Oracle vs. Microsoft: Corporate Espionage or Competitive Intelligence?

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On June 27, 2000, Silicon Valley’s Oracle Corporation, the world’s second largest software manufacturer, admitted that the company hired a private investigative firm, Investigative Group International (IGI), to probe two private public policy research organizations that supported the world’s number one software firm, Microsoft Corporation of Redmond, Washington, during the recent landmark antitrust trial initiated by the U.S. Department of Justice. Oracle hired IGI, a firm headed by former Senate Watergate attorney Terry Lenzner, to gather information on whether Microsoft financially supported the Independent Institute and the National Taxpayers Union, both of which were releasing independent research supportive of Microsoft’s position during the antitrust trial. IGI “conducts confidential fact-finding around the world for corporations, law firms, financial institutions, public agencies, and private individuals.”

“Left undisclosed, these Microsoft front groups could have improperly influenced the outcome of one of the most important cases in U.S. history,” said Oracle in a statement. “It’s absolutely true we set out to expose Microsoft’s covert activities,” said Larry Ellison, Oracle’s chief executive officer. According to Ellison, the Independent Institute and the National Taxpayers Union made it appear that it would be best for American taxpayers if Microsoft won the antitrust trial. “These experts were bought and paid for by Microsoft, by two taxpayers, Bill Gates and Steve Balmer,” stated Ellison. “I feel very good about what we did,” said Ellison. Oracle’s Ellison responded to criticism by challenging Microsoft to spy on
Oracle. “We will ship them our garbage,” he said. “We believe in full disclosure.”

Both the Wall Street Journal and the Washington Post previously reported that the Independent Institute and the National Taxpayers Union had financial ties to Microsoft. Microsoft became a member of the Independent Institute in 1998, a fact acknowledged by The Independent Institute in a press conference held in Washington, D.C., on June 2, 1999. Using its own general funds, The Independent Institute had published an “Open Letter on Antitrust Protectionism” in two national newspapers on June 2, 1999. The “Open Letter,” signed voluntarily without remuneration by 240 of the nation’s leading economists and other scholars, criticizes the antitrust prosecution of Microsoft and other high-tech firms as “having nothing to do with consumer welfare and everything to do with corporate welfare.” The National Taxpayers Union released a study reporting that public pension funds lost $38.6 billion because of the decline in Microsoft’s stock due to the federal antitrust prosecution. After that report was released in early 2000, the Wall Street Journal reported that the National Taxpayers Union had received more than $200,000 from Microsoft.

But exactly what did Oracle Corporation do that Larry Ellison was feeling “very good about”? Could Oracle’s efforts be characterized as an exercise in corporate espionage? Or was it a firm engaging in competitive intelligence against its major market competitor? Providing historical background and some detail on this incident presents a clearer perspective on what actually transpired, while the ensuing analysis and conclusions offer managerial guidance on important legal and ethical questions likely to confront other firms in the highly competitive information technology industry.

MICROSOFT’S ANTITRUST WOES

Microsoft’s antitrust troubles with the U.S. government date back to the spring of 1990. At that time, the Federal Trade Commission (FTC) initiated an investigation into the firm’s business practices related to possible collusion with IBM in the development of a computer operating system, OS/2, its pricing policy on Windows, and its competitive advantage in markets for Windows applications resulting from its knowledge of changes in forthcoming versions of
While the FTC commissioners deadlocked on filing charges from this investigation, the U.S. Department of Justice initiated its own investigation of these charges in the summer of 1993. On July 15, 1994, Microsoft and the U.S. Department of Justice signed a consent decree in U.S. District Court, Washington, D.C., that prohibits Microsoft from calculating its licensing fees on the basis of the number of personal computers a manufacturer ships, and also prevents Microsoft from requiring personal computer makers to take any other software products as a condition of their license for the Windows operating system, yet allows Microsoft to develop “integrated products.”

But all did not remain sanguine between Microsoft and the U.S. Department of Justice. Not quite four years later, on May 18, 1998, Attorney General Janet Reno announced that the U.S. Department of Justice was bringing suit in U.S. District Court against Microsoft for using its monopoly power in the operating system market to stifle competition in the Internet browser market (United States v. Microsoft Corporation civil action no. 98-1232). On October 19, 1998, the antitrust trial began, with 76 days of testimony to follow. On November 5, 1999, the presiding judge, Thomas Penfield Jackson, issued his Findings of Fact in which he states that Microsoft is a monopoly that has abused its market powers to stifle competition in the operating system and Internet browser markets. On June 7, 2000, Judge Jackson ordered that Microsoft be split into two separate and competing companies, one for its Windows operating system and one for its other computer programs and Internet businesses, and comply with a long list of restrictions on its conduct lasting three years if the breakup order withstands appeal, and 10 years if it does not.

As seen by the results of this precedent-setting antitrust case, the competitive stakes were high. Leading information technology firms such as Oracle, Netscape, Sun Microsystems, and IBM, as well as industry associations such as the Software & Information Industry Association and the Computer & Communications Industry Association, have long lobbied the Clinton administration and the U.S. Congress encouraging investigations/federal antitrust lawsuits to be initiated against Microsoft for its alleged anti-competitive business practices. Oracle’s CEO Larry Ellison, a fierce and vocal rival of Bill Gates, has on numerous occasions referred to Microsoft as “a convicted monopolist.” Not surprisingly,
a primary economic beneficiary of the 1998 U.S. Department of Justice antitrust lawsuit could be the world’s second largest software firm, Oracle.

**ORACLE AND IGI**

How did this confidential relationship between Oracle and IGI mutate into business media headlines? In early June 2000, it was uncovered that a woman, identifying herself as “Bianca Lopez” and apparently working for IGI, entered the building in which the Association for Competitive Technology (ACT), a Washington, D.C.–based information technology trade association supportive of Microsoft in its antitrust suit, is located. She had gained access to the building using a cardkey obtained from a former investigative journalist, Robert M. Walters, a licensed private investigator allegedly associated with IGI. In May, Walters rented a room on the same floor of the building that ACT’s offices were located. In spite of press inquiries, IGI refused to acknowledge whether Walters was working for them or not.

According to a report from P & R Cleaning Services Inc. to John Akridge Management Company, the building’s owner, Lopez entered the building on June 2, 2000, and offered office cleaners $60 for ACT’s trash. Rebuffed, she returned on June 6 and increased her offer for Act’s trash to $500 for the cleaners and $200 for the supervisor; again, her offer was refused. Lopez also identified herself as a private investigator. According to the Washington, D.C., police department, which licenses private investigators, there is no “Bianca Lopez” licensed in Washington, D.C., and misrepresenting yourself as a private investigator is a misdemeanor in the District of Columbia.

Jonathan Zuck, president of ACT, believes the timing of this incident was particularly suspicious: “The two cash-for-trash offers happened as U.S. District Judge Thomas Penfield Jackson was weighing Microsoft’s fate, and as the U.S. Senate Judiciary Committee is preparing hearings on the topic.”

After learning of Oracle’s admission of investigating the Independent Institute and the National Taxpayers Union, and cheering the ACT probe (although Oracle management took no responsibility for the alleged transgressions), Zuck issued a statement expressing how he was “shocked and saddened that one of the
leaders of the community I represent has stooped so low in order to forward its political agenda.” He went on to say that “if Oracle believed their actions to be justified in the interests of full disclosure, why did they not come forward when their misdeeds came to light a month ago, instead of engaging in sophisticated schemes to hide them?” Zuck further offered this challenge to Oracle: “I await Mr. Ellison’s apology to our members.” Zuck also is considering legal action. “This is not dumpster-diving outside the building. This is bribery,” he said. “It’s also a security issue.”

Oracle representatives explained to the Wall Street Journal and the New York Times that it never authorized IGI to engage in illegal activities. “We did however insist that whatever methods IGI employed, those methods must be legal,” said Oracle in a press release. “IGI repeatedly assured us that all their activities were 100 percent legal.”

In a press release, The Independent Institute’s founder and president David J. Theroux commented on the Oracle/IGI investigation of his organization: “We were disappointed to learn that our San Francisco Bay Area neighbor, Oracle Corporation, hired Investigative Group International in an unsuccessful attempt to smear us by calling into question the legitimacy of our 14-year scholarly, public policy research program. Instead of being willing to address the issues openly, Oracle has apparently felt the need to employ back-alley tactics, subterfuge, and disinformation in order to achieve its aims.”

Also in a press release, Microsoft responded to the Oracle/IGI news: “Mr. Ellison now appears to acknowledge that he was personally aware of and personally authorized the broad overall strategy of a covert operation against a variety of trade associations. This is dramatic evidence that Microsoft’s competitors have engaged in a massive and ongoing campaign to unfairly tarnish Microsoft’s public image and promote government intervention to benefit themselves.”

An unrepentant Larry Ellison view’s Oracle’s investigative activities as “competitive intelligence” and a public service to the American taxpayer; in contrast, those public policy and trade organizations investigated view the Oracle activities as “corporate espionage.” Confronted with this apparent dichotomy of perspectives, we next turn to defining these often synonymously used phrases.
Defining Competitive Intelligence

When news of the Oracle/IGI investigation appeared in the media, the phrase “competitive intelligence” was often used to describe “corporate espionage.” Shortly after this story appeared, the Society of Competitive Intelligence (SCIP), an Alexandria, Virginia–based professional organization founded in 1986 and consisting of over 7,000 members located in 64 countries, issued a press release whose headlines read “Competitive Intelligence Is Not Corporate Espionage.”

The SCIP is a global nonprofit organization providing education and networking opportunities for business professionals working in the field.

According to SCIP, the definition of competitive intelligence (CI) is the process of monitoring the competitive environment. CI enables senior managers in companies of all sizes to make informed decisions about everything from marketing, R & D, and investing tactics to long-term business strategies. Effective CI is a continuous process involving the legal and ethical collection of information, analysis that doesn’t avoid unwelcome conclusions, and controlled dissemination of actionable intelligence to decision makers.

“To liken CI to espionage is to distort the truth,” said Patrick Bryant, president of SCIP’s Board of Directors. “Espionage is the use of illegal means to gather information.” On the other hand, CI is “the process of gathering data using legal, ethical means and turning it into valuable intelligence through careful analysis.”

“To assist members in their practice of CI, SCIP has developed a strict Code of Ethics (see Table 1), which forbids breaching an employer’s guidelines, breaking the law, or misrepresenting oneself,” adds Bryant.

Furthermore, Bryant emphasized that “a recent policy analysis conducted by SCIP showed that CI practitioners who act consistently within the SCIP Code of Ethics should not run afoul of the Economic Espionage Act of 1996 (EEA), the law which governs CI activities.” The EEA makes stealing or obtaining trade secrets by fraud (and buying or receiving secrets so obtained) a U.S. federal crime.

And corporate espionage is on the rise. According to a recent study jointly conducted by the American Society for
Industrial Security (ASIS) and PricewaterhouseCoopers, Fortune 1000 companies sustained potential losses of more than $45 billion in 1999 from the theft of proprietary information—up from a Federal Bureau of Investigation estimate of $24 billion in the mid-1990s.\(^{50}\) Furthermore, the average Fortune 1000 company reported 2.45 incidents with an estimated loss in excess of $500,000 per incident.\(^{51}\) Of particular interest, high-technology companies reported nearly $120 million in direct losses, with respondents reporting the greatest number of incidents (67 per company) with average loss per incident of about $15 million.\(^{52}\)

According to the SCIP policy analysis, there are several reasons why the EEA should not impact on the practice of competitive intelligence.\(^{53}\) For example, most situations commonly referred to as “gray zones” are not trade secret or EEA violations. Although they raise ethical questions, gray-zone situations such as finding a lost document in the street, overhearing competitors talk about a plan, having a drink with a competitor knowing you are better at holding your liquor, removing your name tag at a trade show, or even falsely identifying yourself as a student (although inconsistent with the SCIP Code of Ethics) are situations that alone will not trigger trade secret liability. Thus, properly trained competitive intelligence professionals should be able to identify and avoid predicaments that would place them in actual legal risk.

**TABLE 1** Society of Competitive Intelligence Professionals Code of Ethics

| • To continually strive to increase the recognition and respect of the profession. |
| • To comply with all applicable laws, domestic and international. |
| • To accurately disclose all relevant information, including one’s identity and organization, prior to all interviews. |
| • To fully respect all requests for confidentiality of information. |
| • To avoid conflicts of interest in fulfilling one’s duties. |
| • To promote honest and realistic recommendations and conclusions in the execution of one’s duties. |
| • To promote this code of ethics within one’s company, with third-party contractors, and within the entire profession. |
| • To faithfully adhere to and abide by one’s company policies, objectives, and guidelines. |

CONCLUSIONS

So, is it corporate espionage or competitive intelligence? As SCIP’s President Bryant points out, “breaching an employer’s guidelines, breaking the law, or misrepresenting oneself,” are flagrant violations of its Code of Ethics for competitive intelligence professionals. Since IGI personnel are alleged to have violated Oracle’s wishes to refrain from illegal activity, that is, illegally entering a building, attempting bribery to obtain private property, and falsely identifying oneself as a private investigator, this behavior would qualify as corporate espionage.

Particularly disturbing is that Oracle believed it necessary to order IGI not to do “anything illegal.” After IGI representatives “repeatedly assured” Oracle representatives of the legality of their investigative activities, should not Oracle’s management have terminated its business relationship with IGI? A reasonable person would think so. Also, if the financial connection between Microsoft and The Independent Institute and the National Taxpayers Union had previously been reported in the national media, what was Oracle’s purpose in pursuing this investigation? As the editorial page of the Wall Street Journal concludes, Oracle’s actions were “an attack on free speech.” As the Journal editorial correctly acknowledges, “the Microsoft prosecution raises broad public policy questions that the public has a right to discuss.”

Microsoft’s press release clearly went to the heart of the matter: “Oracle has funded or supported numerous groups that have attacked Microsoft in recent years, such as ProComp, the Progress & Freedom Foundation, the Software & Information Industry Association, and the Computer & Communications Industry Association. While we do not agree with the views or tactics of these groups, we respect their right to express their views. Oracle apparently believes its business goals are more important than the free speech and privacy rights of others.”

Ellison’s Clintonian justification for Oracle’s commissioning of the IGI investigation, Oracle’s public misrepresentation of the relationships between Microsoft and the organizations targeted in the investigation, and the lack of concern for the apparent criminal activity directed at ACT by IGI representatives are all vivid examples of collapsing corporate civic responsibility in an American culture of denial. One hopes that other information technology
CEOs were sufficiently repulsed by this incident to refrain from engaging in similar activities in future public policy debates.

NOTES

4. Ibid.
5. Ibid.
6. Ibid.
8. Ibid.
9. Ibid.
11. Ibid.
12. Ibid.
15. Ibid.
16. Ibid.
17. Ibid.
18. Ibid.
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26. Ibid.
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29. Ibid.
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32. Ibid.
33. Lauria, “Oracle Caper Lifts Lid…”
34. Ibid.
35. Ibid.
38. Ibid.
39. The Independent Institute, “Statement…”
42. Ibid.
44. Ibid., “Competitive Intelligence Is Not Corporate Espionage.”
45. Ibid.
46. Ibid.
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51. Ibid.

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55. Ibid.

56. Microsoft Corporation, “Microsoft Issues Statement…”