How Far Can Intel Go?

Antitrust Investigation May Focus on Role of NDAs

When the U.S. Federal Trade Commission (FTC) launched a new antitrust investigation of Intel a few months ago, the usual tales made the rounds: stories of Intel threatening to cut off supplies of its processors to system makers that purchased from Intel competitors or otherwise transgressed. Intel denies all of these tales, of course, forcing the FTC to sift through a mountain of paperwork seeking the proverbial smoking gun. Intel freely admits, however, to making a different kind of threat, one that may ultimately catch the FTC's attention.

Intel maintains, for the most part, good relations with all of its major customers. For system makers that design their own system-logic ASICs or motherboards, a key benefit of this relationship is early access to technical specifications of future Intel processors. Boards and particularly ASICs can take a year or more to design, test, and debug before they are ready for production. To deliver products based on the newest Intel processors when they are released, system makers must have detailed technical specifications for those processors a year or so ahead of time.

To obtain early access to this technical information, Intel's customers must sign a nondisclosure agreement (NDA) with Intel. Like most NDAs, Intel's agreements contain a clause that allows the company to terminate the agreement at any time for any cause; in this event, the receiving party must return all copies of Intel specifications. The NDA also covers samples, or prototypes of unreleased Intel processors, which must be returned if the NDA is terminated. Without these prototypes, system makers cannot test their designs with the new Intel processors and therefore cannot ship their products in a timely fashion.

In the workstation or server markets, most vendors design their own boards and ASICs. Many PC makers simply buy third-party chip sets and motherboards that work with the latest Intel processors, but, to differentiate their products, the top PC vendors do their own design work. Thus, to be a major system vendor, an Intel NDA is an essential requirement.

Clearly then, Intel's termination of a customer's NDA is a severe punishment. Intel admits to taking this step twice in the past year, first with Digital (see MPR 6/2/97, p. 26), then with Intergraph (see MPR 12/8/97, p. 4). In the first case, Intel took action after Digital launched a hostile lawsuit without warning, accusing Intel of stealing intellectual property and then lying about it. In this case, Intel was provoked into taking drastic action, but one can ask whether the punishment fit the crime. Within six months, Digital chose to settle the suit, at least in part because it needed a good relationship with Intel to remain competitive.

The Intergraph situation is even more questionable. Intergraph had threatened patent-infringement lawsuits not against Intel but against some of Intel's other customers. These customers asked Intel to indemnify them, shielding them from Intergraph's patents. Instead, Intel asked Intergraph to stop asserting its patents; after Intergraph refused, Intel terminated its NDA. Intergraph has since filed suit against Intel for failing to give the system maker access to technical data and other anticompetitive behavior.

According to contract law, Intel can terminate NDAs whenever it chooses and can partner with whomever it wants. Antitrust law, however, applies a higher standard to a company that is the only supplier of a critical component, a category into which Intel clearly falls. Such a company must treat its customers fairly and equally.

Intel claims that it does treat its customers fairly and equally, but that Digital and Intergraph acted unfairly and thus deserved to be singled out. By this interpretation, Intel was merely quelling bullies who were causing trouble in the neighborhood. But suppose Digital or Intergraph has valid patents that are being infringed? Shouldn't these companies have the opportunity to prove their case in a court of law? Instead, Intel can easily bring these companies to their knees simply by cutting off their NDAs.

Personally, I would rather see less use of the courts and more competition in the marketplace. But allowing Intel to make de facto rulings in its own favor is clearly not the right solution. Taken to an extreme, Intel could terminate a vendor's NDA for disputing the terms of a contract, for asserting legitimate patents, or for putting Netscape Navigator on the desktop (oops, wrong monopolist!). Intel says it wouldn't go that far, but where it draws the line isn't clear.

I believe Intel's dominant position gives it an added responsibility to support all of its large customers equally. Any grievances it has with a system vendor should be settled through negotiation or in court, not by cutting off that vendor's ability to deliver competitive products. Allowing Intel to terminate NDAs arbitrarily gives an already dominant vendor too much power over the entire computer-systems market. M