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January 28, 2002

VIA FACSIMILE 202-307-1454

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

Re: ***United States v. Microsoft Corp. & State of New York v. Microsoft Corp., United States District Court for the District of Columbia, Case Nos. 98-1232, 98-1233***

Dear Ms. Hesse:

On behalf of Sony Corporation ("Sony"), a Japan corporation, we offer the following comments pursuant to 15 U.S.C. § 16(d) with regard to the Revised Proposed Final Judgment (the "Proposed Judgment") in the above captioned matter.

Introduction and Summary

As one of the world's leading technology and entertainment companies, Sony develops and manufactures a wide variety of audio, video, communications and information technology products. Sony is also an original equipment manufacturer ("OEM") of personal computers and a direct licensee of Microsoft Corporation ("Microsoft").

Microsoft maintains that certain provisions of the Proposed Judgment require it to impose "standard" licensing terms on Sony and other OEMs that could possibly erode protections for their intellectual property. Sony and other OEMs have made, and continue to make, significant investments in such intellectual property. These companies should be free to negotiate more favorable licensing provisions that restrict Microsoft's ability to leverage its market power to gain access to this intellectual property. Accordingly, Sony requests a clarification or modification of the Proposed Judgment to ensure that Sony and other similarly situated OEMs

can negotiate appropriate protections for their intellectual property beyond those available in "standard" licensing terms and conditions.

Background

Like other OEMs, Sony has entered into a series of one-year Desk Top Operating System (DTOS) license agreements with Microsoft that contain terms relating to operating system products, royalties and payments. These license agreements incorporate other terms and conditions from longer term "Business Terms Documents" negotiated between Microsoft and its OEMs. Last year, Sony and Microsoft entered into the current Business Terms Document, which is effective for several years.

The current Business Terms Document contains several provisions relating to intellectual property. These provisions include "non-assertion covenants" in which OEMs, under certain conditions, agree not to assert patent claims against Microsoft and Microsoft licensees. Sony and its various affiliates, however, have a significant history and patent portfolio in various areas, including audio, video, software applications and other technologies. To protect its rights to assert these patents, Sony negotiated with Microsoft important limitations on the scope of these non-assertion covenants. Sony believes these limitations are necessary to protect its investments in intellectual property.

Section III.B of the Proposed Judgment

Under the terms of the Proposed Judgment, Sony is a "Covered OEM" because it is one of the 20 OEMs with the highest worldwide volume of licenses of Windows Operating System Products. (Revised Proposed Final Judgment, § VI.D.) The Proposed Judgment would require Microsoft to offer Sony and other Covered OEMs licenses on "uniform terms and conditions." Section III.B of the Proposed Judgment provides:

> B. Microsoft's provision of Windows Operating System Products to Covered OEMs shall be pursuant to uniform license agreements with uniform terms and conditions. Without limiting the foregoing, Microsoft shall charge each Covered OEM the applicable royalty for Windows Operating System Products as set forth on a schedule, to be established by Microsoft and published on a web site accessible to the Plaintiffs and all Covered OEMs, that provides for uniform royalties for Windows Operating System Products, except that:
>
> 1. the schedule may specify different royalties for different language versions;

2. the schedule may specify reasonable volume discounts based upon the actual volume of licenses of any Windows Operating System Product or any group of such products; and

3. the schedule may include market development allowances, programs, or other discounts in connection with Windows Operating System Products, provided that:

   a. such discounts are offered and available uniformly to all Covered OEMs, except that Microsoft may establish one uniform discount schedule for the ten largest Covered OEMs and a second uniform discount schedule for the eleventh through twentieth largest Covered OEMs, where the size of the OEM is measured by volume of licenses;

   b. such discounts are based on objective, verifiable criteria that shall be applied and enforced on a uniform basis for all Covered OEMs; and

   c. such discounts or their award shall not be based on or impose any criterion or requirement that is otherwise inconsistent with any portion of this Final Judgment.

(Revised Proposed Final Judgment § III.B.)

The Department of Justice has explained that Section III.B was included in the Proposed Judgment to prevent Microsoft from retaliating against OEMs that market or promote products from Microsoft's competitors. In its "Competitive Impact Statement," the Department of Justice stated:

> In order to ensure freedom for the 20 Covered OEMs from the threat of Microsoft retaliation or coercion, Section III.B requires that Microsoft's Windows Operating System Product licenses with such OEMs contain uniform terms and conditions, including uniform royalties. These royalties must be established by Microsoft in advance on a schedule that is available to Covered OEMs and the Plaintiffs.

(Competitive Impact Statement at 27-28.)

The Department of Justice also has argued that Section III.B will eliminate "any opportunity for Microsoft to set a particular OEM's royalty or license terms as a way of inducing that OEM to decline to promote non-Microsoft software or retaliating against that OEM for its choices to promote non-Microsoft software." (Id. at 28.) The Department concluded that Section III.B will "ensure that OEMs can make their own independent choices." (Id.)

Microsoft's Proposed Uniform Terms and Conditions

Microsoft has informed Sony that it intends to enter into a new DTOS license agreement with Sony embodying new "uniform terms and conditions" mandated by Section III.B. These "uniform terms and conditions" apparently represent an effort to create a standard set of terms and conditions from a variety of existing Business Terms Documents with various OEMs. Microsoft's efforts to comply with Section III.B, however, may have produced new "uniform terms and conditions" that weaken certain pro-competitive limitations on the non-assertion covenants.

Microsoft has been adjuged to have illegally maintained its operating system monopoly in violation of the Sherman Act. United States v. Microsoft Corp., 253 F.3d 34, 54 (D.C. Cir. 2001), cert. denied, 122 S.Ct. 350 (2001). This raises the possibility that Microsoft will use its monopoly power to force its OEM licensees to give up intellectual property rights, thus affording Microsoft the opportunity to expand its power. In the current Business Terms Document, Sony has negotiated narrow non-assertion covenants to reduce this possibility.

Microsoft maintains that Section III.B of the Proposed Judgment precludes it from accepting the non-assertion covenants in the Business Terms Document freely negotiated and signed last year with Sony. Microsoft insists that, in order to comply with Section III.B, Sony must agree to new "uniform" non-assertion covenants that may weaken previously negotiated protections for Sony's intellectual property. If Sony is forced to agree to these changes, the new license agreement would diminish Sony's ability to assert its patents, particularly in markets outside the operating system market, and thereby may enable Microsoft to expand its power into new areas.

Proposed Clarification or Modification.

Requiring Sony to accept new "uniform" provisions that may weaken Sony's existing intellectual property protections and allow Microsoft to leverage its power into other markets is contrary to the underlying principles of the Proposed Judgment. Forcing all OEMs to accept identical non-assertion covenants also fails to acknowledge or accommodate the important differences among companies regarding intellectual property portfolios and business activities in other markets.

Sony or any other Covered OEM desiring additional intellectual property protection to enable it to compete with Microsoft or other licensees should be free to negotiate for such provisions outside any framework imposed by the Proposed Judgment. Accordingly, Sony respectfully requests that the Proposed Judgment be clarified or modified to provide that OEMs desiring protection for their particular intellectual property interests can negotiate for more favorable non-assertion covenants than those contained in the "uniform terms and conditions." As long as there is a baseline set of "uniform terms and conditions" available to all covered OEMs that would apply if the OEM is unsuccessful in its efforts to obtain more favorable terms, the OEM is protected from coercion or retaliation. If an OEM obtains different terms and conditions for non-assertion covenants, these new covenants could be made available to all

Covered OEMs on a non-discriminatory basis to prevent Microsoft from withholding these provisions to coerce or retaliate against other Covered OEMs. The OEMs should be free to accept or decline the non-assertion covenants depending on their own interests and intellectual property portfolios.

The courts have recognized the threat to competition posed by a monopolist that uses its power in one market to secure domination of other markets. See Spectrum Sports v. McQuillan, 506 U.S. 447 (1993); Alaska Airlines v. United Airlines, 948 F.2d 536 (9th Cir. 1991), cert. denied, 503 U.S. 977 (1992). An antitrust settlement should not enable a monopolist to erode the intellectual property barriers that would otherwise limit the monopolist's penetration of other markets. By including the clarifications or modifications described above, the Proposed Agreement would avoid this unfortunate consequence.

Very truly yours,

Debra A. Valentine /GHV

Debra A. Valentine
of O'MELVENY & MYERS LLP

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