

historian's sense of time and change and regulatory cycling, and an up-to-date knowledge of current doctrinal twists. You should put it on your bookshelf—and on one of the low shelves that you can reach easily while sitting at your desk.

I should map the intellectual space of *The Antitrust Enterprise*. Bork's *The Antitrust Paradox* helped to define the Chicago School and helped push the courts towards a dramatic shift in how they approached antitrust cases. The colonization of antitrust by economics still continues as the U.S. Supreme Court slowly prunes away decades worth of per se rules. The rise of post-Chicago analysis has expanded the possibilities, and how the courts should deal with that richness is one of the early themes of the book. We might think of *The Antitrust Enterprise* as *The Antitrust Paradox* for a post-Chicago antitrust landscape. One of the key features of the new domain is how the court system should manage the complexity of antitrust doctrine itself.

By the standards of modern statutes, the Sherman Act is remarkably brief, but Hovenkamp suggests that we could usefully shorten the statute, sufficiently so that we could put the entire statute on a bumper sticker: “unreasonable restraints on competition are hereby forbidden.” This is reminiscent of a 1908 *New York Times* editorial on potential antitrust legislation to address the perceived defects of the Supreme Court's 1897 decision in *Trans-Missouri*.³ The *Times* wanted a one-word amendment to the Sherman Act (“[t]he insertion of the word ‘unreasonable’ before the word ‘restraint’ would take the mischief out of the act, and sufficiently amend it”) rather than the power grab being pushed by President Theodore Roosevelt in the form of the 1700-word Hepburn Bill.

That we have not moved the ball forward in a century's worth of work reflects either the genius of the Sherman Act (at least as reinterpreted by the Supreme Court in *Standard Oil*⁴ when it abandoned *Trans-Missouri*) or the limits of drafting. Hovenkamp recognizes that law professors lack the power to rewrite statutes—so he spends the rest of the book working with the statutes that we have. The book is divided into twelve chapters organized into three groups: limits and possibilities; traditional antitrust rules; and regulation, innovation, and connectivity.

In the first third of the book, Hovenkamp offers a framework for managing post-Chicago economic analysis. Hovenkamp is acutely aware of the powerful limitations that circumscribe our abilities to implement competition policy regulation. Those limits arise out of the difficulty of identifying antitrust violations; then of proving them (“it has become something of a commonplace that rule of reason antitrust violations are almost impossible to prove, particularly in private

3 United States v. *Trans-Missouri Freight Ass'n*, 166 U.S. 290 (1897).

4 *Standard Oil Co. v. United States*, 221 U.S. 1 (1911).

plaintiff actions”); and then coming up with a tractable remedy to improve matters. Antitrust remedies are beset by the central problem faced by a dog chasing a car: what does the dog do with it when it catches it?

Hovenkamp notes the challenges faced by generalist federal judges, who may not be well-versed in economics and the industry in question and its technologies (or even in antitrust for that matter). The frequent solution to those hurdles is for the judge, as Hovenkamp notes, to delegate decision-making to the only group in the courtroom with less knowledge of these issues, the jury that has been dragooned into service for \$18 a day. Hovenkamp also notes that the theoretical development in antitrust analysis has put further burdens on antitrust decision-making. Post-Chicago analysis often consists of possibility results, that is, a demonstration of harmful behavior that might—and you cannot overemphasize might—emerge under certain highly-stylized conditions and under particular parameter settings. Operationalizing these insights in a way that we can be confident that we are fixing more mistakes than we are making may be beyond our capabilities.

With that in mind, Hovenkamp offers a series of administrative suggestions—a five-step program for antitrust—designed to inject a level of caution for antitrust decision makers:

- 1 Not every anticompetitive practice can be condemned;
- 2 Intent evidence should be used sparingly;
- 3 Whether intervention is justified may depend on the remedy;
- 4 An antitrust rule that cannot be administered effectively is worse than no rule at all; and
- 5 Administrative and compliance costs count.

All of this turns Hovenkamp into something of a Chicago School apologist: “As a result the rather tolerant Chicago School rule may be the best one for policy purposes even though substantial anti-competitive behavior goes undisciplined, simply because we cannot recognize and remedy it with sufficient confidence.”⁵

The second section of the book addresses traditional antitrust rules. Chapter 5 starts with a discussion of market definition and market power and offers an extended criticism of the Supreme Court’s 1992 decision in *Kodak*,⁶ which held that a single-brand after-market could count as a separate market. The book then offers a six-step recipe for applying the rule of reason amidst the quagmire creat-

5 HOVENKAMP, *supra* n. 1, at 48.

6 *Eastman Kodak v. Image Technical Servs.*, 504 U.S. 451 (1992).

ed by the Court's decision in *California Dental Association*.⁷ That decision rejected categorical lines and held, in Goldilocks fashion, that the extent of antitrust inquiry should be that required under the circumstances. Not too hot, not too cold, but somewhere in the middle. Chapter 6 considers the difficulties of identifying collusion under Section 1 of the Sherman Act given the strong economic incentives towards parallel behavior and Section 1's agreement requirement.

Chapter 7 turns to Section 2 of the Sherman Act and monopolization, exclusion, and foreclosure. Hovenkamp's ongoing concern with the likelihood of mistakes in decision-making appears again in his discussion of predatory pricing. Predatory pricing is the Loch Ness monster of antitrust: there are frequent sightings, but, on further investigation, it is not clear that we've ever found the beast itself. Given that, we should fear that the threat of a predatory pricing action will deter critical competitive behavior. Hovenkamp concludes that "a high error rate gives reason to believe that predatory pricing law does more harm than good."⁸

Chapter 8 focuses on antitrust and distribution, including discussions of vertical restraints and the Robinson-Patman Act. Hovenkamp joins the long line of law professors calling for the repeal of that act, but notes that we have been doing so for more than fifty years without any risk of success. Hovenkamp concludes the chapter with a useful discussion of exclusive dealing especially as applied to franchise agreements. Finally, to conclude the second section, Chapter 9 provides a very serviceable walk-through of current merger doctrine, including the U.S. Federal Trade Commission (FTC) and U.S. Department of Justice (DOJ) merger guidelines and leading cases such as *Heinz*,⁹ though the book was written before the decision in *Oracle*¹⁰ or before the publication of the March 2006 DOJ and FTC *Commentary on the Horizontal Merger Guidelines*.¹¹

The last third of the book addresses regulation, innovation, and connectivity (think, to oversimplify, *Trinko*,¹² patents and copyrights, and *Microsoft*).¹³ Hovenkamp offers a nice discussion of the interaction between regulation and antitrust, and of the variety of ways in which antitrust steps back, including fed-

7 *California Dental Assn. v. FTC* (97-1625), 526 U.S. 756 (1999).

8 HOVENKAMP, *supra* n. 1, at 160.

9 *Federal Trade Commission v. H.J. Heinz Co.*, 246 F.3d 708 (D.C. Cir. 2001).

10 *United States v. Oracle Corp.*, 331 F. Supp. 2d 1098 (N.D. Cal. 2004).

11 U.S. FEDERAL TRADE COMMISSION AND U.S. DEPARTMENT OF JUSTICE, COMMENTARY ON THE HORIZONTAL MERGER GUIDELINES (Mar. 2006), available at <http://www.usdoj.gov/atr/public/guidelines/215247.htm>.

12 *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko*, 540 U.S. 398, 410-15 (2004).

13 *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001).

eral regulatory immunity; state action immunity under *Parker v. Brown*,¹⁴ and *Noerr-Pennington*¹⁵ immunity for efforts to influence the government. Hovenkamp notes how the role for antitrust has expanded as we have deregulated chunks of the economy, such as trucking, railroads, and aviation. Again Hovenkamp emphasizes limits, as he suggests that “*Trinko* may effectively have brought the era of antitrust essential facility claims to an end, certainly in regulated industries where an agency is actively supervising the conduct that forms the basis of an antitrust claim.”¹⁶ Hovenkamp regards that as a decidedly good thing, as “an important step in our recognition that competition is not regulation, and federal courts are not regulatory agencies.”¹⁷

Hovenkamp turns next to the perceived conflict between antitrust and intellectual property rights. He takes a detour into copyright proper to criticize the Sony Bono Copyright Term Extension Act, which extended copyright duration retroactively an additional twenty years. In doing so, he illustrates—inadvertently I suspect—one of his points, namely that we fail to draw clean lines separating intellectual property and antitrust and that there is too much of a temptation to try to use antitrust to clean up IP doctrine seen by some to have run amuck. Hovenkamp is on firmer footing when he returns to considering the Supreme Court’s patent licensing cases and the blanket licenses at stake in *Broadcast Music*.¹⁸ Unfortunately, the book was written before the recent interest in patent settlements relating to generic drug entry under the abbreviated new drug application process set forth in the Hatch-Waxman Act.

The book then considers network industries and the *Microsoft* case. This is likely to be the most controversial chapter in the book. Hovenkamp starts with the definition of network as “a market subject to economies of scale in consumption.”¹⁹ That seems wrong; that is more a definition of a network externality than of a network itself. The phone system is a network with network externalities (the one-user phone system isn’t very valuable), while the electricity grid should count as a network, but I don’t benefit directly when you start consuming electricity. Hovenkamp then turns to discussing *Microsoft* case. He suggests that the case should be regarded as one of the “great debacles in the history of public antitrust enforcement” as he believes the consent decree that resolved the case

14 *Parker v. Brown*, 317 U.S. 341 (1943).

15 *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961).

16 HOVENKAMP, *supra* n. 1, at 248.

17 *Id.*

18 *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1 (1979).

19 HOVENKAMP, *supra* n. 1, at 277.

is likely to accomplish very little.²⁰ He argues in favor of allowing judges to retain jurisdiction over cases, not merely to assess whether consent decree terms have been met, but seemingly with a broader, overarching power to attempt to cleanse the market of the consequences of the anticompetitive conduct. That suggestion seems to fly in the face of Hovenkamp's prior concerns about the limits of judicial competence and what I suspect is the settled wisdom of the ongoing regulation of the telecommunications industry in the *AT&T*²¹ case by Judge Harold Greene. Hovenkamp goes on to suggest that the government itself could inject more competition into the operating system market through its purchases and in particular could switch to open source software to put pressure on Microsoft.

More importantly, Hovenkamp's book is pre-Google. Google and what it represents—a shift away from the computer desktop in favor of the network, and a move from products to services—have emerged as the core source of competition to Microsoft's position. Indeed, Ray Ozzie, who replaced Bill Gates as Microsoft's Chief Software Architect in June 2006, quickly declared the personal computer era over and saw the future in the shift towards services of the sort provided by Google. But the open questions are causal: did the antitrust consent decree play any role in creating space for Google to operate? Would Google have emerged anyhow? Or would Microsoft have Netscaped Google and rendered still-born the next serious threat to its desktop monopoly?

We should turn to what is missing from the book. Formal economics is largely absent from the book. One equation (the Lerner index, which measures market power), no calculus and maximization, and indeed relatively few extended numerical examples. There are a few graphs: a traditional early discussion of the social welfare harms resulting from a monopolist's reduced output and the Williamson welfare trade-off graph which highlights—usually in merger analysis—the social benefit of more efficient production and the potential harm from reduced output through greater market power. The book will not bring you up to date on recent developments in antitrust economics, including the large literature on the competitive consequences of bundling or the difficult issues associated with two-sided markets. The book is also a U.S. book, so there is very little discussion of international antitrust or of the antitrust rules of other jurisdictions (most notably nothing on the European Community).

These are not quibbles, but it would be a mistake to make too much about what are ultimately choices about the scope and size of the book. Hovenkamp's *The Antitrust Enterprise: Principle and Execution* will have a long life and a hefty market position. Readers would do well to make their contribution to that position by buying and reading the book. ▼

²⁰ *Id.* at 298.

²¹ *United States v. American Telephone & Telegraph Co.*, 552 F.Supp. 131 (D.D.C. 1982), *aff'd sub nom Maryland v. United States*, 460 U.S. 1001 (1983).