



# When elephants dance, mice watch out!

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..... Charles Dickens' character Sam Weller foresaw the business dynamics of the software industry: " 'It's each man for himself,' the elephant said as he danced among the mice."

Bristol Technology develops software tools—in particular, cross-platform tools that software developers use to port applications software to Unix from other operating system platforms. Bristol had an agreement with Microsoft to get access to technical information about the Win98 application interfaces (APIs), the means for causing applications software to interact with the operating system. According to Bristol, its Wind/U tool was making it too easy for developers to write Unix programs that could also run under NT. Microsoft therefore used pretexts to deny Bristol access to the updated APIs for Windows NT 5, the operating system that will follow Win98 (probably under the name Windows 2000).

Microsoft denies that it is doing any more than trying to gain a fair price for the crown jewels of its intellectual property. Yes, Microsoft is demanding four times as high a fee for access to the source code needed to use the NT APIs, but NT code is worth much more than that for Win98 or Win95. According to Microsoft spokesman Tom Pilla, "Hey, if you're going to buy a Ford and then you want to upgrade to a Lincoln Continental, that represents a deal with different terms and pricing." Bristol counters that this explanation is entirely pretextual, pointing to an

e-mail message from Microsoft's director of business development stating that it would be "a cold day in Hell" before Bristol got any more technical information on NT's APIs.

### **Bristol sues Microsoft**

Bristol, whose headquarters is in Danbury, Connecticut, sued Microsoft in Connecticut federal district court. It charged violation of the federal antitrust laws and the Connecticut Unfair Trade Practices Act (CUTPA). The thrust of Bristol's case is that Microsoft is trying to "leverage" its personal computer (PC) operating system software monopoly into workstation operating system software and server operating system software monopolies. Microsoft's Windows has a monopoly over the PC operating system software market (over 90% market share). But Microsoft's NT has much less than half the market in operating system software for workstations (43% of installed base) and servers (19% of installed base, but 50% of new shipments). Unix, although it may be fading, still accounts for about a quarter of the installed base for servers. Various flavors of Unix account for the over-50% non-Microsoft share of the workstation operating system market, even though no single Unix flavor now has a bigger market share than NT.

Unix has a number of features that make many in the industry prefer it to Windows and NT as an operating system for high-end computers. Availability of a

tool that permits software developers to write applications that will be able to run under Unix and NT, with little added effort for the developer, creates an optimal situation for developers and users. While it suited Microsoft's business plan to encourage such tools while Microsoft was trying to break in and establish a position in the workstation and server operating system software markets, things changed with time. What makes sense for a mouse dancing near an elephant (Microsoft then) is less beneficial for a healthy, growing elephant that doesn't care to have its toes nibbled by the mice among which it dances.

### **Importance of APIs**

Bristol claims that the APIs provide Microsoft with the ultimate lever to extend its PC operating system monopoly to similar workstation and server monopolies. It claims that Microsoft controls an essential facility to entry and operation in the marketplace. Also, Microsoft's refusal to deal with Bristol as to API information (denial of access to the essential facility) is an act of monopolization.

APIs are essential facilities, the argument goes, because any application (for example, a word processor or spreadsheet) must periodically make "calls" to the operating system for services: "Hello, operating system, I want to use the printer." "Hello, operating system, I need to display something on the monitor screen." "Hey, I need to write to the hard disk."

There are thousands of calls. Each call must conform to the formats and protocols that the particular operating system specifies. Any slight deviation from the prescribed formats and protocols will likely "crash" the system. (Imagine that Unix demands to be called in Greek, NT in Latin, and Mac in Old English. What happens if you try to call Mac in Greek or if its proprietor updates to Middle English?)

Rewriting applications for multiple sets of APIs (say, Macintosh, NT, and Unix) is time-consuming and expensive, and inefficient to boot. It may well not be worth the trouble to write the program more than once—for the industry-standard, high-volume operating system. Or to put it differently, a developer may well find it a more profitable use of time to develop a different application than port a completed application to a second, lower volume platform. But a tool like Bristol's Wind/U makes it easy for the application developer to support multiple operating systems. The application is readily enabled to make the correct calls to each supported operating system. Conversely, suppressing Wind/U or similar tools forces developers to support fewer operating systems. By the same token, software users end up with fewer choices. (Ask any Mac user.)

The problem Bristol had when Microsoft cut off access to information about the APIs is that the APIs keep changing. The only way to keep software current is to have timely access to the API information. Microsoft's publications do not disclose full API data. Only the current Microsoft source code does. Hence, when Microsoft cut Bristol off from new API information, Bristol's Wind/U could no longer provide Unix developers and users with the ability to run under both Unix and Win98 or NT. Instead, Bristol's developer customers get bugs and crashes.

Furthermore, Microsoft has stated that it will not provide information about all calls, in any event, but will instead provide information only about a selected portion of the operating system. Microsoft therefore insists that it will determine which calls can be ported between Unix and NT



and which calls will not be ported. (Hence, the bridge between Unix and NT will always have some holes in the roadbed, where Microsoft decides to put them. It remains to be seen whether Microsoft will be benign in selecting calls for porting.)

Bristol's pleadings make a point of evoking the image of the original essential facilities case, *St. Louis Terminal*. In that case, the government sued the railroad companies owning the only bridge over the Mississippi River at St. Louis for refusing to let a rival railroad use it. Bristol says that Microsoft is forcing it to offer its customers a bridge with more and more holes in the roadway. (This sounds like the I-95 Woodrow Wilson Bridge in Washington, D.C.) Customers are therefore becoming increasingly unsure whether they will get to the other side or fall through the holes. Instead of acting as a bridge between Windows and Unix, Wind/U is becoming a perilous adventure; and Bristol's customers are shunning it.

### The CUTPA unfair practices claim

Most of Bristol's charges echo the charges in the government's case against Microsoft and also Intergraph's case (see *IEEE Micro*, Jan.-Feb. 1998, pp. 6-9, 80-84; Jul.-Aug. 1998, pp. 4-6, 81). The unfair practices claim under CUTPA is a little different. It focuses on the alleged unfair-

ness of Microsoft in luring Bristol into joining Microsoft's interface partnership. Bristol calls this a bait-and-switch tactic. Microsoft got Bristol to sign on when it was to Microsoft's advantage to smooth its own way to entry into the workstation and server markets (a mouse next to what were then Unix-flavor elephants). But when Microsoft reached elephant status in those markets, it dumped Bristol as a competitive ploy to eliminate rival operating system software.

Bristol says that even if this is not a monopolization that violates the antitrust laws, still it is unfair and thus violates CUTPA. The Connecticut attorney general has weighed in on Bristol's side in an *amicus curiae* brief stating that CUTPA should apply here because the conduct is "offensive to public policy" and the kind of conduct that violates the "spirit" of the antitrust laws even if not their letter.

### District court's ruling

The case, filed in August 1998, has been pending (since late November) before the district court on two motions. Bristol moved for a preliminary injunction. It would require Microsoft to continue to sell Bristol technical information on the APIs by licensing Bristol to use the source code containing API data. Microsoft moved for summary judgment on the ground that Bristol's claims were entirely without merit. On December 30, the court denied both motions, and set the case for expedited trial commencing June 1.

Microsoft's principal argument has been that it owns intellectual property rights in its source code and technical information. Accordingly, requiring it to share its intellectual property with Bristol without its own consent would, in effect, be a confiscation of Microsoft's property. This argument moved the district court, and it denied the preliminary injunction. The court opined that a preliminary injunction should issue only to preserve the status quo. Here, the status quo has been a license on technical information for APIs of Windows and NT 3.

The breakdown in the relation occurred  
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when Bristol sought a similar license on the new NT 4 and 5 product versions. This is "new and different intellectual property," the court said. Therefore, the preliminary injunction sought is not preservation of the status quo but rather forward-looking relief. This requires that Bristol show a stronger case than usual to get the relief.

Bristol did not make that showing, the court held. To be sure, "the bulk of Bristol's business will disappear," the court said, since the timing constraints of software distribution require Bristol to release a new version of Wind/U at the same time as Microsoft releases NT 5. That will occur in late 1999, and Bristol needs a six-month lead time to develop a version of Wind/U for NT 5. Hence, the court recognized, even a Bristol victory at trial in June 1999 will be too late. In addition, Bristol's customers have lost confidence that Bristol will be able to give them a port from Unix to NT 5 for applications that the customers are now writing. The key issue, therefore, is whether Bristol or Microsoft is most likely to prevail at trial. More precisely, as the court saw it, the test for Bristol to be entitled to a preliminary injunction is that it "clearly establishes" that it will prevail at trial.

The court rejected many of Microsoft's arguments as to why Bristol had no case. Microsoft argued that any injury to Bristol was not the kind of "antitrust injury" that the antitrust laws are intended to redress. The court said that the harm of loss of competition in the workstation and server operating system software markets "constitute precisely the type of injury that the antitrust laws were designed to prevent." Moreover, elimination of Unix as an operating system, which Bristol alleges as a risk, would harm competition in the way the antitrust laws are designed to prevent. The injury threatened is not just to Bristol but to the competitive process.

At the same time, the court accepted the testimony of Bristol's expert that three

relevant markets need to be considered for purposes of competitive analysis. These are PC operating systems, workstation operating systems, and server operating systems. As yet, these have not coalesced into a single operating system market, although they may some time after 2000. (Windows 2000 may be marketed to all three markets.)

But the court did not feel that Bristol had adequately shown impermissible leveraging by Microsoft. The court did not believe that Microsoft, through its tactics, had forced independent software vendors to write for Windows instead of Unix. Rather, such market shifts may well be simply the result of the benefits of Microsoft's software and its widespread acceptance on its merits. Also, Microsoft's 1997 market shares are 28% of new shipments of workstation operating system software and 44% of new shipments of server operating system software. The corresponding projections for 1999 are 43% and 49%. These shares are too small as yet to permit the conclusion that Microsoft has or will actually gain monopoly power in these markets, at least not for purposes of a preliminary injunction that Microsoft must share its intellectual property rights over its objection to doing so.

As to the CUTPA claim, the court was also not persuaded that Bristol would most likely prevail. The legal standard for an unfair trade practice is that the plaintiff must prove at least one of the following three things:

- the practice offends public policy because it falls within some established concept of unfairness;
- it is immoral, unethical, oppressive, or unscrupulous; or
- it causes substantial injury to consumers, competitors, or other business people.

Also, plaintiff can prevail if it shows an incipient antitrust violation or a violation of the spirit of the antitrust laws. (This may be a partial restatement of the first test. Curiously, the court did not address the question of whether Microsoft's con-

duct was an incipient antitrust violation or violated the spirit of the antitrust laws, although the *amicus curiae* Connecticut attorney general briefed it. This is a curious omission.)

As to the first prong of the test, the court questioned whether Microsoft's refusal to deal was pretextual, rather than motivated by a genuine concern to protect its intellectual property crown jewels. Bristol is "more likely than not" to show mere pretext, but "it cannot be said that a clear showing has been made." Similarly, Bristol did not make a clear showing on the second prong. As for the third prong, the injury must be weighed against possible countervailing benefits, and the plaintiff must show that it could not have avoided injury as a result of defendant's conduct.

Bristol might have avoided injury by not having been taken in by Microsoft in the first place, when it bought the alleged bait and switch. The moral apparently is, using 20-20 hindsight, if you are going to enter into a contract like this, you'd better put in a clause giving you the right to renew and keep renewing at a reasonable royalty rate (to be determined by arbitration, if necessary).

For these reasons, therefore, the court refused to grant a preliminary injunction. On the other hand, the court denied Microsoft's motion to dismiss the case. Just as Bristol had failed to establish clearly that it would win the case, Microsoft failed to establish clearly that Bristol would lose the case. (This would appear particularly to be so in light of the judge's comment that Bristol was more likely than not to show that Microsoft's refusal to deal was based on mere pretext and thus within a recognized concept of unfairness.)

As things stand, then, the case will go to trial in June. At that point, Bristol seems more likely than not to prevail on the merits. But it may be out of business by then.