

The Left Hand and the Right Hand

By Jonathan Band

When it comes to information policy, the left hand of the Clinton Administration does not seem to know what the right hand is doing. Specifically, the Justice Department is working assiduously to prevent Microsoft from monopolizing the Internet, while the Commerce Department is handing Bill Gates the keys.

The Justice Department's Antitrust Division recently confirmed that it is investigating Microsoft once again, this time for its \$150 million investment in Apple. In addition, the Antitrust Division is looking into Microsoft's recent acquisition of companies which enable the delivery of real-time sound and video over the Internet.

This latest investigation closely follows DOJ scrutiny of Microsoft's purchase of WebTV (which the Antitrust Division ultimately permitted) and Microsoft's proposed purchase of Intuit (which the Division opposed). The Division is continuing to investigate Microsoft's licensing practices with respect to its Internet search engine, and several years ago entered into a consent decree with Microsoft concerning its licensing practices with MS-DOS.

This close watch on Microsoft's activities is completely warranted. By virtue of its control of the personal computer operating system market, Microsoft is well positioned to leverage its near-monopoly into adjacent markets such as application software, Internet access software, and some day the Internet itself. The current head of the Antitrust Division, Joel Klein, like his predecessor Anne Bingaman, correctly realizes that Microsoft must be kept on a short leash if competition is to be preserved in the information markets of the future.

The Commerce Department, unfortunately, has recently sent Congress a proposal which, if enacted, will ensure Microsoft domination of the Internet.

This past December, the World Intellectual Property Organization, an arm of the United Nations, adopted a new copyright treaty. One provision of the treaty requires signatories to provide adequate legal protection against the circumvention of technological measures which prevent copyright infringement.

The Commerce Department's proposed implementing legislation goes far beyond the limited requirements of the treaty. Instead of simply prohibiting the circumvention of anticopy technologies for the purpose of making infringing copies, the Commerce language would categorically ban the manufacture of devices which enable circumvention. The Commerce Department's rationale for this ban is that the only practical way to prevent circumvention for purposes of making infringing copies is to ban circumvention devices altogether.

The only problem with the Commerce Department's approach is that by banning circumvention devices, it deprives people of the physical ability to make copies now

permitted by the Copyright Act. For example, librarians will not be able to make copies for preservation purposes, and scholars and journalists will not be able to make fair use copies for purposes of criticism and reporting.

Moreover, software developers will not be able to perform the research necessary to assure the compatibility of their products with that of the market leader, e.g., Microsoft. Microsoft will be able to put a software "lock" on its next generation operating system and network software, and thus prevent Internet access and browser developers from studying the Microsoft product to make sure that their software can fully interoperate with Microsoft's. And if their products are not fully interoperable, consumers will reject them in favor of Microsoft products which are. Over time, Microsoft will be able to control all software markets involved with the Internet.

In short, the Commerce Department's proposal gives Microsoft precisely the anti-competitive advantage the Antitrust Division has tried to prevent.

The Commerce proposal has been introduced in both chambers of Congress, and the House Intellectual Property subcommittee held hearings on it last week. Understanding the serious problems with the Administration's approach, Congressman Boucher (D. Va.) announced at the hearings that he would soon introduce a bill addressing acts of circumvention leading to infringement, rather than circumvention technologies. Meanwhile, Senator Ashcroft has already introduced a bill along these lines -- S. 1146. If the Ashcroft/Boucher approach prevails, content providers will have additional means of fighting Internet piracy, but not at the expense of legitimate competition in the Internet.