



July 22, 2005

Bradford L. Smith, Esq.
General Counsel
Microsoft Corporation
One Microsoft Way
Redmond, WA 98052-6399

Re: Issues Related to Bundling MSN Search with Internet Explorer 7.0 and Longhorn

Dear Brad:

On Wednesday, July 6, a group of people from Microsoft spoke with Google for the first time about Microsoft's plan for the "inline search" feature of Internet Explorer 7.0 (IE7). Microsoft also provided Google a twelve-page "term sheet" and told Google that, if it wanted to be considered as a search provider in the Beta 1 release of IE7, it would need to agree to those terms by Tuesday, July 12.

Google is seriously troubled by this approach, both in terms of process and substance.

Not Enough Time

As a matter of process, Microsoft's decision to give Google (and presumably other search providers) such short notice is simply unreasonable. Given the potentially serious implications for consumers and for popular search providers like Google, we see no legitimate reason why Microsoft chose to leave so little time for discussions. The result was that there was no opportunity for any meaningful dialogue, and the main concerns we raised were met with a response along the lines of "we appreciate your points but there isn't enough time to change anything before the Beta 1 release." Despite our serious substantive concerns about Microsoft's proposal, we felt we had no choice but to sign the term sheet on Microsoft's terms. But as you hopefully recognize, this process failed in its stated goal of gaining meaningful input.

The defective process is particularly troubling in light of serious substantive concerns with Microsoft's intended approach for inline search.

How the Default is Set

As an initial matter, Microsoft's stated approach sets the default search provider for inline search in IE7 by migrating the default search setting from previous versions of IE. We note in this regard that all previous versions of IE set Microsoft's own search as the default search

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setting. And since very few users are aware of the autosearch feature in previous versions of IE (as even the employees from Microsoft acknowledged), that original default setting has very seldom been changed to popular search providers that users actually employ, like Google. These facts make it quite clear that migrating the older search setting is not an objective or reasonable approach. Instead, migrating that hidden setting benefits Microsoft while effectively eliminating any meaningful user choice about the default search provider in IE7. In other words, Microsoft's approach puts its own interests above those of end users.

We proposed instead that users be prompted to select the default search provider the first time they use the inline search feature. This approach eliminates any company's own self interests and places control in the hands of the end user, where it belongs. It also helps to ensure that users understand they have a choice of search providers when using the new search box in IE7. We were told this could not be considered for Beta 1 because of the short time deadline.

How the Default is Changed

The problems with the default setting are further compounded by how changes to the default are handled. As you know, most end users do not change defaults. And even the few who might try to make a change from the drop down menu in IE7 will be surprised to learn that their choice will revert to the original default the next time they start IE7. Making changes in the drop down menu temporary rather than permanent differs from normal convention and is especially likely to mislead and confuse end users. Undoubtedly, of the tiny fraction of end users who try to change the default, many will become frustrated and simply leave the default as originally set (in all likelihood to MSN Search in light of Microsoft's previous setting of the default).

We raised this issue with Microsoft as well and, again, were told that there was not enough time to consider our suggestions. We were also told, by way of consolation, that in theory OEMs might change the default setting. Until Longhorn is released, however, almost all installations of IE7 will come as upgrades by end users without involvement of OEMs.

How the Search Providers are Selected

We also have serious concerns about the approach for selecting the search providers included in the drop down list. We are informed that Microsoft would like the list in the Beta 1 release to include the top search providers, by market share. That approach seems sensible, as the selection criterion is related to search providers that end users are likely to want to use.

But we are also told that the list will change over time, with the list of providers being determined by how many referrals are sent to the Windows Genuine Advantage (WGA) program. We can empathize with your desire to promote the WGA program and we may well be willing to help you with that, within reason. But collaborating on an antipiracy program should be unrelated to deciding which search providers are in the drop down list. Using that as a



criterion for deciding who is in the drop down list is bad for users, since it is unrelated to the popularity or quality of search services. We see no legitimate reason why Microsoft would not continue using an objective measure of search provider usage, as you want to do for the Beta 1 release, which is clearly best for end users.

Functional Problems with the Beta 1 Release

Although we have not had much time to evaluate the Beta 1 release we were provided, we have already noticed a serious problem with it: upon installation, it disables any toolbars that the user might have previously installed. Obviously this is a big concern for us in terms of our Google Toolbar, and presumably for other toolbar providers as well. When we contacted our liaison at Microsoft, Brian Schuster, about this we were told that it was a “regression bug” and was being worked on by the technical team. It is critical that this be fixed immediately and that any beta version with this behavior not be distributed to any Google Toolbar users. Again, more lead time would have helped prevent this problem.

Impact on the Market for Search Services

To date, the market for search has been highly competitive, the rate of innovation has been rapid, and consumers have enjoyed the benefits. Google believes that the search market should remain competitive. We are deeply concerned about the potential for harm to the competitive process from Microsoft’s actions, particularly given Microsoft’s monopoly position with its Windows OS and its IE browser.

By pushing out an update of IE with a new search box that will default to Microsoft’s own search product in the vast majority of cases, Microsoft would gain a large number of search users for reasons having nothing to do with the merits of Microsoft’s search offering. We believe that tying Microsoft’s web search offering to its browser in this way would raise very serious issues under the antitrust and unfair competition laws of various jurisdictions, particularly in light of Microsoft’s prior conduct and related findings by the U.S. Department of Justice, U.S. courts and the European Commission. Tying search services to Microsoft’s operating system would raise the same issues.

We hope you agree with us that when it comes to monopoly products such as the Windows OS or the IE browser, consumers are entitled to be informed clearly at the outset about their ability to select a default search product and should be given a simple means of doing so the first time they use the search functionality. This is indispensable both to preserve competition on the merits in search and to avoid distortion of competition in related markets. Therefore, we request that Microsoft reconsider its plans for IE7, and modify it in line with the attached revised term sheet that we previously sent to Microsoft.

Finally, although Google hopes that legal action will not be necessary, we recognize that it is a foreseeable possibility. Accordingly, Google requests that Microsoft take care to retain all

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past and future records relating to any plans to tie search to any Microsoft product or otherwise deprive consumers of a competitive choice in search. This would of course include any records regarding Microsoft's plans to target Google.

We look forward to your response.

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David Drummond

Co-Marketing Term Sheet with respect to In-line Search in IE7 for Windows XP SP2 and the next release of Windows codenamed "Longhorn"

This Term Sheet is made the <date> of 2005 ("Effective Date") between:

Microsoft Corporation of One Microsoft Way, Redmond, WA 98007, USA ("Microsoft") of the one part;

And

Google Incorporated of 1600 Amphitheatre Parkway, Mountain View, California ("Partner") of the other part.

Deleted: <Name of search provider>

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Whereas:

A. Microsoft develops and markets the web browser known as "Microsoft Internet Explorer";

B. Partner develops and markets the web service known as Google Web Search, as well as other services described at http://www.google.com;

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C. Microsoft is developing the next version of Microsoft Internet Explorer known as "Internet Explorer 7" which will have a new Internet search feature known as "Inline Search";

D. The current plan is for Inline Search to have a drop down menu to enable an end user to choose a search provider as the default search provider for Inline Search;

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E. Microsoft recognizes that promotion of the WGA Program on Partner's web site is a valuable and visible marketing mechanism and is desirous of having the WGA Program promoted on Partner's web site to encourage end users to use genuine Microsoft software;

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F. Commencing from the beta 1 release of Internet Explorer 7, expected to be in July 2005, Microsoft would like to pre-populate the drop down menu with a number of links to web services, including Partner's, to enable the end user to have a choice of search services; and

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G. To determine which links will be pre-populated in the Inline Search drop down menu and to promote the WGA Program, the parties have agreed to negotiate in good faith a definitive agreement largely based on the terms contained in this Term Sheet.

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Proposed Terms of the Agreement are:

1. Definitions

1.1 "Affiliates" means, with respect to any legally recognizable entity, any other such entity directly or indirectly Controlling, Controlled by, or under common Control with such entity. "Control," as used in this definition, means the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of a legally recognizable entity, whether through the ownership of voting shares or other interests, by contract, or otherwise.

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Draft June 27, 2005

- 1.2 **"Agreement"** means the executed agreement between the parties arising from this Term Sheet to be executed no later than the release of beta 2 of IE7.
- 1.3 **"Co-Marketing Program"** means the program, as evidenced by this Term Sheet, to promote Partner's presence on IE7's Inline Search drop down menu and Microsoft's WGA Program.
- 1.4 **"IE7"** means Microsoft's web browser known as Microsoft Internet Explorer 7 for Windows XP SP2 and Microsoft Internet Explorer 7 for Windows "Longhorn" and all subsequent releases and updates commercially released during the term of this Term Sheet and the Agreement.
- 1.5 **"Inline Search"** means a control in the frame of IE7 which accepts text search queries from end users and passes the queries to the Provider the user chooses from a drop down menu.
- 1.6 **"Inline Search List"** means the Web Services from MSN and Providers listed in the drop down menu of IE 7's Inline Search.
- 1.7 **"Longhorn"** means the next major release of the Microsoft Windows operating system codenamed "Longhorn."
- 1.8 **"NDA"** means the Non-disclosure Agreement between the parties set forth in Exhibit A.
- 1.9 **"OEM"** means Original Equipment Manufacturer.
- 1.10 **"Partner's Marks"** means Partner's trade marks and logos set forth in Exhibit B.
- 1.11 **"Providers"** means the providers of Web Services participating in the Co-Marketing Program, other than MSN Search.
- 1.12 **"Service Level Requirements"** means Microsoft's service level requirements for the provision of Web Services by Providers as set forth in the Agreement.
- 1.13 **"Test Specs"** means the specification the Providers will use for certifying that a Web Service behaves as expected with Inline Search.
- 1.14 **"Web Services"** mean the Internet search or other search services provided by Providers under the Co-Marketing Program.
- 1.15 **"WGA Program"** means the Microsoft Windows Genuine Advantage Program designed to promote awareness and usage of genuine Microsoft software. More information about the WGA Program can be found at: <http://www.microsoft.com/genuine/default.aspx> This link is provided for informational purposes only and nothing contained on this web page shall be deemed to be part of this Term Sheet.

2. **Term Sheet Not Legally Binding**

- 2.1 This Term Sheet is intended to enable the parties to discuss and arrive at the Agreement with respect to the inclusion of Partner in the Inline Search. With the exception of Sections 1, 3, and 9-17, the terms contained in this Term Sheet shall not be legally binding on the parties.

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2.2 The parties agree to negotiate in good faith but are aware that the development and marketing plans for IE7 are subject to change. Microsoft shall make reasonable commercial efforts to keep Partner informed of any development and marketing changes that could impact the terms of this Term Sheet.

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3. Inline Search

3.1 Microsoft's current plan for Inline Search in IE7 is to pre-populate the Inline Search List with an initial list of four (4) links to Web Services for each regional locale. A fifth link will be for MSN Search. A sixth link in the drop down menu will be available for pre-population by an OEM in the event IE7 is distributed by an OEM. The number of regional locales, the final number and sort order of Web Services in Inline Search List shall be determined by Microsoft in its sole discretion.

3.2 Microsoft recognizes that OEMs have the ability to modify the list of Web Services and set the default Web Service for Inline Search. Microsoft shall not interfere with OEMs' arrangements with Partner or others related to inline search.

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3.3 Microsoft will permit the end user or administrator to delete, add, and sort Web Services in the drop down menu. On first use of the inline search feature, IE7 will prompt the user to select any search provider in the inline search menu (or a provider on the "Microsoft Search Guide" page) as the default search provider. Thereafter, Microsoft will respect the user's choice of default search provider and other search engine settings set by the end user and will not change these settings during subsequent updates or upgrades of IE.

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3.4 For the avoidance of doubt, the parties recognize that MSN Search shall be included in Inline Search on first installation including but not limited to migration scenarios and new installs (subject to the OEM adding and selecting a default Web Service and the end user and administrator being able to subsequently modify or remove MSN Search).

4. Initial Pre-population of Partners in Inline Search Drop Down Menu

4.1 For all releases of IE7 from Beta 1 up to and including the commercial release of IE7 and subsequent updates, Microsoft will pre-populate the Inline Search List with four (4) Web Services from four (4) Providers for each regional locale.

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4.2 Qualifying criteria for placement in Inline Search List in a specific regional locale shall be determined by whether a Provider is (a) within the top four (4) Providers in the specific regional locale, (b) is measured by an independent survey, where available and of Microsoft's choosing, as having at least 5% of all search traffic in the aforesaid region, and (c) for IE7 Beta 2 and later releases within the first six (6) months after the first commercial release of IE7, whether the Provider has signed an Agreement.

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4.3 Partner agrees to consider in good faith its participation in the Co-Marketing Program.

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5. Co-Marketing Program

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Microsoft will provide Partner with unique WGA Program URL links and WGA Program content (e.g. banner ads and / or WGA logo). Within thirty (30) days of receipt and no later than September 30th, 2005, Partner will consider promoting the WGA Program by inserting the aforesaid links and WGA Program content on its web pages so as to promote the WGA Program. The placement frequency, scheduling and location of the URL links and WGA Program content, if any, shall be at the discretion of Partner.

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5.2 The number of unique users transferred to the WGA Program web page via the unique URL links will be tracked and measured by Microsoft.

Deleted: c. Whether Partner qualifies to be in the Inline Search List in each regional locale measured by the number of unique users transferred to the WGA Program web page via the Partner's unique URL during the three month period tracked and measured by Microsoft; and

5.3 Commencing from the date of commercial release of IE7, Microsoft will, after every three (3) month period, report to Partner:

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a. The number of unique users transferred by Partner to the WGA Program web page via the unique URL;

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b. The click through rate of its unique users; and

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c. Which quartile of all Providers results Partner is in.

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5.4 Microsoft will report Provider data relating to sub-section 5.3.a and 5.3.b in aggregate to protect the confidentiality of Providers.

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5.5 The number and order of Web Services in the Inline Search List within a given region shall be determined by Microsoft based on end user preferences and may be updated in later releases of Internet Explorer.

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5.6 At regular intervals (see Section 5.8 below) starting after the first commercial release of IE7, Microsoft will create a new list of links to Web Services from Providers to pre-populate the Inline Search List on a going forward basis based on an objective third-party measure of popularity of each Web Service with consumers.

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Deleted: a. Partner must be amongst the top four (4) Providers referred to in sub-section 5.4.c; and
Partner must have met the Service Level Requirements for at least 90% of the period under measurement.

5.7 The current plan for the beta 1 and 2 releases of IE7 is that the four (4) qualified Providers will be listed in the drop down menu in alphabetical order starting with "A" from the top of the menu. The final plan for the number and sort order of Providers in Inline Search List for the commercial release of IE7 has not yet been determined by Microsoft.

Deleted: If Partner is amongst the top four (4) Providers referred to above but fails to meet the service level requirements or any other material term of the Co-Marketing Program, Microsoft may, in its sole discretion, substitute Partner with the next eligible Provider outside of the top four (4).

5.8 Pre-population and updating of Inline Search List after commercial release of IE7 will be as follows:

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a. In the first commercial release of IE7 released to manufacturing, OEMs and the Web, Microsoft will include in the build of IE7 links to the four (4) initial Providers.

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b. After the first six (6) month period measured by Microsoft pursuant to Section 5.3 and in accordance with Section 5.6, when an end user of IE7 establishes an Internet connection with Microsoft during initial setup,

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Microsoft will download onto the end user's computer the updated Inline Search List of Providers.

- c. For the avoidance of doubt, all setup is subject to Section 3.3.
- d. Microsoft will update the Inline Search List every six (6) months during the term of the Agreement or if the report referred to in Section 5.4 is released within four (4) weeks prior to a scheduled commercial release of a new Windows release or service pack Microsoft may delay updating the Inline Search List until the build of IE7 releases to manufacturing, OEMs and the Web updated links. In no event shall Microsoft change the default search settings already set by a user in IE7.

5.9 Notwithstanding that Partner is not on the Inline Search List, Microsoft will list Partner on a website listing search engines, developed and hosted by Microsoft ("**Microsoft Search Guide**"). Microsoft shall make reasonable commercial efforts to promote the Microsoft Search Guide via links in its web sites and/or from within IE7.

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6. **Microsoft's Obligations**

- 6.1 Within fifteen (15) days of the Effective Date of this Term Sheet, Microsoft shall deliver to Partner the Test Specs.
- 6.2 Microsoft shall provide Partner with updates, bug fixes or other modifications to the Test Specs no later than it offers the same to other Providers or MSN.

Deleted: In the event the WGA Program is discontinued, Microsoft will work with the Providers to establish another co-marketing program to enable Microsoft to determine which Providers to be listed in Inline Search List.

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7. **Partner's Obligations**

- 7.1 Partner agrees that in order to participate in the Co-Marketing Program and to provide a good end user experience, the Web Services provided to end users will meet, if not exceed, the Service Level Requirements.

8. **Licenses and Proprietary Rights**

- 8.1 If Inline Search is enabled to render Partner's Marks, Partner hereby grants Microsoft a non-exclusive, royalty-free, non-transferable worldwide right and license, during the term of this Term Sheet and the Agreement, to use, reproduce, distribute and display Partner's Marks in the Inline Search. Partner has the right to approve any use of Partner's Marks featured in the Inline Search prior to commercial use and display by Microsoft, but Partner shall not unreasonably withhold or delay such approval.
- 8.2 Partner further grants Microsoft a non-exclusive, royalty-free, non-transferable, worldwide right and license during the term of this Term Sheet and the Agreement, to use, publicly perform and display screen shots and/or interactive versions of Partner's Marks rendered in Inline Search for the purposes of demonstrating Microsoft's products and/or services at trade shows or other industry or press events.
- 8.3 Microsoft may use Partner's Marks in promotional materials for the purposes of promoting IE7 and other related Microsoft products and services, subject to: (a)

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Microsoft's compliance with written logo usage guidelines that Partner may provide to it in advance, and (b) Partner's prior approval of Microsoft's use of Partner's Marks in representative samples of such promotional materials, which approval shall not be unreasonably withheld or delayed.

8.4 Nothing in this Agreement limits Microsoft's fair use and referential use of Partner's Marks.

8.5 All rights in the Partner's Marks not expressly granted herein are reserved by Partner.

9. **Term and Termination**

9.1 The term of this Term Sheet commences on the Effective Date and, unless earlier terminated in accordance with Section 9.3, expires on the execution of the Agreement.

9.2 The term of the Agreement commences on the date stated in the Agreement and, unless earlier terminated in accordance with Section 9.3, expires on December 31st, 2006.

9.3 Either party may terminate this Term Sheet and the Agreement immediately upon written notice at any time if the other party materially breaches the obligations referenced in Section 14, (Confidentiality).

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9.4 In addition, either party may suspend performance and/or terminate this Term Sheet and the Agreement immediately upon written notice at any time if the other party is in material breach of any term, condition or covenant of the Agreement (other than Section 14 Confidentiality), and fails to cure that breach within thirty (30) days after written notice thereof.

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9.5 Either party may terminate this Term Sheet and the Agreement as provided in Section 18.6 (Assignment).

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10. **Representations and Warranties; Disclaimer of Warranties**

10.1 Partner represents and warrants that at all times during the term of this Term Sheet and the Agreement:

- a. Partner has and shall have all requisite corporate power and authority to execute and deliver this Term Sheet and the Agreement, to perform its obligations hereunder, and to consummate the transactions contemplated hereby;
- b. as of the Effective Date, Partner is not aware of any pending, or to its knowledge, threatened claims, suits, actions, or charges by third parties pertaining to its services contemplated under this Term Sheet and the Agreement, including without limitation any claims or allegations that any or all of the services contemplated under this Term Sheet or the Agreement violates or misappropriates the intellectual property rights of any third party;

Deleted: <#>Sections <insert> survive the expiration or any termination of this Term Sheet and the Agreement and remain in effect in accordance with their terms. Partner also agrees that Microsoft may continue to use Partner's Marks under Section 8 for a commercially reasonable wind-down period. ¶

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- c. Partner has obtained and will maintain all rights and licenses necessary to operate its services contemplated under this Term Sheet and the Agreement; and
- d. Partner's negotiation and entry into this Term Sheet and the Agreement, its performance hereunder, and Microsoft's exercise of rights granted or authorized by Partner under this Term Sheet and the Agreement will not violate, conflict with, interfere with, result in a breach of, or constitute a default under any other agreement to which it is a party.

10.2 Microsoft represents and warrants that at all times during the term of this Term Sheet and the Agreement:

- a. Microsoft has all requisite corporate power and authority to execute and deliver this Term Sheet and the Agreement, to perform its obligations hereunder, and to consummate the transactions contemplated hereby; and
- b. Microsoft's negotiation and entry into this Term Sheet and the Agreement, its performance hereunder, and Partner's exercise of rights granted or authorized by Microsoft under this Term Sheet and the Agreement will not violate, conflict with, interfere with, result in a breach of, or constitute a default under any other agreement to which it is a party.

10.3 SECTIONS 10.1 and 10.2 CONTAIN THE ONLY WARRANTIES MADE BY THE PARTIES IN CONNECTION WITH THIS TERM SHEET AND THE AGREEMENT. ANY AND ALL SOFTWARE, TECHNOLOGY, SERVICES, DOCUMENTATION, MATERIALS, OR INFORMATION LICENSED OR OTHERWISE PROVIDED BY EITHER PARTY TO THE OTHER HEREUNDER IS PROVIDED "AS IS," WITHOUT WARRANTY OF ANY KIND AND THE ENTIRE RISK AS TO SATISFACTORY QUALITY, PERFORMANCE, ACCURACY, AND EFFORT IS WITH THE RECIPIENT. TO THE EXTENT PERMITTED BY APPLICABLE LAW, EACH PARTY DISCLAIMS ALL OTHER REPRESENTATIONS, CONDITIONS AND WARRANTIES, EXPRESS OR IMPLIED, INCLUDING BUT NOT LIMITED TO ANY IMPLIED WARRANTIES OF COMPANYABILITY OR FITNESS FOR A PARTICULAR PURPOSE AND ANY DUTIES OF LACK OF NEGLIGENCE OR WORKMANLIKE EFFORT. OTHER THAN AS EXPRESSLY SET FORTH IN SECTION 10, THERE IS NO WARRANTY, DUTY OR CONDITION OF TITLE, QUIET ENJOYMENT, QUIET POSSESSION, CORRESPONDENCE TO DESCRIPTION OR NONINFRINGEMENT WITH RESPECT TO ANY AND ALL SOFTWARE, TECHNOLOGY, SERVICES, DOCUMENTATION, MATERIALS, OR INFORMATION LICENSED OR OTHERWISE PROVIDED BY EITHER PARTY TO THE OTHER HEREUNDER IN CONNECTION WITH THIS AGREEMENT.

11. Exclusion of Incidental, Consequential, and Certain Other Damages; Limitation of Liability and Remedies

EXCEPT FOR PAYMENTS TO THIRD PARTIES COVERED BY THE INDEMNIFICATION PROVISIONS IN SECTION 12 (INDEMNIFICATION) OR BREACHES OF SECTION 14 (CONFIDENTIALITY), IN NO EVENT WILL EITHER PARTY BE LIABLE FOR ANY SPECIAL, PUNITIVE, INCIDENTAL, INDIRECT, OR CONSEQUENTIAL DAMAGES WHATSOEVER (INCLUDING, BUT NOT LIMITED TO,

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DAMAGES FOR LOSS OF PROFITS OR CONFIDENTIAL OR OTHER INFORMATION, FOR BUSINESS INTERRUPTION, AND FOR ANY OTHER PECUNIARY OR OTHER LOSS WHATSOEVER) ARISING OUT OF OR IN ANY WAY RELATED TO ANY DEFICIENCY OF THE SOFTWARE, TECHNOLOGY, SERVICES, DOCUMENTATION, MATERIALS, OR INFORMATION UNDER OR IN CONNECTION WITH ANY PROVISION OF AGREEMENT, EVEN IN THE EVENT OF THE FAULT, TORT (INCLUDING NEGLIGENCE), STRICT LIABILITY, BREACH OF CONTRACT OR BREACH OF WARRANTY BY MICROSOFT, PARTNER OR ANY SUPPLIER, AND EVEN IF A PARTY HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES. THE FOREGOING LIMITATIONS, EXCLUSIONS AND DISCLAIMERS APPLY TO THE MAXIMUM EXTENT PERMITTED BY APPLICABLE LAW, EVEN IF ANY REMEDY FAILS ITS ESSENTIAL PURPOSE.

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12. Indemnification

12.1 Partner Indemnity. Partner shall indemnify, defend and hold harmless Microsoft, its Affiliates and each of their respective officers, directors, employees, representatives, licensees, and agents ("**Microsoft Indemnitees**") from and against and in respect of any and all claims, liabilities, allegations, suits, actions, investigations, judgments, deficiencies, settlements, inquiries, charges, demands, or other proceedings of whatever nature or kind (each a "**Claim**"), whether formal or informal, brought by a third party against any Microsoft Indemnitee, as well as from and against and in respect of any and all damages, liabilities, losses, costs, charges, fees, and expenses, including without limitation reasonable legal fees and expenses, as and when incurred, relating to, based upon, incident to, arising from, or in connection with any third party Claim, if such Claim is:

- a. based upon allegations that, if true, would constitute breach by Partner of any of its obligations, representations or warranties set forth in this Term Sheet or the Agreement, including without limitation any of the respective Exhibits;
- b. based on an allegation that Partner's Web Services (i) is or contains any material or information that is obscene, defamatory, libelous or slanderous, or that violates any law or regulation, or violates any rights of any person or entity, including without limitation, rights of publicity, privacy, or personality, or has otherwise resulted in any consumer fraud, product liability, tort, deceptive trade practice, breach of contract, injury, damage, or harm of any kind to any third party or (ii) infringes on any third party rights, including intellectual property rights; or

Notwithstanding any provisions of this Term Sheet and the Agreement to the contrary, other than with respect to Claims arising from or related to (x) Partner's intentional or reckless misconduct, and/or (y) copyright infringement or violations, Partner's maximum indemnification obligation pursuant to this Section 12.1 shall be One million dollars (\$1,000,000.00). Partner's indemnification obligations under this Term Sheet and the Agreement do not modify, and are not limited by, prior agreements entered into between the parties.

12.2 Microsoft Indemnity. Microsoft shall indemnify, defend and hold harmless Partner, its Affiliates and each of their respective officers, directors, employees, representatives, licensees, and agents ("**Partner Indemnitees**") from and against and in respect of any and all Claims, whether formal or informal, brought

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by a third party against any Partner Indemnitee, as well as from and against and in respect of any and all damages, liabilities, losses, costs, charges, fees, and expenses, including without limitation reasonable legal fees and expenses, as and when incurred, relating to, based upon, incident to, arising from, or in connection with any third party Claim, if such Claim is:

- a. based upon allegations that, if true, would constitute breach by Microsoft of any of its obligations, representations or warranties set forth in this Term Sheet and the Agreement, including without limitation any of the respective Exhibits; or
- b. to the extent that any WGA Program content developed and created or otherwise supplied by Microsoft, in whole or in part, to Partner as promotional content to be placed under the terms of this Term Sheet and the Agreement is or contains any material or information that is obscene, defamatory, libelous or slanderous or infringes any third party rights, including intellectual property rights.

Notwithstanding any provisions of this Term Sheet and the Term Sheet to the contrary, other than with respect to Claims arising from or related to (x) Microsoft's intentional or reckless misconduct, and/or (y) copyright infringement or violations, Microsoft's maximum indemnification obligation pursuant to this Section 12.2 shall be One Million Dollars (\$1,000,000.00). Microsoft's indemnification obligations under this Term Sheet and the Agreement do not modify, and are not limited by, prior agreements entered into between the parties.

13. Procedures

13.1. Settlement. Each party agrees that it may not, without the other's prior written consent, enter into any settlement or compromise of any Claim that results in any admission of liability or wrongdoing on the part of the other party or its Affiliates.

13.2. Control. Each indemnifying party has the sole right to control the defense and settlement of any Claim to the extent that it is providing indemnification hereunder. Nevertheless, the indemnified party may at its own expense participate (by itself and/or through any counsel of its choosing) in the defense of any such Claim.

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13.3. Notice. Each party shall notify the other promptly if such party becomes aware of any actual or potential Claims by third parties that could affect either party's ability to fully perform its duties or to exercise its rights under this Agreement.

14. Confidentiality

The parties acknowledge that the specific terms and conditions of this Term Sheet and the Agreement, and the parties' disclosures and activities in connection with this Term Sheet and the Agreement, are Confidential Information (as that term is defined in the NDA) that is subject to the provisions of the NDA.

15. No Obligation/Independent Development

Nothing in this Term Sheet and the Agreement should be construed as restricting either party's ability to acquire, license, develop, manufacture or distribute for itself, or have others acquire,

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license, develop, manufacture or distribute for itself, similar technology and web services performing the same or similar functions as the technology and web services contemplated by this Term Sheet and the Agreement, or lawfully to market and distribute such similar technology and web services in addition to, or in lieu of, the technology contemplated by this Term Sheet and the Agreement.

16. No Exclusivity

The obligations under this Term Sheet and the Agreement are non-exclusive. Nothing herein prevents Partner from performing similar services for or entering similar agreements with third parties.

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17. Notices and Requests

All notices and requests in connection with this Term Sheet and the Agreement are deemed given as of the day they are received either by messenger, delivery service, or in the mails, postage prepaid, certified or registered, return receipt requested, and addressed as follows:

To Partner:

Attn: _____
Phone: _____
Fax: _____

Copy to: _____
Fax: _____

To Microsoft:

Microsoft Corporation
One Microsoft Way
Redmond, WA 98052-6399
Attn.: GM, Internet Explorer
Phone: (425) 882-8080
Fax: (425) 706-7329

Copy to: Microsoft Legal & Corporate Affairs
Fax: (425) 706-7409

or to such other address as a party may designate pursuant to this notice provision.

18. General

18.1 Governing Law; Venue; Jurisdiction. This Term Sheet and the Agreement will be governed by the laws of the State of New York, without reference to the conflict of law principles thereof. Any action or litigation concerning this Term Sheet and the Agreement will take place exclusively in the federal or state courts in New York, and the parties expressly consent to jurisdiction of and venue in such courts and waive all defenses of lack of personal jurisdiction and forum non conveniens with respect to such courts. Process may be served on either party in the manner authorized by applicable law or court rule.

Deleted:
Deleted: Washington
Deleted: King County, Washington

18.2 Attorney's Fees. In any action or suit to enforce any right or remedy under this Term Sheet or the Agreement or to interpret any provision of this Term Sheet or the Agreement, the prevailing party shall be entitled to seek to recover its costs, including reasonable attorneys' fees.

18.3 No Partnership. Neither this Term Sheet or the Agreement, nor any terms and conditions contained herein, creates a partnership, joint venture, agency relationship or grants a franchise.

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- 18.4 **Waivers.** No waiver of any breach of any provision of this Term Sheet or the Agreement constitutes a waiver of any prior, concurrent or subsequent breach of the same or any other provisions hereof, and no waiver is effective unless made in writing and signed by an authorized representative of the waiving party.
- 18.5 **Severability.** If any provision of this Term Sheet or the Agreement is held by a court of competent jurisdiction to be illegal, invalid or unenforceable, the parties intend that the remaining provisions should remain in full force and effect.
- 18.6 **Assignment.** Partner may not assign this Term Sheet or the Agreement, or any rights or obligations hereunder, whether by operation of contract, law or otherwise, except with the express written consent of Microsoft, and any attempted assignment by Partner in violation of this Section shall be void. Notwithstanding the foregoing, Partner may assign this Term Sheet or the Agreement as part of a reorganization, merger, acquisition, change of control or similar transaction without Microsoft's prior written approval if such transaction does not (a) give a controlling interest, majority ownership or the largest interest in Partner to an entity that did not have any ownership interest in Partner as it existed on the Effective Date or (b) sell or otherwise transfer more than fifty percent (50%) of Partner's assets (whether in a single transaction or series of transactions). As used herein, "entity" shall include without limitation an individual, partnership, corporation, trust or limited liability company. Microsoft may not assign this Term Sheet or the Agreement, or any rights or obligations hereunder, whether by operation of contract, law or otherwise, except with the express written consent of Partner, and any attempted assignment by Microsoft in violation of this Section 18.6 shall be void. Notwithstanding anything to the contrary herein, Microsoft may assign this Term Sheet or the Agreement as part of a reorganization, merger, acquisition, change of control or other similar transaction without Partner's prior approval.
- 18.7 **Entire Agreement.** The Agreement, including its Exhibits, constitutes the entire agreement between the parties with respect to the subject matter hereof and supersedes all prior and contemporaneous agreements or communications as to such subject matter. The Agreement may not be modified except by a written agreement dated subsequent to the date of the Agreement and signed on behalf of Partner and Microsoft by their respective duly authorized representatives.

IN WITNESS WHEREOF, the parties have entered into this Term Sheet as of the Effective Date.

MICROSOFT CORPORATION	PARTNER
By:	By:
Name (print):	Name (print):
Title:	Title:
Date:	Date:

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*** TX REPORT ***

TRANSMISSION OK

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DESTINATION TEL # 714259367329
DESTINATION ID
ST. TIME 07/22 12:52
TIME USE 06'55
PAGES SENT 17
RESULT OK



FACSIMILE TRANSMITTAL SHEET

TO: BRAD SMITH

FROM: DAVID DRUMMOND

COMPANY: MICROSOFT

DATE: JULY 22, 2005

FAX NUMBER: Redacted

TOTAL NO. OF PAGES INCLUDING COVER: 17

PHONE NUMBER:

SENDER'S DIRECT NUMBER: Redacted

RE:

FAX NUMBER:

URGENT FOR REVIEW PLEASE COMMENT PLEASE REPLY

NOTES/COMMENTS: