The Gnat versus the Borg

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This month's Micro Law continues the discussion begun in the last issue, that topic being the contempt of court case against Microsoft that the US Justice Department (DOJ) brought in October 1997. (See Micro Law, Nov.-Dec. 1997, pp. 3-5.) Part I described the background of the present case, and the evidence on whether Microsoft has been coercively packaging Internet Explorer (IE) with Win 95 to swallow up the Internet browser market. Part I concluded that it should be difficult for the DOJ ultimately to persuade the court that the antitying clause of the 1996 consent judgment in *US v. Microsoft* covers what Microsoft has been doing with IE. It also suggested that the DOJ will probably need to bring a new antitrust case to combat these practices. The article also expressed some doubt about the ability of the DOJ gnat to stampede the Microsoft elephant. Part II now advances from Part I's metaphor of a gnat biting the backside of an elephant to the metaphor of trying to cope with the Borg.

December ruling

Since the publication of Part I, the district judge issued a preliminary order ruling on the DOJ's motion. The motion asked that Microsoft be held in contempt and be enjoined from Win95-IE tie-ins pending the outcome of the contempt proceeding. Judge Jackson ruled, December 11, 1997, that the 1996 decree was not so clear and unambiguous that he could fine Microsoft for contempt. He noted that to fine the defendant the court must resolve any ambiguity in the decree in favor of the defendant. Also, the government must establish contempt by clear and convincing evidence—not just a mere preponderance of evidence.

On the other hand, he felt that while it remained to be decided whether Microsoft had violated the decree, nonetheless he didn't agree with Microsoft's interpretation of the "integration" proviso in the decree. (This was the proviso in section IV(E)(i) of the 1995 consent judgment that said: 1) Microsoft could not tie licenses of operating system software to licenses of another software product: but 2) Microsoft could develop integrated software products.) For additional details on the court proceedings, see the "Preliminary order" on the box next page.

The real issue

As most observers recognize, the fundamental issue lurking under the smoke and rhetoric is whether Microsoft should assimilate functionality into Windows that another vendor could practicably market as a stand-alone product. What went on with the IE 3 icon is a mere preliminary (see Part I, again). As will appear, the behavior about which the DOJ is now exercised is objectionable and anticompetitive. It can be cured, although section IV(E)(i) of the consent judgment failed to do so. But the cure is pointless because the patient will promptly die from a new disease.

What's wrong with the conduct does not deserve extended discussion. Microsoft used its market muscle to raise the bar that Netscape and other browser wanna-bes must jump over to be in the browser business, whether as new entrants or existing players. If unchecked, Microsoft will continue to try to keep or push them out of the marketplace and add a browser monopoly to its operating system (OS) monopoly.

It is indisputably unlawful for a firm with monopoly power (and Microsoft clearly has a monopoly over PC OS software) to use that power to exclude others from a nearby market. Microsoft is leveraging its power over OS software to try to become the sole or at least the dominant source of browser software. (That Microsoft calls this conduct "further integration of the OS" doesn't

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Preliminary order in the Microsoft case

By placing its main focus on the integration proviso of the consent decree, Microsoft may have committed a major tactical blunder. Microsoft might have been much better off just to have denied that its abusive conduct was a licensing tie-in. The issue in a contempt proceeding is not whether the defendant was naughty or even downright evil. It is whether the defendant violated the specific language of the decree. Accordingly, Microsoft might more successfully have argued that it was just giving away a whistle in its box of Cracker Jacks and making OEMs blow it. This being the case, if the DOJ thought there was a loophole in the consent decree, the DOJ's only remedy would have been to file a new lawsuit and try to get a different decree.

Instead, Microsoft claimed that the integration proviso clearly exempted what it was doing to Netscape and OEMs such as Compaq. Then, Microsoft feigned astonishment (according to the obviously annoyed judge) that the DOJ could think that the integration of Win95 and IE was anything more than just good "cybernetic engineering." Microsoft jumped feet first into an angels-on-a-pinhead debate over whether IE and Win95 were one or two products, insisting that they were a single product. Then Microsoft proceeded to argue that even if they were two products, the *Webster's Third New International Dictionary* says "integrated" just means "combined." It argued that combining Win95 and IE 4 was purely and simply integration, just like combining pancakes and maple syrup, or DOS and Windows 3, or DOS and DoubleSpace, and therefore expressly authorized in the consent decree.

During the December 5 oral argument of the contempt motion, the judge further probed counsel's concept of what it meant under the decree for Microsoft to integrate functions into the operating system (OS). Microsoft two-stepped badly. First (according to the judge's opinion), Microsoft provocatively opined that the decree gave it "absolute discretion to dictate the composition of its OS" and "unfettered liberty to impose its idea" of what belongs in the OS. This was not the thing to say.

"What about integrating Word and Excel into the OS?" the judge asked. Microsoft's counsel then faltered, lost his bravado, turned chicken, and allowed that perhaps that went too far. Wrong! It was too late to backtrack by that time; it was in for a penny, in for a dollar time by then. The judge jumped on that concession in his written opinion, and slid Microsoft right down the slippery slope. He said that Microsoft gave him no principled way to distinguish integrating Excel from integrating IE 4. Accordingly, Microsoft's interpretation of the proviso would render the rest of the critical 55 words of the decree—section IV(E)(i), which the DOJ charged Microsoft with violating—"essentially meaningless."

There is a celebrated legal test known in applied jurisprudence by the technical name, the "puke" test. Microsoft's arguments flunked this test as far as the judge was concerned. He concluded that Microsoft had conceded that section IV(E)(i) did reach Microsoft's controversial licensing practices in some respect. Therefore he would have to decide to what extent it did so, after getting more facts.

That's why it would have been more prudent for Microsoft to take its stand on whether there was a licensing tie-in at all, and to have argued that IV(E)(i) simply didn't apply to requiring OEMs to use a giveaway browser. Microsoft should have just said that not every naughty deed is a tie-in, even assuming that this deed was naughty. To be sure, there is a down side to this approach. Microsoft would have to have said something like this:

> Your Honor, the DOJ says we committed contempt of your order that we should not turn over their garbage can. We just didn't do that. If you believe their allegations, at most what we did was poison their dog. By no stretch of the imagination is that turning over their garbage can. If they don't like our poisoning their dog, they just have to bring a new suit against us on that issue, and we'll respond appropriately if and when they bring that case. But they can't claim that the old order covers dog poisoning, because it clearly doesn't.

Perhaps, it somehow fits in better with Microsoft's corporate culture to argue that it signed a deal with the DOJ that affirmatively authorizes it to poison the dog.

The judge ruled that he would not hold Microsoft in contempt on the present record, but he would deny Microsoft's present request to dismiss the DOJ contempt motion. He would allow further discovery of the facts before ruling, as Microsoft had requested, but he would also attempt to maintain the status quo in the interim. He did this by issuing a preliminary injunction ordering Microsoft not to compel OEMs to use IE 4 with Win95 until the facts had been more thoroughly established and he had made a final ruling. He then appointed a special officer to supervise discovery, inquire into the facts, and make recommendations to the court as to the facts and law by May 31, 1998. But in the meantime, there was to be no more compulsory bundling of IE.

The appeal

Microsoft appealed to the DC circuit's court of appeals on December 15. Microsoft claimed that the district court was entitled only to decide forthwith whether Microsoft had committed contempt—but not to grant a preliminary injunction while studying the matter further. That is, the court had just two options: fine Microsoft $1 million per day for intentional disobedience of the consent decree or else wholly acquit it. This seems to be yet another case of Microsoft making an overbearing, bad argument when it might have made a moderate, more reasonable one.

Clearly a court has the power to maintain the status quo while it makes up its mind on the merits; otherwise the case would be decided by one party's *fait accompli*. It may be that this court made a mistake on these facts and should have exercised its discretion against the DOJ on grounds

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Preliminary order in the Microsoft case (continued)

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that its case was too weak. But that doesn't mean the court had no power to act, as Microsoft claims.

It also seems only reasonable to conclude that the court is not stuck with the either/or of intentional contempt or complete innocence. Among the possible intermediates is that Microsoft did not obey the consent decree, properly interpreted, and yet its conduct was not so culpable as to warrant a fine—just an admonition. (For reasons given elsewhere in this column, I believe Microsoft did not violate the decree and permissibly exploited a loophole in it: Microsoft committed an attempted monopolization but not a tie-in. But the judge is entitled to form a different opinion, and certainly he is entitled to take some time to form his opinion.)

In granting this order, the court said:

> The probability that Microsoft will not only continue to reinforce its operating system monopoly by its licensing practices, but might also acquire yet another monopoly in the Internet browser market, is simply too great to tolerate indefinitely until the issue is finally resolved. Those practices should be abated until it is conclusively established that they are benign.

That is an interesting statement, and it may have much to recommend it. But it is at best a statement that belongs in a case brought to suppress monopolization or a restraint of trade, not a contempt case brought to enforce an existing consent decree forbidding a specific practice. Moreover, Microsoft doesn't have to establish conclusively that its practices are benign. As the court stated earlier in its opinion, it's up to the DOJ to establish by clear and convincing evidence that Microsoft committed contempt of the decree. In short, even if this is the right idea, it's in the wrong place. That's what Microsoft should have zeroed in on in an appeal, not something about which the judge is clearly in the right. (Even then, an appellate court could say that it's just one over-enthusiastic statement in an otherwise unexceptionable opinion. So, it's just a harmless error and not clearly erroneous or an abuse of discretion. That is judgespeak for "you got the shaft, buddy, but you still lose.")

Does all of this mean that things should remain quiet in this case until after June 1? No.

The explanation

Microsoft's response to the court's preliminary injunction was, as one commentator put it, "expletive deleted, judge." Microsoft explained its actions in a letter to the DOJ that Microsoft posted at www.microsoft.com/corpinfo/doj/12-17malone.html (see also Microsoft's Q&A sheet at www.microsoft.com/corpinfo/doj/Q&A.htm). Microsoft informed OEMs that they have the choice of installing IE 3 with Win95. If the OEM did not install IE 3, "it is an inescapable fact that the remainder of the operating system will not function." (As Microsoft's Brad Chase told the press, total deletion of all IE 3 files from Win95 as now released would result in an operating system that "doesn't boot.") But "we are actually going the extra mile to give computer manufacturers more options," Microsoft stated. OEMs can also have the August 1995 original version of Win95, which will boot up and function without IE. This version lacks the DLLs, other enhancements, and bug fixes, however, that Microsoft added to Win95 over the last 30 months. For example, it lacks MSHTML.DLL, so that Quicken 98, games, and other applications that display text in HTML format will not work. Absence of other files added since the August 1995 version wipes out Microsoft Office, Lotus Notes 4.6, and hundreds of other applications.

The DOJ proposed that Microsoft provide OEMs with the current Win95 and let the IE icon be deleted as it would be by using Win95's uninstall utility. Microsoft replied that this would be "unsound." It also refused to allow OEMs to selectively delete some IE files, because that would interfere with consumers' enjoying a "consistent Windows experience." Furthermore, Microsoft added:

> The fundamental principle here is whether Microsoft should be able to decide which products and features it builds into its software. This [preliminary injunction] sets a dangerous precedent for the whole industry. Microsoft has the right to design its products and maintain the integrity of the Windows brand. Consequently, we do not allow computer manufacturers to pick and choose which parts of Windows they want to install.

Contempt motion

The DOJ then filed an additional contempt motion (Dec. 17), alleging that Microsoft was now in contempt of the preliminary injunction and accusing Microsoft of seeking "to make a mockery of the court's order." The court held a status conference on December 19 and told Microsoft and the DOJ to argue their positions again on January 22, 1998 (too late to be included in this issue of *IEEE Micro*). The judge said he'd allow each side to put on one expert witness. The judge also indicated that he would allow the parties about two days to be heard on whether Microsoft was sticking its finger up his nose.

Then, as a parting remark, he asked Microsoft and the DOJ to be prepared to explain something to him on January 13 that might or might not be relevant. The judge said that the preceding day he had asked the court's manager of information services (MIS) to bring into chambers a new PC that had come preloaded with Win95. He had then asked the MIS to uninstall IE, using Win95's uninstall (add/remove programs) utility. The MIS did that for the judge, and in a few minutes the IE icon disappeared from the screen. The judge said that he wondered what was Microsoft's problem in getting that done, and maybe someone could explain it to him on January 13.

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make spinach something else. It is still the extension of existing monopoly power.) There is a dangerous probability of success—that is, Microsoft is likely to become dominant over browsers. End of case. It's a clear violation of section 2 of the Sherman Act.

It would also be easy to frame narrow, appropriate relief against what Microsoft did to Compaq and other PC original equipment manufacturers (OEMs). The simplest thing to do would be to make clause (i) of section IV(E) of the consent decree look more like clause (ii). For example, one might rewrite (E) as follows (italicized part is new):

> E. Microsoft shall not enter into any License Agreement [with an OEM] in which the terms of that agreement are expressly or impliedly conditioned upon:
>
> (i) the licensing, *purchasing, using, or distributing* of any other Covered Product, Operating System Software product, or other product (provided, however, that this provision in and of itself shall not be construed to prohibit Microsoft from developing integrated products; *provided, further, that nothing contained in this proviso shall be deemed to authorize, in and of itself, any conduct not prohibited hereby)*; or
>
> (ii) the OEM not licensing, purchasing, using, or distributing any non-Microsoft product.

The second italicized passage simply restates the obvious. It somehow seems necessary to do so in the case of Microsoft's lawyers since, as discussed in Part I, they purport to read this proviso just the opposite way. Even more concisely, clauses (i) and (ii) could be combined and expanded in scope by substituting for them:

> the OEM licensing, purchasing, using, or distributing, or not licensing, purchasing, using, or distributing, any other product.

Modifying the decree in this manner would be a quick fix, a Band-Aid. The patient would still die in a short time.

Prepare to be assimilated

Why? None of that will stop Microsoft from developing a Win 98 (or Win 2001) that so fully integrates IE 5 that there is no way to disentangle it. For example, Win 98 probably won't even work without a browser (whether Microsoft's or someone else's) somehow available to it. Microsoft will probably abandon the present Help file system and go over to HTML Help files. They would store these files on the user's premises (hard disk or CD) or else make them accessible only by Internet or other modem means. The files will therefore need at least a stripped-down browser to work, even if they don't need the entire IE 4.

Microsoft may well choose to build Win 98 so that parts of it won't work properly without access to and use of some of Microsoft's proprietary software contained in IE 4. Surely, these or equivalent expedients are technically feasible. Microsoft can bury the browser so far inside Win 98 that users won't be able to find it and get rid of it (if they wanted to). They couldn't do that anymore than they could find MOVE when Microsoft added it to MS-DOS, or Stacker when Microsoft appropriated it, or DEFRAG or UNDELETE. All of those used to be separate products of other vendors before the Borg assimilated them into the OS.

Furthermore, there are other marketing expedients besides tie-ins that will have the effect of inducing OEMs to bundle IE, rather than Netscape, with PCs. Moreover, there are other marketing or technical expedients that Microsoft can adopt to sabotage Netscape. A generic legal prohibition of IE tie-ins is futile. A much more extensive prohibition of marketing (and perhaps technical) practices is needed to keep Microsoft from monopolizing the browser field. (For a discussion of some of the other expedients Microsoft can adopt, or already has adopted, see the "Creating incompatibility" box, next page.)

Why does it make more difference when the Borg assimilates the browser than it did when it constantly increased the functionality of MS-DOS? (Microsoft did that in the main lawfully or even benignly. It added the functions that fringe vendors had been distributing as separate products.) The difference is that the browser is the first real threat to Microsoft's OS monopoly for years. Browsers can, like Java, be indifferent to the identity of the hardware and OS platforms. The browser of the future may supplant the Windows OS if it is allowed to do so. It could serve as an interface combining or effectuating the interactions of users, applications, PC hardware, and the Internet.

(Netscape is already independent of the operating system. OEM witnesses in the DOJ's present case against Microsoft say that Microsoft cannot tolerate that. As evidence supporting the view that Microsoft is determined to subvert OS independence, Nicholas Petreley, in the November 1997 *NC World*, points to Microsoft form contracts discussed in the "Creating incompatibility" box.)

Unless some kind of remedy can be devised that will keep Microsoft from doing so, it will lock Netscape, Java, and any possible software threat to Microsoft's dominance out of PC systems. Microsoft will do that by absorbing into its OS all possible computer software applications. That will be especially true for Internet applications such as e-commerce, where the money will someday be.

Thus, one morning in 2002 you will appear before your PC. An irremovable frame on the screen will advise you, in blinking letters accompanied by audio, that tomorrow is your mother's birthday (a part of your registration information). You *will* send her some flowers, candy, or one of a number of other MSstore GIF 89a items depicted on your screen. You *will* select an item by clicking on the appropriate GIF[t] and signifying your consent to have your MScash account billed for it. Resistance is futile. You will obey; we at Microsoft have ways of making you obey. The OS will permit you to read your Microsoft IE 6 e-mail only after you have obeyed. (And you thought that IBM was Big Brother.)

Is resistance futile?

Is resistance to the Microsoft Borg (or Microsoft dalek, if you prefer) futile? That returns us to some questions previously asked at the end of

Creating incompatibility as an exclusionary tactic

The most recent release of Win 95 uses an updated general-purpose direct-link library that almost all applications use. (It is known as COMCTL32.DLL—common control DLL.) Earlier releases of Win 95 had a less functional version of this DLL. An application written to operate with COMCTL32.DLL will probably be incompatible with the earlier COMCTL.DLL. Accordingly, applications developers want to provide their customers with the new version. Customers can download the newer COMCTL.DLL from Microsoft's Web site themselves. Applications developers, however, find it more practicable to supply the DLL in the same installation package with their applications. They do this so that users can appropriately update Win 95 without having to be inconvenienced by going to the Microsoft Web site (an experience that I found to be very frustrating and time-consuming).

Microsoft permits applications developers to distribute its new COMCTL.DLL without charge to their customers, but the developers must ship all of IE 4—not just the new DLL. There appears to be no technical reason, at this time, why the DLL needs the rest of IE 4 to work properly. (The COMCTL.DLL of Windows 3.1 had nothing to do with a browser.) Nonetheless, Microsoft exercises its rights under the copyright law to permit developers to distribute the DLL only as part of an IE 4 package.

Furthermore, if developers or anybody else wants to distribute IE 4, they must agree to a Microsoft form license contract available at http://ieak.Microsoft.com/release2/licwiz1.asp. This agreement (Microsoft's standard IE 4.0 Redistribution License) permits PC OEMs and Internet service providers (ISPs) to distribute IE 4 to their customers without charge. However, there are several catches.

First, the OEM or ISP licensee must issue a press release stating that it has adopted IE or must authorize Microsoft to issue such a press release. The licensee must also place the IE logo on its Web page along with a hot link to the IE Web site. Even more important, compliance with the contract makes a licensee's Web site at least partly incompatible with Netscape.

The provision for Netscape incompatibility is well hidden—in clause (v) of Exhibit C at the end of Microsoft's standard IE 4.0 Redistribution License. It provides that the licensee "shall participate in the following marketing-related activities: … (v) Deploy at least one advanced feature of IE 4 (for example, ActiveX, Microsoft Dynamic HTML) on Company's Internet Product page." What's deploying an "advanced feature" of IE 4?

As explained by Nicholas Petreley, *NC World* Internet guru (see *NC World*, Nov. 1997), this means showcasing an application that includes a Microsoft proprietary implementation of its Web technology. These implementations are extensions (supersets) that are incompatible with the nonextended technology. The result of using them is an application that cannot run under Netscape or regular Java. Thus, the translation of clause (v), per *Infoworld*'s hardware guru Brett Glass (some enhancement provided), is: "Prepare to be assimilated."

What's more, Glass points out, if the developer antagonizes Microsoft, it could terminate the Win 95 license and then the developer would no longer be able to ship its product. (Without COMCTL32.DLL the application won't work for customers who haven't and don't want to bother to upgrade their Win 95 by downloading the DLL.)

Since the DOJ brought its contempt proceeding October 20, 1997, things have become even more confusing. As of this date (late December 1997), Microsoft's Web page, as last updated October 6, 1997, at http://www.microsoft.com/permission/copyrgt/cop-soft.htm states:

> Microsoft does not allow the separate redistribution of COMCTL32.DLL at this time.... You may NOT redistribute the COMCTL32.DLL as a stand-alone.

However, Microsoft will allow redistribution of the DLL as part of the entire IE 4 package, and will also allow developers to let their customers that they can download it from a Microsoft FTP site. On the other hand, Microsoft has another Web page, the December 1997 issue of a newsletter for developers (at http://www.microsoft.com/msdn/downloads/files/40Comupd.htm). It states that developers may now freely ship with their software a self-extracting compressed file providing an improved and updated version of COMCTL32.DLL. The page even provides a download link to get the file. Something must have happened between October 6 and December to motivate Microsoft.

Part I. Is there really anything antitrust-wrong with what Microsoft is doing? Can anything be imagined that would cope with what Microsoft is doing? Would the imagined course of action be practicable? To the extent that it means getting a court to act to restrain Microsoft, could the proposed intervention be supported by a legally sound theory under present law?

The first question is left as an exercise for the reader for now. We proceed to other questions about possible approaches that can be imagined for coping with the Borg.

Break up Microsoft! The first possible approach would be divestiture and dissolution. Spin off each application that can operate independently and has any chance of being commercially viable on its own. Forbid Microsoft from reincorporating or adding any functionality into the now bare Windows that it is technologically possible to implement as a stand-alone product. Word processing, spreadsheets, database managers, compression software, and every Norton and Central Point utility would be barred from Windows. (Simply unbundling them would not suffice, for if Microsoft could sell any of these applications, it would rejigger the application interface (API) of the OS to bollix up competitors' applications.)

Is it likely that any federal agency,

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cabal of state attorneys general, or federal judge would champion this position? (The DC court of appeals has already neutralized and muzzled the only federal judge who would even dream of undertaking this kind of exercise. See Micro Law, Apr. 1995, pp. 6-7.)

There is limited precedent for such breakups, at least in the case of monopolists that have acquired monopoly power by acquisition of or merger with competitors or suppliers or customers (so-called horizontal or vertical integration). Thus the DOJ broke up the Standard Oil and American Tobacco trusts around 1911. It broke up the major film studios' theater empires in the late 1940s to curb film distribution restraints. At the same time, the courts forbade the major studios from owning any theaters in the future. In the 1970s, a similar antitrust judgment took apart a fire and burglar alarm system monopoly. In the 1980s, the famous AT&T/Bell/Western Electric breakup occurred.

Since then, there has been little comparable antimonopoly activity. (The DOJ gave up on its attempt to break up IBM during the Reagan administration, and it never even launched its GM breakup effort. Some observers feel that taking too many tilts at windmills is like Rocky Balboa taking too many blows to the head.) Probably, the DOJ will not seriously consider attempting a Microsoft breakup, and it is highly questionable that any court would even let a cabal of state attorneys generals try to do so. The structural relief project has its merits, but it is a pipe dream. Forget approach number one.

Provide sanctuary. A second approach would be to encourage Sun (or an equivalent) to acquire Netscape and to shield the merged entity from Microsoft predation for three to five years. The idea would be to permit a platform-independent interface to develop to the point of commercial viability. Another part of the idea would be to permit independent vendors to develop application software not compelled to conform to the Wintel platform. (Java and Netscape would take care of that.) Would this work? Possibly. If it did, a thousand flowers might blossom; competition might flourish in the software industry.

The approach has the advantage of less need for court intervention. Assuming that Sun and Netscape were willing to marry, the government would not need to play any role in their merger. (It would just have to threaten to unleash the DOJ gnat if the elephant started to snort and trample. That is, this proposal does not call for maintaining heightened vigilance and being ready to sue Microsoft for monopolizing if it misbehaves against the merged companies.)

This approach is too offbeat to permit any serious predictions—at least from my non-Olympian vantage point. Furthermore, it may be that this approach would destroy the potential of Java to become more than just a Sun product. As things stand, Java may become a universal, platform-independent product permitting all applications developers to write programs that will run on any hardware and OS. Merging Sun and Netscape could stall that movement.

Comprehensive price regulation. A third possible approach would be to subject Microsoft to comprehensive price regulation. The classic Microsoft strategy is to make it uneconomical for any vendor to compete with it. Microsoft sells its OS software for a price that includes the vendor's product at "no additional cost." (It isn't really zero, because Microsoft has steadily raised the price of its OS. Win 95 costs a big multiple of what MS-DOS cost.) Compression was "free" in MS-DOS 6 after Microsoft appropriated Stacker's patented technology. IE 3 was "free" to OEMs that bought Win 95 (at a multiple of Windows 3's price). The monopoly price of the OS software subsidized the "free" or integrated applications.

This Microsoft strategy would falter if an injunction required Microsoft to maintain a nonmonopolizing price differential. This would be a price differential between Win 98 with and without any given added or integrated function that had previously been, or could feasibly be, sold as a stand-alone product. The differential would approximate the fair market value of the stand-alone product. This might stymie the Borg. But what are the chances of getting a court to approve, and shoulder the burden of administering, this kind of price regulation program? Scratch number 3 too.

Anticonduct injunctive relief. A fourth approach might be to strengthen the present consent decree's prohibitions against abusive conduct in three ways:

- First, remove the loophole in section IV(E)(i) as already discussed, which limits it to license tie-ins. Language for this Band-Aid has already been suggested.
- Second, add a new generic prohibition something along these lines:

> Microsoft is prohibited from engaging in any act or practice (or trick, scheme, or device) the purpose or effect of which is to penalize any OEM in any way, or subject any OEM to any harm or loss, for dealing in or using a product of a vendor other than Microsoft or for failing to deal in or use a product of Microsoft.

  This is an anti-tie-in and anti-tie-out prohibition that is not defined in terms of known instrumental practices, because Microsoft is too ingenious to travel only the known, familiar road. The prohibition is defined instead in terms of what you don't want to happen. This would at least be a little more than a Band-Aid.
- Third, something is needed to circumvent the Borg's strategy of assimilation and bundling. Microsoft carries out this strategy by using its monopoly over access to the OS. How do you prevent that?

A number of earlier antitrust cases have involved a firm's use of intellectual property rights to restrain trade. The tie-in is the classic example, but not the only one. In the late 1960s and early

1970s, I spent years prosecuting drug companies on the DOJ's behalf. They were restraining price competition by using licensing tactics designed to keep patented drug chemicals out of the hands of generic manufacturers (price cutters). One of these cases reached the Supreme Court in 1973 on the issue of what relief is appropriate in such a case.

The Supreme Court said that where a firm uses its intellectual property rights to aid it in restraining trade, two types of relief are well established and appropriate. One is reasonable royalty licensing of the intellectual property on nondiscriminatory terms to all bona fide applicants. The other type of relief is mandatory sales of the product embodying the intellectual property, again on reasonable and nondiscriminatory terms to all bona fide applicants. Such relief is particularly appropriate, the Court said, when the intellectual property has provided the leverage for the firm to impose the restraints or has contributed to the anticompetitive impact of the antitrust violation. (In the case that reached the Supreme Court, the justices reversed the judgment of the lower court because it had refused to order these well-recognized remedies.)

Lower courts have split on the question of whether royalty-free licensing should be ordered in an egregious case. The justices of the Supreme Court have split on this issue, and the Court has said that the matter remains undecided. However, a number of consent decrees have contained such provisions.

Open up the APIs

How does this apply to the Borg? An appropriate order along the lines suggested by the foregoing precedents would require Microsoft to make critical information available to any bona fide applicant. This would be full information concerning the hooks or application interface (API) of Win 98, NT 2001, or whatever OS Microsoft sells for the next five to ten years. Furthermore, the order should prohibit Microsoft from modifying the API until 120 days after making the information concerning the modification available. Otherwise, Microsoft would just keep changing the interface to make its competitors' applications inoperative. (A limited exception might be needed for bug fixes.) This kind of relief would shield the development of competitive applications. Microsoft could not lock them out of the marketplace by preventing them from working with Microsoft's indispensable and monopolized OS.

Would it be enough? What about bundling and subsidization of "free" integrated applications? Let's consider some examples. On the one hand, Stacker has faded away since Microsoft integrated compression and made it a free part of the OS. That may be a special case, however, reflecting current hard-disk price levels and consequent lack of pressure on users to save hard-disk space by using a somewhat annoying expedient. On the other hand, Norton Utilities is still a competitive factor, because it offers superior functionality. Moreover, to some extent, even a free IE 3 was unable to dislodge Netscape because of the latter's apparent superior functionality. It took Microsoft's threat to cancel the Win 95 license to get Netscape off some OEMs' screens. Nonetheless, it is an uphill battle to combat monopoly subsidization with superior functionality.

I would predict that executing this approach is doable for the DOJ. It is not beyond the gnat's capabilities. However, the gnat would need some electrical engineers or computer scientists to help. Microsoft has been claiming for years that it has been open about its hooks and APIs. Yet, time and again, bug hunters and others have stumbled over undocumented OS features, sometimes years after a release. For example, it was alleged recently that undocumented hooks in Windows 3.1 were discovered that Microsoft's Excel 3 spreadsheet had used to mop up the floor with Lotus 1-2-3. Excel used the hooks to outspeed 1-2-3, while Lotus remained ignorant of them. The discovery of the hooks allegedly resulted from the fact that Win 95 "broke" Excel 3 because Win 95 had different hooks. (Microsoft didn't care by then, because it had long since ceased shipping Excel 3, replacing it with Excel 5.)

It would therefore be essential to have programmers study Microsoft's source code to confirm that the hooks and APIs had been disclosed. Obviously, the Antitrust Division doesn't have this ability. It would have to pay consultants or find volunteers (set up a Usenet group?) to perform this task.

Is hiding the hooks illegal?

The question has been asked whether hiding the hooks and APIs of Windows 3 and Win 95 is an antitrust violation. Probably, it would not be one considered in isolation. But as an act in furtherance and pursuance of an overall unlawful scheme to monopolize, it is an unlawful act.

Furthermore, consider that Microsoft has long and stoutly publicly denied hiding the hooks of its operating systems. The deceptiveness of that practice makes it a violation of section 5 of the Federal Trade Commission (FTC) Act, by itself and apart from any monopolization issue. (FTC Act §5 makes unlawful any unfair and deceptive acts and practices, and directs the FTC to order violators to cease and desist from them. Most states have so-called Little FTC Acts that cover the same ground, and which state attorneys general enforce. In some states private parties can also enforce them.)

Furthermore, the Supreme Court has held, in a case that I spent nearly a decade working on (the *S&H green stamps* case), that the FTC has the power under section 5 to suppress conduct that is simply unfair. The conduct does not need to be an antitrust violation, an incipient antitrust violation, or even deceptive. The conduct may be suppressed as unfair because it is unethical, oppressive, or unscrupulous, or because it causes substantial injury to consumers or competitors or other businessmen. Any one of those reasons is enough if the FTC provides a rational explanation of why the conduct is unfair and appropriately links its conclusions to the facts it finds. This might lead one to conclude that the FTC and/or state attorneys general would be in a more advantageous position than is the DOJ to challenge this conduct.

Dealing with interface manipulation

Manipulating the interface to exclude competitors is not a novel tactic that Microsoft invented. Several antitrust suits against IBM in the 1970s challenged its practice of changing the interface between the mainframe CPU and its peripheral devices (such as disk drives and other products of would-be "plug compatible" alternative supply sources). Every time a plug-compatible manufacturer began to make sales inroads, IBM would change the interface specifications so that the manufacturer's products would no longer work with IBM equipment.

The federal appeals court on the west coast held that it was legal for IBM to change its interface to bring about a technical improvement. But if the antitrust plaintiff could establish that IBM had no technical justification for changing the interface, then the change could be held a monopolistic act. (This legal test did not do much for plaintiffs, since IBM could almost always come up with some theory about why the change was part of a technical improvement.)

In the early 1980s, the European Commission investigated IBM for monopolistic practices (termed "abuse of a dominant position"). IBM settled the case by agreeing to a set of guidelines. Under the guidelines, IBM had to give timely information to third parties about planned changes in the interface specifications for the System/370 mainframes. Thus, if IBM changed its operating system or the configuration of its interconnect cables in a way that affected third party hardware or software, IBM had to inform developers. They could then make appropriate changes in their products to maintain compatibility. IBM appears to have obeyed the guidelines, and the net effect seems to have been to prolong the commercial viability of System/370.

Perhaps the EC understood the computer business better than the west coast federal appeapls court did.

Perhaps, an alternative would be to rely on contempt-of-court sanctions against any failure of Microsoft to disclose any hook or API—with the burden shifted to Microsoft to show that the failure was not intentional or negligent. (You impose on Microsoft a duty to exercise diligent, due care in reporting APIs.) Of course, that would still lead to risks that Microsoft might consider any occasional contempt fine just a cost of doing business—a worthwhile expenditure. While implementing this relief effectively may pose a problem, still it does not seem an insurmountable one.

Moreover, a respectable antitrust theory could be put forward to support this case in court. Microsoft's Wintel OS software (however named) is an essential facility. That means it is like the only bridge across the Mississippi River at St. Louis, or the only power transmission line to towns in northern Minnesota, or a patent that must be used to make a product compliant with an industry standard, for example, a standard bus. (Those examples all come from actual antitrust decisions.)

Legal precedent says that if the owner of a facility essential to viable competitive activity refuses to permit access to the facility, as part of a program to maintain the owner's monopoly power, a court will order the monopolist to allow access on reasonable and nondiscriminatory terms. (That is a reason why ANSI and the IEEE, for example, require essential patents for a standard to be available on reasonable, nondiscriminatory terms– as a condition of their adoption of the standard.) This theory applies to intellectual property, as the precedents discussed earlier hold. Since hiding the hooks and APIs is one of the means that Microsoft has used to extend its monopoly in the past, ordering a stop to that practice is highly appropriate and necessary remedial relief to stop this abusive, unfair, and deceptive practice. (For a similar problem with IBM, see accompanying box "Dealinig with interface manipulation.")

No doubt, Microsoft's lawyers will scream that its trade secrets in its hooks and APIs are property rights, sacrosanct from confiscation. That cry of pain deserves little sympathy, however. It may appropriately be compared to a snake-oil seller's protest against disclosure of his trade secret that his snake oil is swamp water and won't cure anything. Perhaps one might even look to another analogy—that of a used-car salesman complaining about the government requiring him to disclose the trade secret of the actual mileage on his cars, odometer reading notwithstanding.

On the other hand, making the hooks and APIs public might be regarded as a form of mandatory licensing of intellectual property, rather than simply a disclosure of facts that the public is entitled to know. That raises the additional issue, on which I touched earlier, of whether mandatory licensing of intellectual property can be required on a royalty-free basis, as contrasted with a reasonable-royalty basis. This is an unresolved question. The court might well hold that Microsoft is entitled to a reasonable royalty. Perhaps it is. But one might ask, what is the amount of reasonable royalty to which someone is entitled for use of his trade secrets whose main value is in their use for an illegal purpose?

Of course, securing this relief would require a new *US* v. *Microsoft* suit. It is by no means a basis for rewriting the present consent decree over a nonconsenting Microsoft's objections. As said above, at least IMO, it is a case not beyond the gnat's capabilities, even though the elephant, Borg, dalek, whatever, will not go willingly or gently into the dark. If it were my responsibility (which, of course, it isn't, probably fortunately for all concerned, so you can tell me talk is cheap), I'd take another tilt at the windmill. Consider this graphic: Rocky Balboa imagines that he hears a bell signaling the beginning of a new round. Maybe if the DOJ's gnats won't hear that bell, the state attorneys general (drunk on the blood of the tobacco companies) will. That would be a remarkable way to inject new vitality into antitrust enforcement.

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