Antitrust Division
U.S. Department of Justice
601 D Street NW
Suite 1200
Washington, DC 20530-0001

The Honorable Colleen Kollar-Kotelly
United States District Court for the District of Columbia
333 Constitution Avenue, NW
Washington, DC 20001

Re: US v. Microsoft, Civil Action No. 98-1232: Revised Proposed Final Judgment

The Honorable Judge Kollar-Kotelly and the US Department of Justice:

Please find attached the firm objections of the KDE League, Inc. to the above-referenced proposed final judgment (the "Proposal"). The KDE League is a group of industry leaders and KDE developers focused on facilitating the promotion, distribution, and development of KDE. KDE is a contemporary, free "Open Source" desktop environment.

In many ways, KDE is the functional equivalent of Windows. It consists of a modern, elegant, intuitive desktop environment, including a modern browser, accompanied by a host of easy-to-use and easy-to-learn applications, including the productivity/office suite KOffice. In addition, KDE provides a broad array of intuitive graphical configuration tools. In fact, APPS.KDE.com (a KDE/Qt application website) lists over 1,250 publicly-available KDE applications (it should be noted that someone using KDE can also run a number of non-KDE applications, such as GNOME, Motif, wxWindows, X, etc. applications).

The comprehensive set of tools available to KDE users combine to make system administration substantially easier than the standard command-line-driven UNIX/Linux administration, and hence make Linux and other UNIXes more competitive with Microsoft not only in the desktop markets but also in the server operating system markets.

While KDE is most commonly used in conjunction with Linux, it is extremely portable and versatile, and does not depend on any particular operating system. For example, it also runs successfully on many other systems (such as Sun's Solaris, Compaq's Tru64, IBM's AIX, HP's HP-UX, and other UNIXes). Moreover, since KDE is based on an outstanding graphical toolkit called Qt, and since Qt is also available for Windows, the new Mac OS X, as well as embedded devices (such as Sharp's new Zaurus), KDE has the potential to become a familiar

environment deployed in a broad array of heterogeneous environments.

As you are undoubtedly aware, Microsoft has often been noted, during the trial and particularly in recent months, as viewing Open Source as the only significant challenge to its reign. So far, Open Source – particularly Linux – has been largely limited to server systems. But in recent months the defendant has been paying increasing attention to KDE, and at this juncture KDE is *the* major direct competitor with Microsoft Windows desktop operating system products and Microsoft middleware and productivity applications and, through its capacity to simplify installation, usage and administration, a major *indirect* competitor with the defendant in the server operating system market.

In recognition of the strength and power of KDE as a desktop environment, an ever-growing body of companies and governments have started the switch to KDE, including the Korean government, which is migrating 120,000 office workers to KDE from Windows, and other companies and governments are seriously contemplating the switch, including the government of Germany. Due to its maturity, low cost, features and active developer community, as well as due to the freedoms KDE grants its users, KDE constitutes the most viable competitor to Microsoft Windows in the desktop operating system market and the strongest factor in the expansion of UNIX-based operating systems in the server market.

The defendant has now clearly observed that in fact KDE is ready and able to expand the role of Open Source as well as proprietary UNIXes on the office, school and home desktop, as well as on TV settop boxes, webpads, handheld-devices and other computing platforms.

The KDE League strongly feels that the proposed settlement does not adequately protect KDE from the defendant's monopoly power, and hence leaves the defendant free to attempt to crush its strongest potential competitor in an anticompetitive manner. In fact, we anticipate that if the Proposal is approved, the defendant may feel even less tethered than it has during the course of this seven-plus-year proceeding to use unlawful practices to attempt to derail KDE from widespread acceptance. The fact that the government has refused my requests for meetings to discuss how the Proposal might be reworded to provide some comfort that the defendant will be unable to use unlawful practices to crushing its strongest competitor adds little solace to a weakly-worded document.

At this juncture I would like to disclose that, from the time of commencement of this case until approximately June 1999, I was employed as an attorney by counsel for the defendant in this matter. However, I was exclusively involved in representing other clients in unrelated matters. I never performed any legal services for the defendant, nor was I ever exposed to any non-public information

about the defendant, whether relating to this litigation or otherwise.

I would also like to point out that the views and opinions in this memorandum express the views of the KDE League, and may not necessarily express the views of its members.

Best regards,

Andreas Pour
Chairman
KDE League, Inc.

Introduction

The KDE League opposes the above-referenced proposed final judgment (the *"Proposal"*). Specifically, the Proposal lacks adequate enforcement provisions, is too limited in scope, and fails to address issues of restitution. Our objections will focus on the specific problems faced by an Open Source project such as KDE/Linux, though many will apply more broadly as well.

In conducting its review, the Court should bear in mind the applicable provisions of 15 U.S.C. Sec. 16(e):

(e) Public interest determination

Before entering any consent judgment proposed by the United States under this section, the court shall determine that the entry of such judgment is in the public interest. For the purpose of such determination, the court may consider -

(1) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration or relief sought, anticipated effects of alternative remedies actually considered, and any other considerations bearing upon the adequacy of such judgment;

(2) the impact of entry of such judgment upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

As the Supreme Court wrote in *U.S. v. Grinnell Corp.*, 384 U.S. 563 (1966):

> We start from the premise that adequate relief in a monopolization case should put an end to the combination and deprive the defendants of any of the benefits of the illegal conduct, and break up or render impotent the monopoly power found to be in violation of the Act. That is the teaching of our cases, notably *Schine Theatres v. United States*, 334 U.S. 110, 128 -129.

As a result of its limited, if not negligible, scope, the absence of any enforcement provisions for private litigants who have shouldered the expense of the trial already and who have been financially injured by the defendant, and the absence of any restitution to the victims of the defendants' unlawful conduct, the Proposal is at best palpably without, if not directly against, the public interest. As has been said by industry analyst Robert X. Cringely, "If this deal goes through as it is written, Microsoft will emerge from the case not just unscathed,

but stronger than before".[1]

Unenforceable.

The Proposal makes enforcement of its minimal restrictions by parties actually harmed by the defendant's violation of its provisions practically impossible. In particular, should the defendant use unlawful and anti-competitive practices against KDE, neither the KDE developers nor the KDE League will be likely to obtain redress for such violations. This failure may ultimately deny consumers the choice to forgo the use of some or all of defendants' products.

To ensure private litigants, who, as the courts so far have agreed, have been financially injured by the defendant, have a remedy for the defendant's unlawful conduct, and so that the defendant's competitors, such as KDE, can have the hope to obtain justice should the defendant continues its pattern of unlawful practices, *the Government should require that Microsoft admit to its standing as a monopolist and the violations of the Sherman Act affirmed by the court of appeals,* together with any additional violations this Court may find upon remand of, and consistent with, the appellate court's order.

The proposed remedies are inadequate for private litigants for the following reasons. First, the Final Judgment provides that it "does not constitute any admission by any party regarding any issue of fact or law".[2] The clearest implication of this provision is that the defendant is not legally determined to be a "monopoly" in this case for purposes of *res judicata* or collateral estoppel. Microsoft has proven in this case that, for all practical resources, it has infinite resources, time, tenacity and patience to fight any potential litigants. In fact, recent SEC filings indicate that the defendant is sitting on a $36 billion cash horde. Even the government, with all its resource, has fought for almost seven-and-a-half years, only to end up with a Proposal which only the defendant's stockholders could cheer about. How is a free, open project like KDE to obtain redress against such a tenacious and resourceful opponent?

Though the conclusion was obvious to all judges engaged in this matter, both at trial and on appeal, the fact is that virtually no private plaintiff will be able to afford to prove that Microsoft is a monopoly, a necessary first step in obtaining relief against the defendant should it continue to abuse its monopoly position

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1 See Robert X. Cringely, He's Not in It for the Profit (Dec. 6, 2001, PBS Presents).

2 See Proposal, *Preamble.* The Proposal reads in relevant part:

> AND WHEREAS, this Final Judgment does not constitute any admission by any party regarding any issue of fact or law;

and thwart competition in its markets. The Government, having fought its battle in what in technological terms is a generation, cannot really take seriously its reference to remedies under Section 4 of the Clayton Act in Article VI of its Competitive Impact Statement (doc. 9549).

Second, the enforcement provisions of the Proposal are weak enough to amount to nothing but a ruse. For example, the "Technical Committee" which is charged with the duty to "assist in enforcement of and compliance with th[e] Final" Judgment, are (1) picked by MS (though one is picked by MS and one by Justice and the third by the first two, in light of how this Proposal signals the government' practical abandonment of prosecution of this matter, and in light of the defendant's tenacity, it is likely in our opinion that the third person will favor the defendant); (2) sworn to secrecy; (3) paid by MS; (4) required to work on MS's "campus"; and (5) unable to speak with any MS employee without an MS lawyer present.[3]

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3 See Proposal, Section IV.B. The Proposal reads in relevant part:

B. Appointment of a Technical Committee

1. Within 30 days of entry of this Final Judgment, the parties shall create and recommend to the Court for its appointment a three-person Technical Committee ("TC") to assist in enforcement of and compliance with this Final Judgment.

2. The TC members shall be experts in software design and programming. No TC member shall have a conflict of interest that could prevent him or her from performing his or her duties under this Final Judgment in a fair and unbiased manner. Without limitation to the foregoing, no TC member (absent the agreement of both parties):

a. shall have been employed in any capacity by Microsoft or any competitor to Microsoft within the past year, nor shall she or he be so employed during his or her term on the TC;

b. shall have been retained as a consulting or testifying expert by any person in this action or in any other action adverse to or on behalf of Microsoft; or

c. shall perform any other work for Microsoft or any competitor of Microsoft for two years after the expiration of the term of his or her service on the TC.

3. Within 7 days of entry of this Final Judgment, the Plaintiffs as a group and Microsoft shall each select one member of the TC, and those two members shall then select the third member. The selection and approval process shall proceed as follows.

a. As soon as practicable after submission of this Final Judgment to the Court, the Plaintiffs as a group and Microsoft shall each identify to the other the individual it proposes to select as its designee to the TC. The Plaintiffs and Microsoft shall not object to each other's selection on any ground other than failure to satisfy the requirements of Section IV.B.2 above. Any such objection shall be made within ten business days of the receipt of notification of selection.

b. The Plaintiffs shall apply to the Court for appointment of the persons selected by the Plaintiffs and Microsoft pursuant to Section IV.B.3.a above. Any objections to the eligibility of a selected person that the parties have failed to resolve between themselves shall be decided by the Court based solely on the requirements stated in Section IV.B.2 above.

c. As soon as practical after their appointment by the Court, the

Third, making matters worse are the Proposal's "No Third Party Rights" provisions.[4] The absence of third party rights is, in fact, explicitly stated twice in the Proposal: first in Section III.I (last paragraph) and again in Section VIII). Thus if a private party has been harmed by the defendant's violation of the Final Judgment, that person's sole recourse is to approach the Justice Department or a State to request enforcement of the Proposal. Given the fact that the Justice Department has not even responded to the KDE League's request for a hearing regarding the settlement, it seems that the likelihood that the Justice Department

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two members of the TC selected by the Plaintiffs and Microsoft (the "Standing Committee Members") shall identify to the Plaintiffs and Microsoft the person that they in turn propose to select as the third member of the TC. The Plaintiffs and Microsoft shall not object to this selection on any grounds other than failure to satisfy the requirements of Section IV.B.2 above. Any such objection shall be made within ten business days of the receipt of notification of the selection and shall be served on the other party as well as on the Standing Committee Members.

d. The Plaintiffs shall apply to the Court for appointment of the person selected by the Standing Committee Members. If the Standing Committee Members cannot agree on a third member of the TC, the third member shall be appointed by the Court. Any objection by Microsoft or the Plaintiffs to the eligibility of the person selected by the Standing Committee Members which the parties have failed to resolve among themselves shall also be decided by the Court based on the requirements stated in Section IV.B.2 above.

4. Each TC member shall serve for an initial term of 30 months. At the end of a TC member's initial 30-month term, the party that originally selected him or her may, in its sole discretion, either request re-appointment by the Court to a second 30-month term or replace the TC member in the same manner as provided for in Section IV.B.3.a above. In the case of the third member of the TC, that member shall be re-appointed or replaced in the manner provided in Section IV.B.3.c above.

5. If the United States determines that a member of the TC has failed to act diligently and consistently with the purposes of this Final Judgment, or if a member of the TC resigns, or for any other reason ceases to serve in his or her capacity as a member of the TC, the person or persons that originally selected the TC member shall select a replacement member in the same manner as provided for in Section IV.B.3.

6. Promptly after appointment of the TC by the Court, the United States shall enter into a Technical Committee services agreement ("TC Services Agreement") with each TC member that grants the rights, powers and authorities necessary to permit the TC to perform its duties under this Final Judgment. Microsoft shall indemnify each TC member and hold him or her harmless against any losses, claims, damages, liabilities or expenses arising out of, or in connection with, the performance of the TC's duties, except to the extent that such liabilities, losses, damages, claims, or expenses result from misfeasance, gross negligence, willful or wanton acts, or bad faith by the TC member. The TC Services Agreements shall include the following.

a. The TC members shall serve, without bond or other security, at the cost and expense of Microsoft on such terms and conditions as the Plaintiffs approve, including the payment of reasonable fees and expenses.

b. The TC Services Agreement shall provide that each member of the TC shall comply with the limitations provided for in Section IV.B.2 above.

7. Microsoft shall provide the TC with a permanent office, telephone, and other

acting on behalf of any Open Source project or other small company is marginal at best. In addition, many Open Source developers live in other countries, making it extremely difficult for them to obtain any redress through the courts. (Here it is important to bear in mind that while these developers live in other countries, their software is freely available to American consumers, and hence any harm visited upon these international developers results in direct harm to the American consumers which the Antitrust Laws are designed to protect.) This limitation should be particularly borne in mind when reading the entire Proposal, such as the supposed "abandonment" of certain trademark rights in

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office support facilities at Microsoft's corporate campus in Redmond, Washington. Microsoft shall also, upon reasonable advance notice from the TC, provide the TC with reasonable access to available office space, telephone, and other office support facilities at any other Microsoft facility identified by the TC.

8. The TC shall have the following powers and duties:

a. The TC shall have the power and authority to monitor Microsoft's compliance with its obligations under this final judgment.

b. The TC may, on reasonable notice to Microsoft:

i. interview, either informally or on the record, any Microsoft personnel, who may have counsel present; any such interview to be subject to the reasonable convenience of such personnel and without restraint or interference by Microsoft;

ii. inspect and copy any document in the possession, custody or control of Microsoft personnel;

iii.. obtain reasonable access to any systems or equipment to which Microsoft personnel have access;

iv. obtain access to, and inspect, any physical facility, building or other premises to which Microsoft personnel have access; and

v. require Microsoft personnel to provide compilations of documents, data and other information, and to submit reports to the TC containing such material, in such form as the TC may reasonably direct.

c. The TC shall have access to Microsoft's source code, subject to the terms of Microsoft's standard source code Confidentiality Agreement, as approved by the Plaintiffs and to be agreed to by the TC members pursuant to Section IV.B.9 below, and by any staff or consultants who may have access to the source code. The TC may study, interrogate and interact with the source code in order to perform its functions and duties, including the handling of complaints and other inquiries from non-parties.

d. The TC shall receive complaints from the Compliance Officer, third parties or the Plaintiffs and handle them in the manner specified in Section IV.D below.

e. The TC shall report in writing to the Plaintiffs every six months until expiration of this Final Judgment the actions it has undertaken in performing its duties pursuant to this Final Judgment, including the identification of each business practice reviewed and any recommendations made by the TC.

f. Regardless of when reports are due, when the TC has reason to believe that there may have been a failure by Microsoft to comply with any term of this Final Judgment, the TC shall immediately notify the Plaintiffs in writing setting forth the relevant details.

g. TC members may communicate with non-parties about how their complaints or inquiries might be resolved with Microsoft, so long as the confidentiality of information obtained from Microsoft is maintained.

Section VI.T.

Fourth, the term of the agreement is extremely short -- only five years.[5] Even if the government proves to the court "a pattern of willful and systematic violations", the Proposal may only be extended once for a maximum of two years.[6] Thus, given the defendant's dilatory legal maneuverings, it is easily possible that the defendant can blatantly violate the Proposal from the get-go and have the Proposal expire before proceedings can adjudge it guilty of any violations.

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h. The TC may hire at the cost and expense of Microsoft, with prior notice to Microsoft and subject to approval by the Plaintiffs, such staff or consultants (all of whom must meet the qualifications of Section IV.B.2) as are reasonably necessary for the TC to carry out its duties and responsibilities under this Final Judgment. The compensation of any person retained by the TC shall be based on reasonable and customary terms commensurate with the individual's experience and responsibilities.

i. The TC shall account for all reasonable expenses incurred, including agreed upon fees for the TC members' services, subject to the approval of the Plaintiffs. Microsoft may, on application to the Court, object to the reasonableness of any such fees or other expenses. On any such application: a) the burden shall be on Microsoft to demonstrate unreasonableness; and (b) the TC member(s) shall be entitled to recover all costs incurred on such application (including reasonable attorneys' fees and costs), regardless of the Court's disposition of such application, unless the Court shall expressly find that the TC's opposition to the application was without substantial justification.

9. Each TC member, and any consultants or staff hired by the TC, shall sign a confidentiality agreement prohibiting disclosure of any information obtained in the course of performing his or her duties as a member of the TC or as a person assisting the TC to anyone other than Microsoft, the Plaintiffs, or the Court. All information gathered by the TC in connection with this Final Judgment and any report and recommendations prepared by the TC shall be treated as Highly Confidential under the Protective Order in this case, and shall not be disclosed to any person other than Microsoft and the Plaintiffs except as allowed by the Protective Order entered in the Action or by further order of this Court.

10. No member of the TC shall make any public statements relating to the TC's activities.

C. Appointment of a Microsoft Internal Compliance Officer

1. Microsoft shall designate, within 30 days of entry of this Final Judgment, an internal Compliance Officer who shall be an employee of Microsoft with responsibility for administering Microsoft's antitrust compliance program and helping to ensure compliance with this Final Judgment.

2. The Compliance Officer shall supervise the review of Microsoft's activities to ensure that they comply with this Final Judgment. He or she may be assisted by other employees of Microsoft.

3. The Compliance Officer shall be responsible for performing the following activities:

a. within 30 days after entry of this Final Judgment, distributing a copy of the Final Judgment to all officers and directors of Microsoft;

b. promptly distributing a copy of this Final Judgment to any person who succeeds to a position described in Section IV.C.3.a above;

Of course there is also a "Voluntary Dispute Resolution" provision, where essentially a victim of the defendant's monopoly abuses would have the opportunity to submit a grievance through a web form.[7] Insofar as the defendant adamantly denies any wrongdoing in the face of a lawsuit by the federal government and numerous States, and in the face of every judge to have reviewed the matter and disagreed with them, it strikes us as extremely unlikely that any aggrieved party would obtain resolution using this method. Under the Proposal, the defendant then has 30 days to decide, in effect, to ignore the

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c. ensuring that those persons designated in Section IV.C.3.a above are annually briefed on the meaning and requirements of this Final Judgment and the U.S. antitrust laws and advising them that Microsoft's legal advisors are available to confer with them regarding any question concerning compliance with this Final Judgment or under the U.S. antitrust laws;

d. obtaining from each person designated in Section IV.C.3.a above an annual written certification that he or she: (i) has read and agrees to abide by the terms of this Final Judgment; and (ii) has been advised and understands that his or her failure to comply with this Final Judgment may result in a finding of contempt of court;

e. maintaining a record of all persons to whom a copy of this Final Judgment has been distributed and from whom the certification described in Section IV.C.3.d above has been obtained;

f. establishing and maintaining the website provided for in Section IV.D.3.b below.

g. receiving complaints from third parties, the TC and the Plaintiffs concerning Microsoft's compliance with this Final Judgment and following the appropriate procedures set forth in Section IV.D below; and

h. maintaining a record of all complaints received and action taken by Microsoft with respect to each such complaint.

D. Voluntary Dispute Resolution

1. Third parties may submit complaints concerning Microsoft's compliance with this Final Judgment to the Plaintiffs, the TC or the Compliance Officer.

2. In order to enhance the ability of the Plaintiffs to enforce compliance with this Final Judgment, and to advance the parties' joint interest and the public interest in prompt resolution of issues and disputes, the parties have agreed that the TC and the Compliance Officer shall have the following additional responsibilities.

3. Submissions to the Compliance Officer.

a. Third parties, the TC, or the Plaintiffs in their discretion may submit to the Compliance Officer any complaints concerning Microsoft's compliance with this Final Judgment. Without in any way limiting its authority to take any other action to enforce this Final Judgment, the Plaintiffs may submit complaints related to Sections III.C, III.D, III.E and III.H to the Compliance Officer whenever doing so would be consistent with the public interest.

b. To facilitate the communication of complaints and inquiries by third parties, the Compliance Officer shall place on Microsoft's Internet website, in a manner acceptable to the Plaintiffs, the procedures for submitting complaints. To encourage whenever possible the informal resolution of complaints and inquiries, the website shall provide a mechanism for communicating complaints and inquiries to the Compliance Officer.

request (it is possible the defendant might redress a grievance, of course, but since the defendant continues to assert it is not a monopoly and not guilty of any wrongdoing, it is totally unreasonable for the government to rely on this in its evaluation of the Proposal).[8]

Alternatively, a complaint may be submitted to the Technical Committee, which in turn *may* review a complaint (it is notable in this regard that though the Proposal speaks of "shall investigate", as there are no third party rights under the Proposal, a third party has no remedy in the event the Technical Committee fails to take such action).[9] In the event the Technical Committee agrees with the person filing a grievance, that person is barred from every presenting any evidence in court about the findings of the Technical Committee.[10] In the final analysis this situation probably does not have a great practical effect, as the person filing the grievance does not have any rights under the Proposal anyway. However, it does highlight in how many ways the defendant has been able to insulate itself from any responsibility for actual wrongdoing it engages in, and how the Technical Committee is a veritable mirage with respect to any party having a legitimate grievance against the defendant.

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c. Microsoft shall have 30 days after receiving a complaint to attempt to resolve it or reject it, and will then promptly advise the TC of the nature of the complaint and its disposition.

4. Submissions to the TC.

a. The Compliance Officer, third parties or the Plaintiffs in their discretion may submit to the TC any complaints concerning Microsoft's compliance with this Final Judgment.

b. The TC shall investigate complaints received and will consult with the Plaintiffs regarding its investigation. At least once during its investigation, and more often when it may help resolve complaints informally, the TC shall meet with the Compliance Officer to allow Microsoft to respond to the substance of the complaint and to determine whether the complaint can be resolved without further proceedings.

c. If the TC concludes that a complaint is meritorious, it shall advise Microsoft and the Plaintiffs of its conclusion and its proposal for cure.

d. No work product, findings or recommendations by the TC may be admitted in any enforcement proceeding before the Court for any purpose, and no member of the TC shall testify by deposition, in court or before any other tribunal regarding any matter related to this Final Judgment.

e. The TC may preserve the anonymity of any third party complainant where it deems it appropriate to do so upon the request of the Plaintiffs or the third party, or in its discretion.

4 See Proposal, Section III.I (last paragraph) and Section VIII.
5 See Proposal, Section V.A.
6 See Proposal, Section V.B.
7 See Proposal, Section IV.D.
8 See Proposal, Section IV.D(3).
9 See Proposal, Section IV.D(4).
10 See Proposal, Section IV.D(4)(d).

OS Only

The restrictions imposed on the defendant in the Proposal are inadequate to prevent the defendant from further engaging in reasonably predictable unlawful behavior. Moreover, the restrictions are inadequate to protect our democracy from the overconcentration of power left in the defendant's hands.

The restrictions of the Proposal have the following principal shortcomings:

First, Microsoft's office, multimedia, Internet and other products, although many of which from all appearances each constitutes a monopoly onto themselves, are not even addressed by the Proposal. Instead, only the "OS" is covered. Viewed in light of the defendant's .NET strategy for the future, this limitation all but renders the Proposal's prohibitions vacuous.

Although it is a fact proven in this case that the defendant used its OS as a basis to abuse its monopoly position and compete unfairly, the essence of the violations related to the incorporation by the defendant of additional technologies into its "OS". This inclusion repeatedly encompassed items, such as a browser or multimedia player that, in reality, do not form part of the OS but rather are separate applications as they do not have any responsibility for allocating limited resources, such as memory, disk space, screen space, etc., among competing applications, but rather themselves are applications competing for these limited resources).

Under the Proposal, the OS is, at least to some minimal extent (presumably far less than the defendant could have hoped when it formulated its current NET strategy), subject to restrictions. Accordingly, one can reasonably anticipate that the defendant's new strategy will be to *extract* functionality from the OS. Instead, these applications could be provided separately, either as "free" downloads from the Internet (of course if, as may be expected, they won't work without the defendant's OS they are not "free") or as network services provided over the Internet or a local network, providing a credible justification for reclassifying as an application what was before (at least according to the defendant) part of the OS.

Specifically, the defendant has "bet the company" on its .NET platform. The .NET strategy means any device which has one application (for simplicity, something equivalent to Java) can access a great multitude of services, whether provided by MS or its allies. The OS itself can be restored to what traditionally has been considered an OS, to wit, a system for allocating shared resources (such as access to memory, disk space, the screen, etc.) amongst competing

applications, such as multimedia players, browsers, etc., rather that artificially defined to include those applications itself. Such an approach can be seen with some of the defendant's recent home products.

In other words, the last decade has witnessed MS simply "integrating" applications into the OS to ensure control over more applications and expand its OS monopoly (for example, when MS integrated its Internet browser into the OS, Netscape's Navigator was doomed). With the OS under attack and possibly subject to regulation, the defendant has begun taking the direct opposite tack, undermining the importance of the OS and extracting and separating the core functionality provided by its applications. Of course, from the user's perspective, nothing will have visibly changed.

Second, by reserving to the defendant the right to determine "in its sole discretion" the software code which comprises a "Windows Operating System Product", the Proposal grants the defendant the uncurtailed freedom to redefine the term "OS".[11] Notably, the definition of "Microsoft Middleware Product" is limited to products which are "in a Windows Operating System Product".[12] Hence, if the OS is reduced in significance, and the Middleware Products are either bundled separately (as a group of add-ons, similar to how currently MS Office is an add-on, possibly available for free download or use to anyone with a registered MS Operating System) or provided as a service via the Internet or some other computer network, such products (though essentially the same) would not be covered by the Proposal either.

Thus, the minimal restrictions included in the Proposal relate to something about which the defendant may reasonably foreseeably no longer care. Having abused its monopoly in the desktop to gain a monopoly in applications (including certain middleware), the defendant can/likely will simply switch to abusing its monopoly in applications, and nothing in the Proposal places any restrictions on that foreseeable tactic.

Third, another extremely important inadequacy of the Proposal is the complete omission of the defendant's office/productivity applications ("Productivity Products"). It seems clear that the defendant enjoys a monopoly in at least the office productivity market (Word, Excel, Powerpoint, FrontPage, etc.) commensurate with (or perhaps even more so) its OS monopoly.

Thus, for example, the provisions of Section II.E of the Proposal, which (to some very limited extent) require the defendant to share "Communication Protocols"

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11 See Proposal, Section VI.U.
12 See Proposal, Section VI.K.

with third parties to enable them to interoperate with Windows Operating System Products, do not extent to Productivity Products. In particular, the definition of "Communications Protocol" is limited to tasks involving a "Windows Operating Systems Product", which as noted does not include Productivity Products.[13]

In addition, the principal way in which the defendant maintains its monopoly in Productivity Applications is through the use of file formats which are extremely – if not unnaturally – difficult for competitors to decipher. Without access to the details of such file formats (the standards published on the defendant's website are totally inadequate), competing developers cannot create adequate filters so that their projects can interoperate with the defendant's Productivity Products. As the vast majority of the human knowledge base has been "locked" into these decidedly proprietary formats, the absence of an open standard limits consumer choice and may even prevents consumers from switching to another operating system.

One obvious manner in which the lack of attention to Productivy Products comes into play is in the "restrictions" of Section III.A. These do not prevent the defendant from retaliating against an OEM for the "protected" conduct in the pricing of such additional software, as well as other popular software distributed by the defendant (such as its web server or database products).

13 See Proposal, Section VI.B.

Similarly, the provisions of the Proposal which to some limited if not negligible extent require the defendant to permit others to learn the defendant's secret protocols do not even pretend to extend to the format of its information encryption, encoding and other obfuscation.

Volumous Exceptions

What few requirements are imposed on the defendant are largely undone by the breadth of the qualifications in III.J of the Proposal, particularly subsection 2. Provision (a) thereof essentially disqualified all corporations (including the defendant itself), as it is impossible not to have a "history" of violation of intellectual property rights presumably even making an unpermitted backup copy would satisfy this broad provision). Provision (b) requires demonstration of a "reasonable *business*" need (as opposed to reasonable *technical* need) for a "planned or shipping product". The provision would essentially require a competitor to disclose to the defendant its non-public, planned products, without any confidentiality, non-competition or other assurance that the defendant will not use this information to benefit itself or harm the supplier. Provision (c) entitles the defendant to establish "reasonable, objective standards ... for certifying the authenticity and viability of its business", which standards for some unknown reason the defendant is not now able to articulate, leading to a very low expectation as to the reasonableness and objectiveness of the eventual standards.

Undoubtedly provisions (b) and (c) are intended to prevent Open Source projects, which to date form the sole serious competitor to the defendant over its range of products, from claiming any rights specified in the Proposal. Generally Open Source developers program for the challenge and joy of expression, rather than as part of a "viable business". As Open Source software is free, the defendant could quite rightfully argue that the developers do not have a "viable business". Yet from the perspective of a software user, it hardly matters what the developers' motivation is; in fact a user might prefer software that is developed under the Open Source model rather than for profit.

Finally, provision (d) permits the defendant to deny any request unless the party making the request in essence submits all its trade secrets and intellectual property to a "third party". Since this "third party" (not to be confused with "independent party") is selected in the defendant's sole discretion, and since there is no provision assuring the confidentiality of any data submitted or that any party reviewing the information – including this "third party" -- itself satisfies the criteria of Section III.J, any requester will have to assume that all the submitted information will be carefully reviewed by the defendant.

No Protection to Consumers

The Proposal also does not provide any protection to consumers. While some indirect protection is provided via the limited protections afforded to OEMs, large consumers (such as Fortune 1000 companies) receive no protection. For example, nothing in the Proposal appears to prevent the defendant from raising prices on software to, for example, General Electric if General Electric elects to deploy KDE in its offices. In effect, the defendant is free to retaliate freely against large companies, governments, universities, and other institutions which elect to employ competing products in some but not all of their computer systems.

No Protection for ISVs/Developers on other Platforms

As recognized by the trial court, both by the defendant and the plaintiff, Open Source clearly represents the most viable competitive threat to defendant's monopoly. Nevertheless, the Proposal does not provide any means for this competition to compete fairly with the defendant.

For example, the defendant's obligation to release Documentation and APIs under Section III.D does not extend to document formats (such as MS Office formats or video/audio "codecs" used in multimedia applications) or network protocols used by the defendant to maintain its monopoly, nor does it prevent the defendant from pursuing patents or other exclusive legal rights on such formats and protocols solely or substantially for the purpose of preventing competition from software vendors/developers on other platforms.
In addition, as noted above, it is far from clear that any of the limited and unenforceable restrictions in the Proposal apply to Open Source businesses and developers at all.

Proposal Language

Much of the language of the Proposal appears to be drafted to permit easy circumvention. This point will be made with a handful of examples, although many more can be identified in the Proposal.

For example, Section III.A uses the term "known to Microsoft", as opposed to something less stringent (knowledge being very difficult to prove), such as leaving out the language "it is known to Microsoft that" altogether or by using the substitute phrase "it is or should be known to or suspected by Microsoft that". In addition, provision III.A.2 does not provide protection to OEMs who ship Personal Computers that boots only into a competing operating system.

As another example, Section III.C.4 prohibits the defendant from entering into any agreement with an OEM which restricts the ability of the user to launch another operating system from the boot prompt. However, the provision does not restrict the defendant from causing its operating system to delete any boot loader which might provide the user a choice of which operating system to launch. In fact, the defendant's operating systems are well known to so interfere with the operation of other operating systems. In addition, the provision fails to provide that the defendant is barred from requiring OEMs to install a Windows Operating System on all its products, which has been the case in the past and which forces consumers to pay for a product they either do not want or need and makes alternative operating systems unable to compete with the defendant on the basis of price.

The provisions of Section III.E similarly fall short of the goal of permitting competition with the defendant. In particular, the disclosure of Communication Protocols is limited by Section III.J.1, which broadly exempts any information "which would compromise the security of a particular installation or group of installations". While superficially this sounds reasonable, the gaping hole is created by reference to "any portion[] or layer[] of Communication Protocols". Of course, it would be difficult to imagine that knowledge of a communication protocol *layer* could compromise security, and hence the addition of such language by the defendant would strongly indicate its intention to create such layers in order to prevent competitors from interoperating with its products. It is worth noting at this juncture that all the major authentication, security and encryption schemes rely on completely open protocols and that security is afforded solely through an unknown key, token or similar access control mechanism rather than through any portion of the protocol itself. This is true because it is generally considered insecure to rely on aspects of a protocol for security or authentication as they are quite easy to reverse engineer, i.e. defeat, by anyone not concerned with compliance with the law.

Section III.J.2 requires the defendant to permit competition only when a "Windows Operating System Product" (which, as noted more below, is a definition entirely within the control of the defendant) launches a "Microsoft Middleware Product" (essentially a browser, Java, a media player, a chat client, a mail client or a calendar client), but *only* if (a) the product is opened in a "Top-Level Window", *and* b) either (i) *all* of the user interface elements are displayed, or ii) the Trademark of the Microsoft Middleware Product is displayed. Thus, if the product is not opened in a "Top-Level Window", the defendant can prevent the consumer from using a competitor's product. Why, might one reasonably ask, would whether or not a media player has a separate "move" and "resize" button affect whether or not the user should have a choice over the media

player? In fact, the definition of "Top-Level Window" is entirely obtuse. Technically, any "window" can contain "sub-windows" -- even a simple dialog box is composed of many sub-windows (*e.g.*, each text item, each checkbox, each text edit box, etc. is a "window"). Since this is a requirement, one must assume it means something more. Hence the requirement leaves a tremendous amount of wiggle room for the defendant.

Similarly, clause (c) of the definition of "Top-Level Window" permits ample room for manipulation. The defendant can simply ensure that at least the "user interface elements", as opposed to the actual functioning of the program, is *not* under the control of an "independent process". It is important to note here that use of the term "separate process" would have been much broader; by specifying "independent process", the defendant has made it trivially easy to make any top-level window not fall within the definition of "Top-Level Window" simply by starting the middleware product as a "child" process.

The second requirement also leaves huge amounts of room for avoidance of any requirement to permit users access to competitor products. One easy way to circumvent the requirement is to add a single user interface element which is available when the product is launched from the Start menu, but not when it is launched from the Microsoft Middleware Product. This element could be an element entirely inconsequential to the operation of the Microsoft Middleware Product, such as a trivial status bar, an extra line of text somewhere, an extra menu element, an extra toolbar or toolbar icon, etc.; in fact it could be a single user interface element added solely to the version launched from the "Start" menu for the *purpose* of making it different than the one launched from the Microsoft Middleware Product (and of course this element could be added *after* the functional and user interface design of the product has otherwise been totally completed).

Of course, it is also trivially easy for the defendant to avoid being caught in subsection (ii) of Section III.J.2. In particular, the definition of the term "Trademarked" specifies that:

> We start from the premise that adequate relief in a monopolization case should put an end to the combination and deprive the defendants of any of the benefits of the illegal conduct, and break up or render impotent the monopoly power found to be in violation of the Act. That is the teaching of our cases, notably *Schine Theatres v. United States*, 334 U.S. 110, 128 -129.
>
> Any product distributed under descriptive or generic terms or a name comprised of the Microsoft® or Windows® trademarks together with descriptive or generic terms shall not be Trademarked as that term is used in

this Final Judgment.

Accordingly, the defendant could describe its media player as the "Microsoft Media Player", or its messenger as the "Microsoft Messenger", or its calendar as the "Microsoft Calendar", without being caught in subsection (ii). Obviously, no competitor can similarly name its product, so to say such names are not Trademarked defies all reason. In any event, the essence of the argument is that, if the defendant expends just a little bit of effort and (possibly) imagination, Section III.J.2 will not curtail the defendant from eliminating user choice as to the Middleware Product launched by any Microsoft Operating System Product.

Similarly, Section III.J.3 does not specify that the user's consent be voluntary (e.g., the consent may be provided as part of a larger question), that the presentation of the request for the consent be non-discriminatory and fair to all products, or that the defendant may only request a switch once, so that it cannot prevail over its competitors by virtue of sheer harassment (such as popping up a dialog every time a Middleware Product is launched or even every time a feature of a Middleware Product is used). Even the time language in provision b) of that Section is a huge loophole, as it is commonplace for OEMs to do the "initial boot up" before shipping a PC and hence the 14-day period could have largely or completely expired by the time a user boots up the PC for the first time.

Another example of loophole language from the definitions relates to the term "ISV". The term is defined in terms of an "entity", rather than the traditional "person" or "person or entity", thereby preventing Open Source developers from falling within the protections afforded to ISVs. From a competitive standpoint, there is no reason for the government to favor an incorporeal entity over a human developer, and accordingly this definition is unreasonable and against the public interest.

No Restitution or Penalties

The evidence, upon which the defendant was adjudged guilty of essentially felonious conduct, was mainly based on events of the mid-late 1990's. Since the commencement of this litigation, the defendant's behavior has in the KDE League's opinion become substantially more unlawful and egregious, the whole time right under the government's nose.

Under the Proposal, the punishment for conduct which all judges to hear evidence have uniformly ruled is unlawful appears to be absolutely nothing; even the most generous read of the Proposal would have to conclude that at most it aims to prevent the defendant from engaging in (some) further unlawful conduct.

In fact, no restitution or compensation to the corporate, developer or consumer victims of its legion abuses is contemplated. Not even an injunction against the defendant's recent announcement that it will stop providing *security* patches for older versions of its product line (which would be similar to a car manufacturer not fixing a serious safety violation and an act which a non-monopolist could hardly get away with), forcing everybody to "upgrade" to the much-more-expensive but in many cases much-less-desirable Windows XP/2000 series.

Apparently, the government is quite content that the defendant keep the billions in profit it unlawfully bilked from American consumers and businesses.

Moreover, the government's failure to address the defendant's ever-more-egregious conduct provides the public with no confidence that the government would act to enforce the "slap-on-the-wrist" restrictions contained in the Proposal. Accordingly, it is imperative for the public interest that any settlement provide remedies for private litigants to enforce their rights under the federal antitrust laws without having to mount a full attack and prevail over the defendant on the core issues of monopolization and abuse of monopoly power.

Patent Abuse

The threat of the defendant using patents to destroy Open Source interoperability with the defendant's technologies is a major obstacle to consumer choice and a competitive marketplace. The defendant is building up a large reservoir of patents, assisted by the USPTO's abysmal software patent review strategy. Even a patent which might be obviously invalid, for lack of novelty or otherwise, would be extremely difficult for an Open Source project to overcome, as the defendant has a huge hoard of resources to throw at Open Source developers who would in almost all cases lack the resources to respond, let alone prevail.

Just to pick one example of an absurdly broad patent which the defendant could use as a sword to maintain its monopoly was recently issued. See United States Patent 6,330,670 (Dec. 11, 2001). Claim 1 of this patent is for:

> A computerized method for a digital rights management operating system comprising: assuming a trusted identity; executing a trusted application; loading rights-managed data into memory for access by the trusted application; and protecting the rights-managed data from access by an untrusted program while the trusted application is executing.

This really is something that must be extremely obvious to even a non-computer

scientist. It's the equivalent to getting a patent on the following "process", employed by a security guard at a top-secret facility:

> A method for workplace security comprising: assuming a trusted employer; relying on trusted equipment; permitting the protected employee onto the premises; and protecting the premises from access by an untrusted person while the trusted person is working.

While this sounds like a joke, it is actually more sophisticated than this most obvious "patent" the defendant has obtained. Unfortunately, an Open Source project like KDE would find it veritably impossible to have such a patent overturned in court should the defendant elect to try to enforce it.

Even more unfortunately, the Proposal does not place any restrictions or circumstances on the defendant – such as its status as an abusive monopolist – which might assist its competitors fight such an attack in a legal forum.

Conclusion

In conclusion, the KDE League would like to reiterate its firm opposition to the Proposal. The Proposal does nothing to assist a great many competitors in competing with the defendant, even in markets which the defendant has demonstrably conquered using unlawful methods. And it does nothing to prevent the defendant from unlawfully abusing its most viable competitors, not even a small leg up in pursuing justice in a court of law.