Intel Dodges Bullet

FTC Consent Decree Avoids Broader Issues

In settling its case against Intel just two days before the trial was scheduled to start, the U.S. Federal Trade Commission (FTC) convinced Intel to accept a punishment as severe as the government was likely to gain, even if it had won the trial. This agreement appears to be a coup for the FTC, but it fails to address any of the broader issues that would have resulted from a completed trial. Intel is happy to receive a slap on the wrist, and the rules governing dominant technology vendors are as muddled as ever.

To settle the case, Intel has agreed to a consent decree (which has been approved by the FTC but is not officially binding until the public-comment period ends on May 16). The decree (*www.ftc.gov/os/1999/9903/d09288intelagreement.htm)* prevents Intel from taking retaliatory action, such as refusing to provide products or advance product specifications, against a customer due to an intellectual-property (IP) dispute. Essentially, the decree prevents Intel from doing what it did to Compaq, Digital, and Intergraph in various disputes over the past few years (see MPR 6/22/98, p. 8).

Intel admits no wrongdoing in these previous events, but it will be forced to act differently in the future. If a customer asserts its IP (patents, trade secrets, etc.) against Intel, the CPU maker must either defend itself in court or negotiate a license with the customer; Intel cannot simply extort a license, as it did in these earlier situations, although it may apply more subtle forms of coercion.

While preventing Intel from committing such dastardly acts, the decree will have little financial impact on the company, which should be able to license others' IP for modest fees or through royalty-free cross-license agreements. With Intel's enormous cash and patent portfolios, the cost of obtaining IP should be immaterial.

Given the narrow scope of the FTC's case, the agency could not have accomplished much more through a favorable ruling in the trial. There was some chance (a significant one, depending on whom you talk to) that the FTC would not have won its case. A trial and appeal also would have taken at least a year or two. Thus, the consent decree is a bird in the hand worth more than a lengthy and uncertain trial.

For Intel, the outcome of the trial might have been much worse. To win its case, the FTC would have had to demonstrate that Intel holds monopoly power in one or more relevant market segments and thus is bound by the Sherman Antitrust Act. Had the judge ruled in the FTC's favor, Intel would legally be branded a monopolist.

This ruling, if upheld in the inevitable appeal, would have opened the door for a horde of follow-on suits, allowing both the FTC and various civil parties, including Intel's competitors and customers, to file suit against Intel for a variety of business practices. With Intel declared a monopolist, these cases would be halfway to victory before they even started. By signing the consent decree, Intel avoids this scenario, gaining a key legal victory. While the decree treats Intel as a monopolist, it does not legally apply that label. The Intergraph case (see MPR 5/11/98, p. 16), scheduled for trial next February, will be the next to litigate Intel's monopoly status.

The consent decree also avoids setting a precedent for other companies. Many companies have a dominant share of a particular market segment. This is particularly prevalent in technology areas, due to the power of standardization. Microsoft, Cisco, and Adobe, for example, have the power to abuse their customers in the same way Intel did. Unlike a judge's ruling, the consent decree has no legal effect on these other vendors.

The problem is that the Sherman Act and most subsequent case law define the relationship between a monopolist and its competitors, but they say little about how a monopolist can treat its customers. Intel has given the vendor/customer relationship a new twist: in striving to offer the best possible system technology to its customers, Intel occasionally takes IP from one customer and makes it broadly available. Whether the Sherman Act protects a customer from IP theft in this situation remains unclear.

The settlement does protect Intel's customers, who can more boldly assert their rights in the future. Removing one of Intel's more feared enforcement techniques may subject the company to more lawsuits. The plaintiffs, however, must still prove the merits of their case to win a judgment.

The consent decree validates my view that allowing Intel to destroy a customer's business is simply unfair (see MPR 12/29/97, p. 3). By not seeing the case through to trial, however, the FTC failed to find this conduct illegal. The decree protects Intel's customers from Intel, but it offers mere guidelines to the rest of the industry. In its rush to resolve the minor issues in this case, the FTC ignored the broader interest. Regardless of its outcome, a trial would have established a legal precedent that would govern the future behavior of many technology companies. That result would have been beneficial. M