



Winsocking the competition

Users are throwing bricks at Microsoft for nuking other companies' WINSOCK.DLL entries in Win 95, but Gates won't provide a fix and just keeps on socking it to the competition. Users gripe that when they access Internet via either Win 95's MSN (Microsoft Network) or its remote access features, their WINSOCK.DLL file is renamed WINSOCK.OLD. Microsoft then writes in a new WINSOCK.DLL that permits use only of Microsoft's MSN software. Unless a Internet-using program can access WINSOCK.DLL, the program cannot get to the Net.

For example, use MSN once and Netscape is unusable after that, because it cannot fire up without accessing WINSOCK, and it can't do that any more. Even one test run on MSN automatically kills any Net browser competitive with MSN. The user is therefore wed to MSN for any access to the Net, and divorce from MSN is tough to make stick.

(Users can, *if they know how*, delete the WINSOCK.DLL that Microsoft installed and then rename WINSOCK.OLD as WINSOCK.DLL. But any further use of MSN will nuke WINSOCK the same way all over again. The only way to beat the problem is to use a special Win 95 version of the competitive program, and they are mostly not yet on the market.)

Has Microsoft been up to its famous dirty tricks? Is this tactic legal?

The facts surrounding the MSN Net browser issue are not completely clear. Conceivably, this is—as Microsoft claims—just a technology problem. When CompuServe released its NetLauncher last summer, it too renamed the WINSOCK.DLL file, causing problems for some users. Perhaps WINSOCK cannot be operated like WIN.INI, for example, with separate sections of the program for different products. This may not, therefore, be

just a scheme by Microsoft to lock users into MSN.

But, even hypothetically, is it legal for a company intentionally to manipulate an interface, or create other major compatibility difficulties, to keep end users from using a competitor's product? After all, renaming a DLL is not the only way to deny interoperability to competitors. IBM used to be very good at figuring out ways to lock out wanna-be plug-compatible vendors. (Every time they figured out the disk drive/computer interface, IBM would change it.) The law in this field comes largely from litigation in the 1970s involving IBM and subsequent litigation stemming from AT&T's attempt to slow MCI down.

There are two main legal theories. According to scholars from the University of Chicago, doing this is just good, clean, efficiency-promoting competition, and benefits of greater allocative efficiency will trickle down to the public as a result of it. The opposing populist view is that these tactics are not honestly industrial. Instead, they are monopolization in violation of antitrust laws, at least so long as the alleged bad actor uses the tactic with the intent and purpose of harming competitors.

The mainstream answer on this issue seems to depend on whether the company doing this has "market power" in the "relevant market," and whether it has a good excuse (such as Flip Wilson's defense, "the technology made me do it"). Probably, a dominant or near-dominant company (presumably, therefore, a company enjoying substantial market power) must not deliberately create incompatibility with competitive products or services to gain a monopoly or preserve it, unless it needs to do so to provide customers a technological improvement. IBM, for example, beat the rap at least once in the 1970s by showing that its competition-frustrating interface change might have

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been part of an effort to increase functionality for mainframe computer equipment users.

Suppose that it could be shown that Microsoft deliberately bollixes up WINSOCK to hamper the competition, and the Flip Wilson defense fails. Then, an antitrust case would probably turn on whether Microsoft has enough market power, because of its control of Win 95, to pose a serious threat of gaining a monopoly in Net access software. The federal appeals court in New York has ruled, however, that such a case can be based merely on significant competitive advantage in the second market (here, Net access software), even if no second monopoly results. On the other hand, all courts probably agree that if control of Win 95 does not give Microsoft substantial market power, its conduct would at worst be haughty but not antitrust-punishable.

What of a company without industry dominance that nonetheless has a facility to which competitors need access to compete effectively (what antitrust law calls an essential facility)? Control of an essential facility probably would give a firm enough market power to make the firm's denial of competitive access to the facility illegal. But for an antitrust plaintiff to prevail in this kind of case, the defendant's allegedly essential facility must be one that its competitors are unable to duplicate, as a practical matter.

Also, it must be technically feasible for the proprietor of the facility to make it available to competitors (a variation on the Flip Wilson defense, "the technology won't let me provide access to others"). On the other hand, a company whose product or service cannot be considered as an essential facility under these rules is probably in little danger of antitrust difficulties from using a block-out, lock-in, anti-compatibility tactic.

The WINSOCK ploy must be viewed in its context to evaluate it under the essential facility legal theo-

ry. MSN is not the essential facility to which access is being denied, and MSN is apparently not that important a program to make its abuse (assuming that any intentional winsocking of competitors occurred) the withholding of an essential facility. At the most specific market level (what we may term the nanolevel), WINSOCK would be the allegedly essential facility to which competitors are being barred access. At the next more generic level (the microlevel), Win 95 would be the allegedly essential facility. If we proceed from nail to horseshoe to horse, and so on, perhaps access to computers and the Net are respectively essential at the millilevel and higher.

Right now, Win 95 probably has too small a share of the operating system software market, or the PC-compatible operating system software market, for it to be presumed from market share alone that Microsoft's control of Win 95 gives it market power or that access to it is essential to effective competition. (That fact may change within a year.) Hence, some other kind of factual analysis would have to be developed to show that running under Win 95 is essential to Microsoft's Net software competitors, and without that showing a monopolization case, or even an attempted monopolization case, would fail.

This may suggest that a somewhat related tactic, but really a different one from winsocking the competition, may warrant scrutiny. This tactic is putting MSN as an icon on Win 95 but not putting competitors on the same screen as alternate choices for users, while at the same time making it somewhat difficult for users to install MSN's competition. This could be considered denial of an essential facility, if Win 95 is in fact an essential facility, and if denial of access to it threatens to give Microsoft a monopoly over access to the Net. Again, however, the proof of actual or likely dominance or essentiality is a critical factor.

It is generally a daunting task for a

competitor to prevail in a monopolization case under any of the foregoing legal theories. It would be particularly so against a powerful and resourceful defendant such as Microsoft. A monopolization case against Microsoft would not be a project for a fainthearted or easily wearied litigant, or for someone who would rather have a personal life than seek to gain vindication under our justice system.

There can be other legal problems, however, besides antitrust suits. Winsocking may be challenged under state unfair competition laws and unfair business practices laws. There may also be a charge of deceptive practices or misrepresentation, based on Microsoft's alleged failure to disclose information to users that reasonably ought to be disclosed to them. Microsoft does not warn the public that use of MSN will nuke WINSOCK files and thus disable other Net software. A court, in a suit by an aggrieved competitor, or a state or federal consumer protection agency, might consider that Microsoft engages in deceptive marketing by failing to warn users of the winsocking.

Such a legal challenge would be far less costly and problematic than an antitrust suit, since proof of market power in the relevant market is not so major an issue—and under some of these laws is entirely immaterial. In addition, the populist school of thought, not the Chicago school, tends to dominate unfair competition and business practices law. An injured competitor would therefore have a better chance—although no slam dunk—in winsocking it back to Bill under these business practices laws.

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