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

Dear Ms Hesse,

I am Professor of Law at Columbia University Law School in New York, and General Counsel (*pro bono publico*) of the Free Software Foundation, a non-profit §501(c)(3) corporation organized under the laws of the Commonwealth of Massachusetts, with its headquarters in Boston. I make this statement under the provisions of 15 U.S.C. §16(d) concerning the Proposed Revised Final Judgment (hereinafter "the Settlement") in *United States v. Microsoft Corp.*

The remedies sought to be effected in the Settlement are, in their broad outline, appropriate and reasonable measures for the abatement of the illegal conduct proven by the United States at trial. The goal of such remedies is to require that Defendant affirmatively assist the restoration of competition in the market in which the Defendant has been shown to have illegally maintained a monopoly in violation of 15 U.S.C. §2. The remedies embodied in the Settlement would substantially achieve that goal, appropriately furthering the Government's pursuit of the public interest, if the Settlement were amended to rectify certain details one-sidedly favorable to the Defendant's goal of continuing its illegal monopoly.

Defendant—in the interest of continuing unabated its illegal monopoly—has artfully drafted certain clauses of the Settlement so as to hobble potential competition, giving the appearance of affirmatively assisting to undo its wrong, but covertly assisting instead in its continuance.

The District Court found that the Defendant had illegally maintained a monopoly in the market for Intel-compatible PC operating systems. (Findings of Fact, November 19, 1999, ¶19.) The mechanism of that monopolization, the court found, was the attempt to establish exclusive control of "application program interfaces" ("APIs") to which applications developers resort for operating system services, so as to prevent the possibility of "cross-platform" development threatening Defendant's operating systems monopoly. (Findings of Fact, ¶80 and *passim.*)

The Settlement accordingly makes appropriate provision to require Microsoft to provide access to full and complete technical information about its APIs on non-discriminatory terms, so as to prevent Defendant's prior conduct in erecting artificial and illegal barriers to entry to the monopolized market.

But the precise terms of the Settlement create a series of artful technical loopholes vitiating the primary intention.

Section III(D) provides that:

> Starting at the earlier of the release of Service Pack 1 for Windows XP or 12 months after the submission of this Final Judgment to the Court, Microsoft shall disclose to ISVs, IHVs, IAPs, ICPs, and OEMs, *for the sole purpose of interoperating with a Windows Operating System Product*, via the

> Microsoft Developer Network (”MSDN”) or similar mechanisms, the APIs and related Documentation that are used by Microsoft Middleware to interoperate with a Windows Operating System Product. (emphasis added)

The “sole purpose” requirement means that Defendant does not have to make any such API information available to developers of software whose purpose it is to make competing Intel-compatible PC operating systems. Only those who make programs that interoperate with Windows Operating Systems Products may receive such information. Under §III(I)(3), an applications developer who has received licensed information concerning Defendant’s APIs could be prohibiting from sharing that information with a maker of a competing Intel-compatible PC operating system, for the purpose of interoperating with that competing product. Under §III(I)(2), if a potential competitor in the market for Intel-compatible PC operating systems also makes applications products, it can even be prohibited from using licensed information it receives in order to make those applications interoperate with Defendant’s products also interoperate with its own competing operating system. What should be a provision requiring Defendant to share information with potential competitors in the monopolized market turns out, after Defendant’s careful manipulation, to be a provision for sharing information “solely” with people other than competitors in the monopolized market. The same language has been inserted into §III(E), thus similarly perverting the intention of the Settlement with respect to Communications Protocols.

Defendant has not merely engaged in this undertaking with a goal to the exclusion of potential future competitors from the monopolized market. In the teeth of the evidence, long after having been proved to have behaved with exaggerated contempt for the antitrust laws, Defendant is attempting in the very Judgment delivered against it to exclude from the market its most vigorous current competitor.

Defendant’s most significant present challenger in the Intel-compatible PC operating systems market is the collection of “free software,” which is free in the sense of freedom, not necessarily in price: thousands of programs written collaboratively by individuals and organizations throughout the world, and made available under license terms that allow everyone to freely use, copy, modify and redistribute all the program code. That free software, most of it licensed under the terms of the Free Software Foundation’s GNU General Public License (“the GPL”) represents both an operating system, known as GNU, and an enormous corpus of applications programs that can run on almost all existing architectures of digital computers, including Intel-compatible PCs. Through one such free software component, an operating system “kernel” called Linux, written by thousands of individuals and distributed under the GPL, the GNU operating system can execute on Intel-compatible PC’s, and by combining Linux with other free software, GNU can perform all the functions performed by Windows. Non-Microsoft Middleware can execute on Intel-compatible PCs equipped with components of GNU and Linux. Intel-compatible PCs so equipped currently account for more than 30% of the installed server base in the United States, according to independent industry obsevers.

The District Court found that “by itself, Linux’s open-source development model shows no signs of liberating that operating system from the cycle of consumer preferences and developer incentives that, when fueled by Windows’ enormous reservoir of applications, prevents non-Microsoft operating systems from competing.” (Findings of Fact, November 5, 1999, ¶50.) (referring, confusingly, to the combination of GNU, Linux, and other programs simply as “Linux.”) The District Court correctly found that in order to compete effectively with Defendant in the desktop operating systems market for Intel-compatible PCs, systems equipped with the free software operating system should be able to interoperate with “the enormous reservoir” of Windows applications.

There is no inherent barrier to such interoperation, only an artificial barrier illegally erected by Defendant. If Defendant were required to release information concerning its APIs to the developers of free software, GNU, Linux, the X windowing system, the WINE Windows emulator, and other relevant free software could interoperate directly with all applications that have been developed for Windows. Anyone could execute Windows applications programs bought from any developer on Intel-compatible PC's equipped with the competing free software operating system. And because, as the District Court found, the cost structure of free software is very much lower than Defendant's, the competing operating system product is and would continue to be available at nominal prices. (Findings of Fact, November 5, 1999, ¶50.)

That would be too effective a form of competition, from the Defendant's point of view. For this reason, Defendant has included in the Settlement the terms that exclude from API documentation precisely those to whom it would be most logically addressed: potential competitors seeking access to the monopolized market. If the Settlement were enforced according to its intention, the result would be immediate and vigorous competition between Defendant and the parties against whom, the District Court found, Defendant was illegally maintaining a barrier. The Settlement should be amended to level that barrier, which the current language inserted by Defendant artfully maintains. The language of §§III(D) and III(E) should be amended to require Defendant to release timely and accurate API information to all parties seeking to interoperate programs with either Windows Operating System Products or applications written to interoperate with Windows Operating System Products.

For the same reason, Defendant's attempt to continue denying the free software development community access to its APIs through the imposition of royalty requirements, in §III(I)(1), should be removed. As the District Court recognized, free software development means that everyone in the world has access, without payment of royalties or prohibition of redistribution, to the "source code" of the software. All APIs and other interfaces are fully available at all times to anyone who wants to interoperate with the existing programs. This, and the ability to reuse existing program code in new programs without payment of royalties or license fees, permits vast numbers of interoperable, high-quality programs to be written by a mixture of volunteers and professional project developers for free distribution. By authorizing Defendant to engage in non-reciprocity by charging royalties for the same information about its programs, thus purposefully ousting volunteer developers, and by prohibiting "sublicensing," thus precluding profit-making developers from seeking interoperability with volunteers, the Settlement is craftily perverted into a mechanism whereby Defendant can continue to withhold API information so as to preclude the operations of potential competitors. The Settlement should be modified so that §III(I)(1) requires reciprocity, by precluding the imposition of royalties on developers who make their own APIs fully available without payment of royalties or license fees, and so that §III(I)(3) precludes limitation on sublicensing, and requires Defendant to release API information on terms reciprocal to those on which competitors make their own API information available.

In one additional provision Defendant has attempted to subvert the intention of the Settlement in order to preclude effective competition by the Intel-compatible free software operating system. Under §III(J)(1), Defendant may refuse to disclose "portions of APIs or Documentation or portions or layers of Communications Protocols the disclosure of which would compromise the security of anti-piracy, anti-virus, software licensing, digital rights management, encryption or authentication systems, including without limitation, keys, authorization tokens or enforcement criteria." This provision is so indefinite that Defendant can be expected to argue that all APIs and Communications Protocols connected with the security and authentication aspects of electronic commerce (including especially "without limitation" keys and authorization tokens, which are the basic building blocks of all electronic commerce systems) can be kept secret. At present, all such protocols and APIs are public, which is appropriate because—as computer security experts would testify if, as it should, the District Court seeks evidentiary supplementation under 15 U.S.C. 16(f)(1)—security is not attained in the computer communications field by the use of secret protocols, but rather by the use of scientifically-refereed and fully public protocols, whose security has been tested by full exposure in the scientific and engineering communities. If this provision were enforced as currently drafted, Defendant could implement new private protocols, extending or replacing the existing public protocols of electronic commerce, and then use its monopoly position to exclude the free software operating system from use of that de facto industry standard embodied in its new unpublicized APIs and Protocols. Defendant then goes further in §III(J)(2), according to itself the right to establish criteria of "business viability" without which it may deny access to APIs. Considering that its primary competition results from a development community led by non-profit organizations and relying heavily on non-commercial and volunteer developers, one can only conclude that Defendant is once again seeking the appearance of cooperation with the rule of law, while preparing by chicane to deny its injured competitors their just remedy.

The Free Software Foundation not only authors and distributes the GNU General Public License, and in other ways facilitates the making of free software by others, it also manufactures and distributes free software products of its own, particularly the GNU operating system, and sells compilations of its own and others' free software. The Foundation sustains specific injury from the violations set forth in the complaint that are not remedied by (and indeed are specifically excluded from) the Settlement. The Foundation and the other free software developers with whom it acts are the single most significant competitor to the Defendant in the monopolized market, and the adoption of the Settlement as drafted, with its terms so carefully designed by Defendant to preclude its effective competition, would be a travesty. We urge that the Settlement be amended as we have described.

Very truly yours,

Eben Moglen