Coming to Grips with Antitrust

Settlements Likely on Business Practices, But Not on Product Integration

Since I last wrote about the issue of Intel's and Microsoft's power a mere six weeks ago (see MPR 5/11/98, p. 15), a lot has happened: Microsoft negotiated until the 11th hour but ultimately decided to fight the U.S.Department of Justice (DOJ) in court, and the U.S. Federal Trade Commission (FTC) has filed suit against Intel (see MPR 6/22/98, p. 8).

Intel and Microsoft are both aggressive companies, to say the least—and their shareholders have reaped the rewards. Both are also smart companies with legions of lawyers working for them, and it seems very unlikely that either company would knowingly pursue an illegal strategy. But the line between what is illegal and what is merely aggressive is not precisely defined, and it is now apparent that the government's view of where the line belongs is quite different than Intel's and Microsoft's views.

Antitrust concerns have been raised about Intel's business practices for years. There have been prior investigations by the FTC, and there have been lawsuits by AMD and Cyrix. Until now, nothing has gone very far. One problem faced by attorneys working on the prior cases is that it was difficult—perhaps impossible—to get PC makers to testify about their dealings with Intel. Digital and Intergraph, however, both reached the point where their executives felt the need to act, and the companies' lawsuits against Intel put in the public domain the first on-the-record complaints about Intel.

The Intergraph case (see MPR 5/11/98, p. 16) is especially relevant, since it deals with Intel's practice of withdrawing its nondisclosure agreements from companies with which it is involved in legal disputes. In the preliminary injunction ruling in this case, Judge Edwin Nelson issued the first legal opinion that Intel "has monopoly power in the relevant market of high-performance CPUs," setting the stage for further actions (though Intel has appealed this decision).

Since it is not possible to be a competitive PC vendor without being able to plan in advance for Intel's future processors, as my colleague Linley Gwennap pointed out last December (see MPR 12/29/97, p. 3), Intel can, by deciding who gets advance information, decide who gets to play and who doesn't—an extraordinary power.

The way Intel uses its NDAs clearly would be legal for an ordinary company but is another issue entirely for a company in Intel's position. Intel asserts that even if it has a monopoly—which it disputes—there is no legal basis for requiring it to disclose confidential information to any company, but the government obviously disagrees.

Many PC makers are concerned about the effects their actions might have on their relationship with Intel, which makes it harder for Intel's competitors to gain design wins. Intel says it would not cancel NDAs in retaliation for a customer's use of a non-Intel chip, and its track record supports this claim—but the mere possibility must cause some concern.

In Microsoft's case, the Department of Justice is going far beyond business practices: it is trying to put limits on product definition. As a result, it is understandable that Microsoft felt the need to fight; fundamental product-design issues are at stake. The browser issue has overshadowed issues about Microsoft's business practices, which are the more appropriate subject for DOJ intervention.

Intel and the FTC may be able to reach a negotiated settlement of the current complaint; it seems that Intel could comply with the FTC's demands without any material affect on its business. Intel is not willing to accept the "monopolist" characterization, however, and Intel's executives are no doubt concerned that any concession would be the beginning of a long series of actions—give 'em an inch and they'll take a mile. Intel may well be concerned that other areas, such as how it allocates chips and comarketing funds, will come under scrutiny. Despite this concern, however, the distraction and resource drain of a long, drawn-out fight with the government—which still could end with Intel losing—could be even more damaging.

Should the FTC challenge Intel's right to integrate graphics into its system logic (as it plans to do with the forthcoming Whitney chip set), or whether Intel can integrate these functions on the processor, then Intel would have to fight to the final appeal—just as Microsoft will fight over browser integration. It is appropriate that the government take a close look at the business practices of these two companies, which have an extraordinary degree of control over a critical industry. But having the government involved in product definition—and asking companies to buck natural technology trends—in untenable.

Intel realized what it meant to be a consumer company only when it was faced with a consumer revolt—and a massive write-off—over the FDIV bug (see MPR 1/23/95, p. 4), and the company's attitudes changed profoundly. Similarly, Intel may have another epiphany as a result of the FTC investigation changing its business practices to those appropriate to a company with its immense market power. M

See www.MDRonline.com/slater/antitrust *for more on this subject. I welcome your feedback at* mslater@zd.com.