Intergraph Gains Injunction Against Intel

Court Documents Shed Light on Questionable Intel Business Practices

by Linley Gwennap

In granting an injunction against Intel in the Intergraph suit (see MPR 4/20/98, p. 4), U.S. District Judge Edwin Nelson cited several previous court rulings that, applied to Intel, portray the microprocessor giant as a monopolist. The ruling also makes public certain incidents that show Intel as an aggressive enemy. Judge Nelson—who, like Intergraph, is located in Alabama—believes these incidents show Intel abusing its monopoly power in an illegal fashion.

Intel's Questionable Business Practices

The court documents paint a picture of Intel as a company bent on controlling its customers. Wade Patterson, an Intergraph executive, describes how Intel has changed its disclosure policy over time. "Initially, most of the information necessary to develop products using Intel's chips was provided in product data books. ... However, as each subsequent generation of chips were made available, … information which was no longer contained in product data books, but necessary for product development, was migrated into packets of confidential information commonly referred to as 'yellow books.' … Intel managed the supply of such yellow books … through the use of nondisclosure agreements (NDAs)."

This set the stage for Intel to pull the rug out from under Intergraph. Despite earlier assurances from then-CEO Andy Grove that Intel "treated all of its developers fairly and equally," Patterson testified that "I was advised by both Pat Gelsinger and Anand Chandreshaker, on four separate occasions, that Intel would not enter into any future nondisclosure agreements or supply any information normally provided under nondisclosure agreements, unless Intergraph conceded and granted Intel rights under its Clipper patents. Shortly thereafter, Intel first demanded the return of information under [sic] nondisclosure agreement."

Judge Nelson finds Intel's new NDA policy disturbing. "In view of Intel's previous policy … and in view of the fact that Intel has offered no reasonable explanation of any present need for the use of the NDAs, it seems reasonable to conclude that Intel's present use of one-sided and terminable-at-will NDAs and its retaliatory cancellation of the NDAs are unreasonable and anticompetitive contractual restraints using Intel's monopoly in CPUs and related design and technical information. Furthermore, the chilling effect which Intel's arbitrary enforcement of the NDAs in this manner must have on other members of the industry, who are dependent upon Intel for microprocessors, is obvious."

Intergraph filed suit on November 17, 1997, to prevent Intel from repossessing the yellow books. Then things really got ugly. According to the court, "One day after suit was filed, Intel imposed [by mailing a letter] a three-day deadline for Intergraph to submit a request for the allocation of chips for the second quarter of 1998. There is no evidence the letter was received by Intergraph until December 1, 1997." Intel later relented, permitting Intergraph to submit its request for processors.

Intel continued to make Intergraph's life difficult. The court finds that "Intel originally promised Intergraph that it would deliver samples and technical information pertaining to Intel's latest microprocessor (code named 'Deschutes') by December 15, 1997. Those samples were not delivered to Intergraph until January 26, 1998, the date on which Intel publicly released that product as the 333-MHz Pentium II microprocessor. That same day, Intergraph's competitors announced that they had Deschutes-based workstations available for delivery."

Flashing a bit of sarcasm, Judge Nelson writes that he "is impressed with the manner in which Intel apparently plays 'hard ball' with those who cross it."

Judge Labels Intel a Monopolist

Intergraph is attempting to prove that Intel is in violation of the Sherman Antitrust Act, section 2 (§ 2). To prevail in this claim, writes the judge, "Intergraph only needs to establish that Intel (1) possesses monopoly power in the relevant market and (2) has willfully acquired or maintained that power. The court concludes that Intergraph has established a substantial likelihood of proving both elements at trial."

The judge draws a distinction between the processors that Intergraph requires—high-performance Slot 1 processors compatible with Windows NT—and the microprocessor market in general, citing *U.S. Anchor v. Rule Industries*, which held that the market for a premium anchor constituted its own relevant market within the broader anchor market.

Within this relevant market, Intel's share is 100%, as there are no other Slot 1 processors available today. Even in the broader microprocessor market, Intel's extraordinary market share "clearly exceeds the legal threshold for presumptive monopoly power," according to Judge Nelson. "A sixty to sixty-five percent market share establishes a *prima facie* case of market power and creates a genuine issue of dangerous probability of monopolization." He cites *U.S. v. Grinnell*, which found an 80% market share to be a "substantial monopoly" and an 87% market share "leaves no doubt" of monopoly power.

"Based on the foregoing facts," he concludes, "the court finds that Intel has monopoly power in the relevant market of high-performance CPUs … on a worldwide basis."

Duties of a Monopolist

A monopolist has responsibilities that most companies do not, regardless of whether it achieved its dominant market share through legal or illegal means. As the judge explains, "Because Intel is a monopolist, the law imposes upon it affirmative duties to refrain from acting in a manner that unreasonably harms competition. It is not necessary for Intergraph to establish that Intel acquired its monopoly unlawfully. It is enough to show that Intel has misused or maintained that monopoly, even if lawfully acquired. ...

"Even conduct by a monopolist that is otherwise lawful may violate the antitrust laws where it has anticompetitive effects," the judge points out. Intel has argued that its NDAs contain a clause that allows it to terminate an NDA at any time for any cause. Judge Nelson believes this clause is invalid because it imposes an "unconscionable" burden on Intergraph and thus violates the Uniform Commercial Code (UCC) as well as the Sherman Antitrust Act. "Contracts used as part of an anticompetitive scheme are unlawful under the antitrust laws," he writes.

He argues that Intel's processors have become the lifeblood of the computer industry and thus constitute an "essential facility" similar to electrical power. "Intel's advanced CPUs and Intel's technical information are 'essential' if they are vital to competitive viability and [if] competitors cannot effectively compete in the relevant market without access to them. …

"Reasonable and timely access to critical business information that is necessary to compete is an essential facility. Furthermore, a monopolist's unilateral refusal to deal violates § 2 of the Sherman Act where such conduct unreasonably handicaps competitors or harms competition."

The judge notes that a monopolist cannot hide behind patent law while violating antitrust law: "That Intel owns patent rights to its CPUs does not confer upon it a privilege or immunity to violate the antitrust laws." He cites several cases to make his point, in particular quoting *Image Technical Services v. Eastman Kodak* that "exclusionary conduct can include a monopolist's unilateral refusal to license a [patent or] copyright or to sell a patented or copyrighted work."

This point of law also appears applicable to Intel's refusal to license the P6 bus (see MPR 4/20/98, p. 3). The company claims it is protecting its intellectual property, but if Intel is found to be a monopolist, it could be forced to license the bus to competing chip-set vendors that want to produce P6-compatible system logic.

Intel Must Deal With Intergraph

Intel argues that because Intergraph threw down the first suit, Intel should not have to do business with the workstation vendor. Furthermore, says Intel, Intergraph was threatening Intel's customers with patent claims (see MPR 12/29/97, p. 3), leading Intel to terminate Intergraph's NDA.

Judge Nelson isn't buying any of these arguments. He notes that Intergraph had a similar patent conflict with IBM, yet the two companies continued to do business with each other during the conflict. "The court concludes that Intel has no legitimate business reason to refuse to deal with Intergraph. Intergraph has been a loyal and beneficial customer of Intel. The dispute over Intergraph's patent claims could be resolved separately without Intel denying Intergraph the essential CPUs and technical information it needs."

The ruling requires Intel to treat Intergraph in the same way it treats similar companies: "Hewlett-Packard, Compaq, Dell, IBM, Netpower, and Silicon Graphics." Intel must keep track of how it distributes yellow books, samples, and processors to these companies to demonstrate that Intergraph is being treated fairly. Intel has promised to comply with the injunction while also appealing it.

In agreeing to the injunction, the judge weighed the fact that the burden on Intel to support Intergraph is small, but if Intel does not provide support, the potential damage to Intergraph is great. In a final ruling, the judge must ignore these factors, which could improve Intel's chances. The judge also notes, "On a preliminary injunction determination, the quality of evidence is not restricted to what would be admissible at trial. At this stage, Intel has had an opportunity to rebut, but has failed to rebut, the key evidentiary assertions made by Intergraph."

For More Information

Intergraph has built a veritable Web shrine containing all court documents and information relating to its suit against Intel, including the full text of Judge Nelson's 70-page ruling. It is located at *www.intergraph.com/intel*.

Intel Lawyers Fight Back

Intel's appeal outlines several lines of defense that may prevail, if not in overturning the injunction then at the full trial. Intel asserts that Intergraph's claim for relief under the Sherman Act requires that company to be a competitor to Intel. Since Intergraph has abandoned its CPU efforts, it has instead convinced the judge that it competes with Intel in the graphics market. Intel argues that its "alleged" monopoly in microprocessors has no bearing in the graphics market, where the company's market share is in single digits.

A federal court of appeals will try to sort out these claims. Intel's stated defense may work in the Intergraph case, but it doesn't appear relevant if a chip-set vendor files a similar suit, or if the U.S. Federal Trade Commission files suit in the wake of its pending investigation.

If Intel is declared a monopolist in a federal court, it could be subjected to a flood of lawsuits from CPU, system-logic, and graphics-chip makers. Intel has often settled suits before the final verdict comes in, and if its appeal fails, we expect the company to settle this suit as well to avoid even the chance of such a catastrophe. M