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EC erects toll booth for Microsoft's open source rivals

By Andrew Orlowski in San Francisco

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Far from penalizing Microsoft, Wednesday's decision by the European Commission assures a bright future for the company as a patent licensing operation, according to one representative only two open source interests called to testify before the investigation.

Because Microsoft will be allowed to pursue royalty revenue from the APIs it publishes, Jeremy Allison says that the projects such as Samba, which he jointly leads, may face a prohibitive hurdle. Microsoft's competitors use software such as Samba to access file and print services on Windows machines.

The EC's investigation was brought about by Sun Microsystems, which through ventures such as 'Project Cascade', tried to do in proprietary form what Samba and similar projects such as Novell's Evolution Exchange client do in *software libre* form: provide a compatible, interoperable infrastructure to compete with Microsoft's enterprise software. Microsoft's rivals have become increasingly reliant on these

free software projects. But Wednesday's decision unexpectedly divides the anti-Microsoft camp, says Allison.

"The EU had a wonderful opportunity but it got greedy," he told us yesterday. "This splits the competition."

The doomsday scenario has several ifs, but the ramifications are worth exploring. The decision states that "to the extent that any of this interface information might be protected by intellectual property in the European Economic Area, Microsoft would be entitled to reasonable remuneration".

If Microsoft decided to enforce these claims, then rival software developers would face a choice: either to agree to Microsoft's licensing terms and pay the royalties, or not. But free software developers refuse to work with pay-for IPAs, as we've seen from the battles over the acceptance of Web standards as either RF (Royalty Free) or RAND ('reasonable, non-discriminatory'). This is one of the cornerstones of free software.

Says Allison: "Microsoft already has copyright over the implementation of these interfaces that they themselves create, but do they have IP protection over the interface definitions themselves - the IDL [Interface Definition Language] files that contain the description of the interfaces?"

If Microsoft wants to charge for access to the APIs, he says, "then this provision is useless as it explicitly excludes one of the few potential competitors Microsoft has, the Free
Software/Open Source community."

"It would have been better to levy no fine, but to force Microsoft to provide these interfaces into the public domain. This would allow the possibility of real competition. Allowing Microsoft to remain in control in any form over the interface disclosure leaves the competitive landscape unchanged."

Marshall Phelps

Last summer, Microsoft hired Marshall Phelps, the lawyer who built up IBM's mighty patent licensing operation from nothing. "You don't just get patents for the sake of getting patents," Phelps told a panel of IP attorneys last May.

And last year Microsoft broke with precedent and announced its first ever IP licensing program, with peppercorn fees for camera manufacturers to license the FAT and FAT32 file systems used on removable media, such as Compact Flash.

Eben Moglen, the Free Software Foundation's attorney, told us in December: "Microsoft executives are aware they have crossed a maturity threshold - they can't grow as quickly as they have before; and even blockbluster products won't change this dramatically. So patent revenue is a significant assistant to maintaining something like traditional forms of growth."

In recent years Microsoft has shaken up its once-desultory patent filing policy, and a trickle of applications has turned into a flood of grants. The 139 patents assigned to the company by the USPTO already in 2004 includes, "Systems, methods and data structures for encompassing scripts written in one or more scripting languages in a single file using XML", a design for a power adaptor, and "a common namespace for Internet and local filesystem objects".

It's left as an exercise for the reader to judge which of these which might be useful to Microsoft in fending off interoperability claims from projects such as Samba, Novell with its Evolution Exchange client, or a Sun.

Like the IBM of yore, Microsoft has recognized the business value of promoting its own ad hoc standards which mix the formal specifications laboriously set by traditional computer standards committees with the more informal, consensus-based specifications endorsed by the IETF, the Internet's standards body.

When Sun brought the case to the EU in 1999 it sought to pin down what had been a very wobbly moving target. And in some sense the verdict is ideally fashioned for a Sun Microsystems c. 1999. It doesn't take into account that Sun, along with the rest of the industry, now depends on *software libre* alternatives such as Evolution and Samba.

The right-wing Cato Institute denounced the EC Microsoft verdict as "a corporate welfare programme for market losers". But this is a conclusion that ignores both history and basic consumer equations of value.

The commercial software market is a very short-lived thing, and it draws its moral justification in no small part to Bill Gates 1976 letter to "hobbyists", arguing that software shouldn't be open.

The commercial software market today exists because there are many sound economic reasons for the social contract he proposed: commercial proprietary software is in many instances judged to be more attractive, or the only option: where the benefits of openness are outweighed by the assurance of support and continued development. And let's face it, we have too much choice, and Microsoft promises to make the pain of

making decisions go away.

However there is the question of value, too, and much of what Microsoft now claims to do as its right - doesn't belong in the marketplace at all. It can simply be done by free software or it can be done cheaper. When a company earns over 80 per cent profit margins and sits on a $50bn cash pile, even the most technophobic customer is entitled to ask if this has been earned, or if the customer is really getting that much value for money.

The software market is a phantom market, and by obfuscating its most basic interoperability protocols, Microsoft is acknowledging this, too. It can sustain this position only by convincing regulators that this a special magic that if confiscated, needs reimbursement. And this is precisely what the company has achieved in the EC verdict.

There's an even simpler way of looking at it.

"When Microsoft begins a revenue based licensing scheme, it intrinsically thinks that its antitrust troubles are over," the FSF's Moglen, noted here last December. This time, Microsoft has ensured that the licensing scheme and the antitrust solution dovetail neatly together. They're one and the same. ®

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