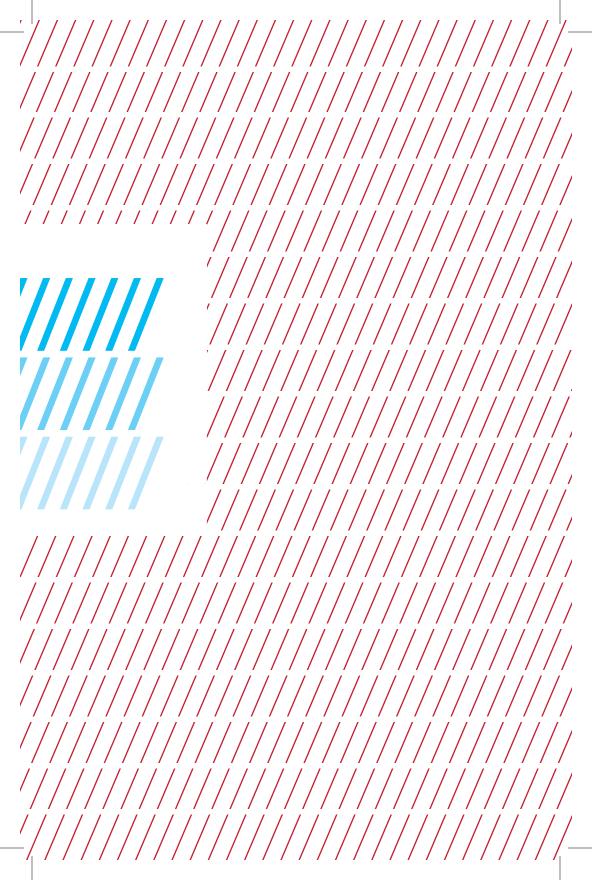
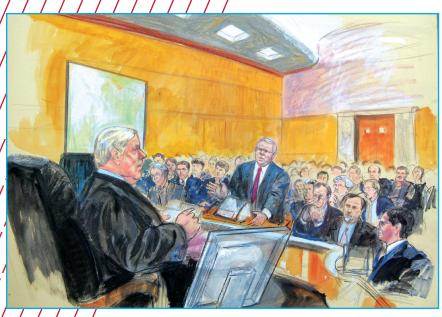


Berkman
The Berkman Center for Internet & Society at Harvard University





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 ${\bf Courtesy\ Dana\ Verkouteren} \\ http://www.caricature-dc.com/courtroom-sketch-artist-MD/index.html$ 

"United States of America v. Microsoft, arguably the most important antitrust case of the late 20th century—because it is, in a sense, the first case of the 21st century."

—Jeffrey A. Eisenach, Competition, Innovation and the Microsoft Monopoly: Antitrust in the Digital Marketplace

Sponsors

## ////// Cyberlaw Clinic

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Harvard's Cyberlaw Clinic engages Harvard Law students in a wide range of real-world litigation, licensing, client counseling, advocacy, and legislative projects and cases, covering a broad spectrum of important legal and policy issues relating to the Internet, new technology, and intellectual property. The Berkman Clinic was the first of its kind and today continues its tradition of innovation in this area.

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## The Berkman Center for Internet & Society

The Berkman Center's mission is to explore and understand cyberspace, its development, dynamics, norms, standards, and need or lack thereof for laws and sanctions.

We are a research center, premised on the observation that what we seek to learn is not already recorded. Our method is to build out into cyberspace, record data as we go, self-study, and share. Our mode is entrepreneurial nonprofit.

Overview

Ten years have passed since the U.S. Department of Justice and 20 states filed their landmark antitrust case against Microsoft and the trial of the lawsuit began in federal district court in Washington, D.C. This major conference, United States v. Microsoft: Ten Years Later, will look back over the last ten years and explore the lasting lessons and deeper meanings of the case for Microsoft, for the software and technology industries, and for antitrust law and enforcement. Sponsored by the the Cyberlaw Clinic at Harvard Law School and the Berkman Center for Internet & Society, this conference is the first retrospective to examine the lawsuit and its aftermath from the perspective of many of the participants in the original case and trial, as well as leading legal and economic academics.



All conference proceedings will take place in the Austin East classroom of Austin Hall, unless otherwise noted.

#### FRIDAY, September 12, 2008

2:00—3:00 pm	REGISTRATION
3:00—3:15 pm	WELCOME  Elena Kagan, Dean, Harvard Law School
3:15—3:30 pm	OPENING REMARKS  Phil Malone, Clinical Professor of Law, Harvard Law School
3:30—4:15 pm	GENERATIVITY, INNOVATION AND US v. MICROSOFT  Jonathan Zittrain, Professor of Law, Harvard Law School
4:15—4:30 pm	BREAK
4:30—6:00 pm	PANEL 1: Integrating Substantive Law, Strategy and Trial Tactics In a Complex Monopolization Case  John Cove, Partner, Boies, Schiller & Flexner  Karma Giulianelli, Partner, Bartlett Beck  Steve Houck, Partner, Menaker & Herrmann LLP  Tom Burt, Corporate Vice President & Deputy General Counsel,  Litigation Group, Microsoft Corp. (tentative)  Tam Ormiston, Iowa Attorney General's Office
6:00—7:15 <i>þm</i>	OPENING RECEPTION (John Chipman Gray room on the second floor of Pound Hall)  SATURDAY, September 13, 2008
8:00-8:30 am	COFFEE, REGISTRATION
8:30—9:45 am	PANEL II: Integration, Product Improvement and Tying: Access or Code; Liability or Remedy
	Moderator: Andrew Chin, Associate Professor of Law, University of North Carolina School of Law

David Heiner, VP and Deputy General Counsel, Microsoft

Steve Holtzman, Partner, Boies, Schiller & Flexner

Edward Felten, Professor of Computer Science and Public Affairs, Princeton University

9:45-10:00 am BREAK

10:00-11:00 am KEYNOTE ADDRESS AND DISCUSSION

**Brad Smith**, Senior Vice President and General Counsel, Microsoft Corp.

11:00—12:30 pm PANEL III: Assessing Market Power and Anticompetitive Conduct in

Dynamic, Innovation Driven Markets: Economic and Legal Lessons

from US v. Microsoft

Tim Bresnahan, Chairman, Department of Economics, Stanford University

Frank Fisher, Jane Berkowitz Carlton and Dennis William Carlton Professor of

 ${\it Microeconomics, Emeritus, Massachusetts Institute of Technology;}$ 

Chairman Emeritus, CRA International

Harry First, Professor of Law, New York University School of Law Keith Hylton, Professor of Law, Boston University School of Law

Doug Melamed, Partner, Wilmer Hale (former Acting AAG, Antitrust Division,

US DOJ)

12:30-1:30 pm LUNCH (provided)

(Hark South on the second floor of Harkness Commons)

1:30-2:15 pm REMARKS AND DISCUSSION

David Boies, Partner, Boies, Schiller & Flexner

2:15-3:15 pm PANEL IV: US v. Microsoft and The Media

Moderator: David Boies, Partner, Boies, Schiller & Flexner Rajiv Chandrasekaran, National Editor, Washington Post Mark Murray, General Manager, Coproate Public Relations

& Public Affairs, Microsoft Corp.

Joe Nocera, New York Times and Fortune Magazine

John Wilke, Wall Street Journal

3:15-4:00 pm REMARKS AND DISCUSSION "Minding the Gap,"

Andy Gavil, Professor of Law, Howard University School of Law

4:00—4:15 pm BREAK

4:15-6:00 pm ROUNDTABLE DISCUSSION

Moderator: Einer Elhauge, Professor of Law, Harvard Law School

David Boies, Partner, Boies, Schiller & Flexner

**Brad Smith**, Senior Vice President and General Counsel, Microsoft Corp.

Doug Melamed, Partner, Wilmer Hale

Keith Hylton, Professor of Law, Boston University School of Law

6:00 pm CLOSING REMARKS

## Speaker Biographies



David Boies, one of the nation's most successful and wellknown trial lawyers, is founding partner of Boies, Schiller & Flexner. He served as Chief Counsel and Staff Director of the U.S. Senate Antitrust Subcommittee in 1978 and Chief Counsel and Staff Director of the Senate Judiciary Committee in 1979. Among his many highprofile cases are the defense of IBM in its Iona-runnina antitrust case against the U.S. Justice Department: his defense of CBS against libel charges brought by retired General Wiliam Westmoreland; and his representation of the Federal Deposit Insurance Corporation in its litigation to recover \$1 billion in losses for failed savings and loans. Boies is probably best known for his role as lead counsel for former Vice-President Al Gore in the litigation relating to the 2000 election Florida vote count, and for serving as Special Trial Counsel for the Justice Department in its antitrust suit against Microsoft.



Tim Bresnahan is Chairman of the Economics Department at Stanford University. He is also the Landau Professor of Technology and the Economy and, by courtesy, a Professor of Economics for the Graduate School of Business He is the former Chief Economist of the Antitrust Division of the U. S. Department of Justice. His research focuses on industrial organization, applied econometrics, and the economics of technology. Currently, he is researching entry and appropriability in technology industries, competition between old and new-paradigm computing, and economic organization for high social return to technical progress.



Tom Burt is corporate vice president and deputy general counsel for litigation in Microsoft Corp.'s Law and Corporate Affairs Department. He manages all of the company's U.S. litigation issues, coordinates international cases and directs the work of outside law firms retained by Microsoft to represent it in lawsuits. He has built a strong internal Litigation Group, participated in negotiating a settlement of antitrust litigation with the U.S. Department of Justice, led the successful defense against additional antitrust remedies proposed by nine U.S. states, and represented Microsoft in a number of patent cases. Burt ioined Microsoft in 1995 and has since held several legal positions within the company.



Rajiv Chandrasekaran is the National Editor of The Washington Post and the author of Imperial Life in the Emerald City, a best-selling account of the bungled American effort to reconstruct Iraq. He joined The Post in 1994 as a reporter on the Metropolitan staff. From April 2003 to October 2004, he was The Post's bureau chief in Baghdad, responsible for covering the American occupation of Iraq and supervising a team of Post correspondents. He took a sabbatical from The Post in 2005 to serve as the journalist in residence at the International Reporting Project at the Johns Hopkins School for Advanced International Studies in Washington and as a public policy scholar at the Woodrow Wilson International Center in Washington.

Chandrasekaran appears regularly on CNN, MSNBC and National Public Radio.



Andrew Chin is a tenured associate professor at the University of North Carolina, where he teaches intellectual property and antitrust law. Before law school. he earned a doctorate in computer science at Oxford University on a Rhodes Scholarship and had taught computer science at King's College London. He graduated from Yale Law School in 1998 and began a clerkship with U.S. District Judge Henry Kennedy in Washington that fall. Judge Jackson soon learned of Chin's background and invited him to assist his own law clerk, David McIntosh, in drafting bench memos regarding the computer science evidence. Chin provided more than 800 hours of unpaid service during and after his clerkship term, deferring payment on his student loans to do so. Now fully solvent, Prof. Chin has presented his analysis of the trial evidence and subsequent phases of the case in two law review articles, reprints of which are available at registration or online

at andrewchin.com.



John F. Cove, Jr. is a partner at Boies, Schiller & Flexner LLP specializing in antitrust litigation and counseling. He has represented plaintiffs and defendants in antitrust matters, including price fixing, boycott, and monopolization cases, direct and indirect purchaser class actions, and unfair competition actions in federal and state courts across the nation. Mr. Cove has also represented clients in federal grand jury investigations of alleged cartel activity and other criminal offenses and in premerger reviews before federal and state antitrust authorities. Before joining the firm, Mr. Cove was a trial attorney with the Antitrust Division of the United States Department of Justice, where he served as a senior member of the trial team in United States v. Microsoft.



Einer Elhauge is the Petrie Professor of Law at Harvard Law School and faculty director of the Petrie-Flom Center for Health Law Policy, Biotechnology and Bioethics. He teaches courses including Antitrust, Contracts, Corporations, Health Care Law, and Statutory Interpretation. Previously, he was a Professor of Law at the University of California at Berkeley, and clerked for Judge Norris on the 9th Circuit and Justice Brennan on the Supreme Court. He has authored numerous pieces including antitrust peti-

tioning and state action immunity, legislative term limits, the 2000 Presidential election, sacrificing corporate profits in the public interest, corporate sale of control doctrine. whether lawyers improve the legal system, and how to devise a morally just and cost effective medical system. His most recent books include "Statutory Default Rules" (Harvard University Press 2008), and "U.S. Antitrust Law and Economics" (Foundation Press 2008).



Edward W. Felten is a Professor of Computer Science and Public Affairs at Princeton University. and is the founding Director of Princeton's Center for Information Technology Policy. His research interests include computer security and privacy, especially relating to media and consumer products; and technology law and policy. He has published about eightv papers in the research literature, and two books. His research on topics such as web security, copyright and copy protection, and electronic voting has been covered extensively in the popular press. His weblog, at freedomto-tinker.com. is widely read for its commentary on technology, law, and policy. In 2004, Scientific American magazine named him to its list of fifty worldwide science and technology leaders.

# Speaker Biographies Cont'd.



Harry First is the Charles L. Denison Professor of Law at New York University School of Law and the Director of the law school's Trade Regulation Program. From 1999-2001 he served as Chief of the Antitrust Bureau of the Office of the Attorney General of the State of New York. He is the co-author of law school casebooks on antitrust (with John Flynn and Darren Bush) and on regulated industries (with John Flynn), as well as the author of a casebook on business crime and the author of numerous articles involving antitrust law. Professor First has twice been a Fulbright Research Fellow in Japan and has served as an Adjunct Professor of Law at the University of Tokyo. His most recent scholarly work has focused on various aspects of the Microsoft litigation, and he and Professor Andrew Gavil are currently working on a book titled "Microsoft and the Globalization of Competition Policy: A Study in Antitrust Institutions," to be published by MIT Press.



Franklin M. Fisher, Ph.D., is the Jane Berkowitz Carlton and Dennis William Carlton Professor of Microeconomics. Emeritus at the Massachusetts Institute of Technology. where he taught for 44 years and the Board Chairman of CRA International. He received the Ph.D. in economics from Harvard University in 1960, and, in 2001, he received an honorary doctorate from the Hebrew University of Jerusalem, Professor Fisher is the author or senior co-author of 17 books and well over 150 articles in the area of economics. For many years, Professor Fisher has served as an expert witness in matters involving antitrust. contract disputes, valuation, damages, and trademark infringement. He was IBM's chief economic witness in its antitrust cases of the 1970s and served in a similar role on behalf of the Department of Justice in the Microsoft antitrust case.



Professor Andy Gavil

faculty of the Howard

University School of

Law in Washington,

D.C., where he has

taught since 1989.

law with firms in

He practiced antitrust

Chicago and Denver

from 1981 - 89 and

is a member of the

is Of Counsel to Sonnenschein Nath & Rosenthal LLP. Prof. Gavil has written, lectured. and commented on antitrust law and litigation, including exclusionary conduct by dominant firms, indirect purchaser rights, the role of expert economic testimony, burdens of production and proof, and the impact of the Supreme Court on the evolution of antitrust law. With William E. Kovacic and Jonathan B. Baker, he is the author of Antitrust Law in Perspective: Cases Concepts and Problems in Competition Policy (2d ed. 2008) and is currently at work with co-author Harry First on Microsoft and the Globalization of

Competition Policy:

A Study in Antitrust

Institutions.



Karma M.

Giulianelli is a Partner at Bartlit Beck Herman Palenchar & Scott in Denver. Prior to joining Bartlit Beck, she was a trial lawver in the Honors Program at the Antitrust Division of the US Department of Justice. While there, she worked on both criminal and civil antitrust matters, including merger and non-merger matters. She was a member of the team investigating Microsoft's Internetrelated conduct in 1996. After participating in the Oct. 1997 case against Microsoft alleging violations of the Consent Decree. she continued as a member of the trial team in US v. Microsoft, which was filed in May 1998.

At Bartlit Beck, her representations have included the Canadian government in a case involving civil RICO claims against R.J. Reynolds; Micron Technology in Micron v. Rambus; I.E. DuPont de Nemours & Company in products liability litigation; and Tyco International Ltd. in securities litigation.



David Heiner is Vice President & Deputy General Counsel at Microsoft Corporation, where he heads up the legal department's Interoperability & Antitrust Groups, Mr. Heiner is responsible for policy aspects of interoperability, work with standards organizations, antitrust counseling and representation of the company before antitrust regulatory agencies worldwide. Mr. Heiner is a graduate of Cornell University and the University of Michigan Law School. Before joining Microsoft in 1994. Mr. Heiner practiced at Sullivan & Cromwell in New York, focusing on antitrust, securities and other commercial litigation. Following law school. Mr. Heiner clerked for the Honorable Thomas P Griesa of the U.S. District Court of the Southern District of New York.



Steven Holtzman is a partner at Boies, Schiller & Flexner LLP, specializing in antitrust, intellectual property and securities litigation. Prior to ioining the firm, he was a Trial Attorney with the Antitrust Division of the US Department of Justice, in San Francisco. His professional experience includes extensive criminal. merger, non-merger civil and policy work. He was a senior member of the trial and investigative team in US v. Microsoft (D.D.C. 1998), and was co-lead or lead counsel in US v. Alliant Techsystems and Aerojet-General Corporation (W.D.II. 1994).

He also has extensive telecommunications experience, including representing the **United States** in US v. Sprint Communications, Deutsche Telekom and France Telecom (D.D.C. 1995), and representing clients such as AT&T. Texas Instruments. and Broadcom Corporation.



Stephen D. Houck is of counsel to the NYC law firm of Menaker & Herrmann LLP, where he specializes in antitrust law and commercial litigation, and is Executive Director of the Center for State Enforcement of Antitrust and Consumer Protection Laws. Inc.. a not-for profit corporation that works with state attorneys general to enhance the enforcement of antitrust and consumer protection laws. In addition. since 2003. Mr. Houck has served as Enforcement Counsel to the California Group of States in the government litigation against Microsoft.

Mr. Houck was
Chief of the Antitrust
Bureau of the New
York State Attorney
General's Office
from 1995—1999.
During that time
he represented the
plaintiff states as lead
trial counsel during the
liability phase of the
Microsoft litigation.

Mr. Houck received his undergraduate degree from Princeton University and his law degree from Harvard Law School.



Keith Hylton has published numerous articles in American law journals and peerreviewed law and economics journals. His textbook, Antitrust Law: Economic Theory and Common Law Evolution, was published by Cambridge University Press in 2003. Professor Hylton joined the Boston University School of Law faculty in 1995 after teaching for six years and receiving tenure at Northwestern University School of Law. At BUSL, he teaches courses in antitrust. torts, and labor law. In addition to teaching. he serves as Editor of the Social Science Research Network's Torts and Products Liability Law Abstracts and Co-Editor of Competition Policy International.

## Speaker Biographies Cont'd.



Elena Kagan, the Charles Hamilton Houston Professor of Law has served as Dean of Harvard Law School since July 1, 2003. A leading scholar of administrative law. Kagan has served on the faculties of both Harvard Law School and the University of Chicago Law School, in addition to holding senior legal and policy positions in the federal government. An alumna of Harvard Law School and a former law clerk to the late Justice Thurgood Marshall, Dean Kagan teaches administrative law, constitutional law, and civil procedure. Her recent scholarship focuses primarily on the role of the president of the United States in formulating and influencing federal administrative and regulatory law. She also has written on a range of First Amendment issues.



Phil Malone is a Clinical Professor of Law at Harvard Law School and the Director of the school's Cyberlaw Clinic at the Berkman Center for Internet & Society. He previously served for over 20 years as a federal prosecutor with the Antitrust Division of the U.S. Department of Justice, including seven years as the lead civil service lawyer on the government's antitrust investigations of and trial against Microsoft. Before leaving the Justice Department, Malone was one of the lead lawyers in the antitrust trial against Oracle Corp. At Harvard, Malone directs the work of the Cyberlaw Clinic and teaches the seminars Antitrust, Technology and Innovation, and Practical Lawyering in Cyberspace, as well as a Freshman Seminar at Harvard College, Cyberspace in Court: Law of the

Internet.



A. Douglas Melamed is a partner in the Washington, D.C., office of Wilmer Cutler Pickering Hale and Dorr LLP. He has more than thirty years experience in antitrust counseling; in nonmerger investigations and litigation, particularly in the technology, telecommunications, media and financial services sectors; and in the merger review process. He has litigated cases in the U.S. Supreme Court. lower federal and state courts, and before the FTC. He has been involved in most of the leading recent cases at the intersection of intellectual property and antitrust, including the Microsoft, Rambus and Philips/ITC cases. Mr. Melamed served in the U.S. Department of Justice. Antitrust Division, from 1996-2001, as Acting Assistant Attorney General and, before then, as Principal Deputy Assistant Attorney General. He received his B.A. from Yale University in 1967 and his J.D. from Harvard in 1970, where he was an editor of the Harvard Law Review.



Joe Nocera writes the Talking Business column for The New York Times each Saturday. He is also a staff writer for The New York Times Magazine. In addition, he serves as a regular business commentator for NPR's Weekend Edition with Scott Simon.

Before joining The Times in 2005, Mr. Nocera spent 10 years at Fortune Magazine.

He was a 2007 Pulitzer finalist, He has won three Gerald Loeb awards, including the 2008 award for commentary, and three John Hancock awards for excellence in business journalism. His most recent book, "Good Guys and Bad Guys: Behind The Scenes With The Saints and Scoundrels of American Business (and Everything In Between)" (Portfolio, 2008) was published this spring.

Mr. Nocera earned a B.S. in journalism from Boston University in 1974. He was born in Providence, Rhode Island, and lives in New York City.



#### Tam Ormiston

ioined Iowa's Consumer Protection Division in 1978 and became the director of its Farm Division in 1983. After a leave of absence. he returned to the Iowa Attorney General's Office in 1998 as Chief Policy Deputy Attorney General, where he has served as the Consumer Advocate for the State of Iowa and oversaw the Consumer Protection Division and the Department of Human Services/ Board of Regents Division, including Iowa's role as one of the state plaintiffs in US v. Microsoft. He has served in a variety of capacities since then. Mr. Ormiston received the Marvin Award from the National Association of Attornevs General. He is a 1974 graduate of the University of Iowa School of Law, where he simultaneously earned a Master's Degree in American Studies. He also participated in a joint Fulbright program at Seoul National University in Seoul. Korea.



### **Brad Smith is**

Microsoft's Senior Vice President, General Counsel and Corporate Secretary. Smith has played a leading role on intellectual property, competition law, and other Internet legal and public policy issues. He is also the company's chief compliance officer. Since becoming general counsel in 2002, he has overseen negotiations with governments and other companies, includina Microsoft's 2002 antitrust settlement with state attornevs general, its 2002 data privacy negotiations with the Federal Trade Commission and European Commission, and agreements to address antitrust or IP issues with Time Warner, Sun Microsvstems. RealNetworks. IBM and Novell

Smith previously worked for 5 years as Deputy General Counsel for Worldwide Sales. Prior to that, he spent 3 years managing the company's European Law & Corporate Affairs group, based in Paris.



vember 1999.

#### John Wilke John Jonathan Zittrain Wilke is a reporter is Professor of Law at

Harvard Law School. and news editor in the where he co-founded Washington bureau of The Wall Street its Berkman Center Journal. He writes for Internet & Society. about law enforce-Previously he was Professor of Internet ment and government regulation, covering Governance and Regfederal courts, the ulation at Oxford University. His research Justice Department and other agencies. In interests include July 1989, Mr. Wilke battles for control of joined the Journal as digital property and a reporter in the Boscontent, cryptography, ton bureau, covering electronic privacy. technology. He moved the roles of intermeto the Washington budiaries within Internet reau in May 1995 and architecture, and the covered economics useful and unobtrusive and the Federal Redeployment of techserve until December nology in education. 1996 when he began He performed the first covering government large-scale tests of Intechnology policy, the ternet filtering in China and Saudi Arabia in Federal Trade Commission and the Jus-2002, and now as part tice Department. He of the OpenNet Initiawas appointed to his tive he has co-edited current position in Noa study of Internet filtering by national governments. Access Denied: The Practice and Policy of Global Internet Filtering. His book The Future of the Internet—And How to Stop It was just released from Yale University Press and Penguin UK-and under a Creative Commons license. Papers

> may be found at http://www.jz.org.





### IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,

٧.

MICROSOFT CORPORATION,

Defendant.

Plaintiff,

Civil Action No.

(Antitrust)

COMPLAINT

Joel I. Klein Assistant Attorney General

A. Douglas Melamed Principal Deputy Assistant Attorney General

Rebecca P. Dick Director of Civil Non-Merger Enforcement

Jeffrey Blattner Special Counsel for Information Technology

U.S. Department of Justice Antitrust Division 950 Pennsylvania Avenue, N.W. Washington, D.C. 20530-0001 Christopher S Crook
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Attorneys

Logistics

All events on Sept. 12 and 13 will take place in the Austin East classroom in Austin Hall except for the Friday reception, which will be held in the John Chipman Gray room on the second floor of Pound Hall, and the Saturday lunch, which will be in the south dining room on the second floor of Harkness Commons. For more information on logistics, please consult the US v. Microsoft: Ten Years Later website:

http://cyber.law.harvard.edu/events/usvms



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