The Strategic Abuse
of the
Antitrust Laws

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VeriSign

- Official registrar of .com and .net
- Sep 2003: redirects mistyped addresses to its own advertising site (sitefinder.com)
- ISPs object, ask ICANN to stop.
- VeriSign sued, contending ICANN’s decision was an illegal conspiracy
- Judge: so deficient not to merit a trial
The VeriSign Plot Thickens

- Popular Enterprises buys expired domains and redirects them to its own advertising site.
- Popular sued VeriSign, alleging the existence of sitefinder.com violated the antitrust laws.
- Suit is continuing.
Roadmap

- Examples
- Purposes
- Incentives to sue
- Government as strategic player
Colorado Chiropractic Council

- Sent 30 hospitals requests for privileges
  - Threat of lawsuit
- Nine did not admit CCC
- These hospitals sued for restraint of trade
- Judge: “Completely without merit...completely lacking substance as the basis of an antitrust claim.”
Next Generation Realty

- Entrant in Iowa real estate
- Sought commission-sharing from incumbent Iowa Realty
  - But Next Gen itself did not share
- Iowa Realty refused as not reciprocal
- Next Gen filed antitrust suit
- Iowa Supreme Court: “without merit”
Private Action

- Outnumber government suits nine to one
- Both Sherman Act (1890, sec 7) and Clayton Act (1914, sec 4) permit private antitrust suits
  - Treble damages
- Canada’s 1889 Combines Investigation Act didn’t permit private litigation until 1976
  - Single damages
  - Rare
General Idea

- Incentives for private antitrust litigation are not guided by consumer welfare
- What are the motives of firms engaged in private antitrust litigation?
- How can law be used strategically?
- How can the antitrust laws be crafted to minimize damage?
Strategic Use

- Antitrust can be used to
  - Harass
  - Harm
  - Extort

- Harassment and harm can be used to induce cooperation
  - Often cheaper to sue than to defend

- Extortion reduces returns to investment
Reasons for Private Litigation

- Extort funds from a successful rival
  - Walmart vs MC, Visa
  - Microsoft
- Change the terms of the contract
  - Texaco & price discrimination
- Punish non-cooperative behavior
Reasons for Private Litigation

- Respond to an existing lawsuit
- Prevent a hostile takeover
  - Service Corp v. Loewen
- Discourage the entry of a rival
  - Utah Pie
- Prevent a successful firm from competing vigorously
  - ISOs
Prevent Vigorous Competition: Digital v. Intel

- Digital Alpha versus Intel Pentium
- Market dominance of Pentium
- Digital threatened litigation, labeling Intel a monopoly
- FTC starts inquiry
- Intel purchases Digital facilities, provides advantageous terms for Pentium
Who Profits?

- Actions can be either
  - pro-competitive (cost reducing) or
  - anti-competitive (rival’s cost raising)

- Examine incentive to sue in an economic model
Main Result

- Gain from preventing a pro-competitive action is larger than preventing an anti-competitive actions if
  - Firm has a smaller share
  - Market is dispersed
- Loss from pro-competitive rival action is increasing in number of firms
- Loss from anti-competitive action is decreasing in number of firms
Antitrust laws often distorted to reduce competition
  - Very undesirable side effect
Outright ban on private antitrust litigation would solve that problem
  - At cost of stopping some legitimate suits
  - Encouraging more anti-competitive behavior
Conclusion, Continued

- Alternative models may provide best of both worlds
- Agency “gate-keeper” for private litigation
- Agency *amicus curiae* for private litigation
- Private financial support for agency litigation
- Decoupling damages and awards
- Providing experts to courts to reduce uncertainty