Plaintiff's Exhibit
3418_C
Comes v. Microsoft

Lineen comments.

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4. PRODUCTS

(a) Definitions

(i) "Operating System Work" means any software (finished or not) that is or is planned to be part of, runs on or in and uses APIs of, an "Operating System Product" or "Operating System Add-on" and whose ? function (hereinafter "Operating System Function") is any of the following:

This is OK for an Add-on but ? for OS work

Storage management such a S/ memory management, logical file system services, physical file systems, loaders;

I/O management such as bus services, device driver services, configuration, printer management, device driver interfaces, device drivers, spooler;

Process and thread management such as scheduling, dispatching, execution environment, interrupt management, coprocessor and multiprocessor services and floating point support;

IPC services such as queue, memory, semaphore, signal;

Presentation management services such as window management, menu management, font management, 2D graphics;

Security services such as access control, privilege, auditing;

RAS services such as exception handling, recovery, trace, dump, logging;

System configuration functions;

Language interpreters intended for end user control applications;

End user utilities (e.g., move, copy, editors, etc), installation aids, shells visual interface;

On-line publications services;~~-or~~

Basic object management services;

Pointing funcitons;

Executable API descriptions [header files].

Development tools such as [resource compilers~~,~~?] and linkers~~, [editors, and debuggers?]~~ are also included, as are all documentation associated with these works including architecture descriptions, design documents, specifications, workbooks, test cases, test case descriptions, customer publications, on-line documentation, tutorials, ~~translations,~~ and documentation development tools.

(ii) "Advanced Operating System Work" means any software (finished or not) that is or is planned to be part of, or runs on or in and uses APIs of, an Operating System Product or~~,~~ Operating System Add-on ~~or Advanced Operating System Add-on and~~ whose function is in any way related to (hereinafter "Advanced Operating System Function") ~~is~~ any of the following:

Networking software for transport, remote procedure calls, redirection, shell interface;

3D graphics;

Multimedia functions such as audio, video, voice (runtime code, but not development tools)~~;~~.

~~Pointing and/or handwriting functions; or~~

~~Advanced user interface toolkits.~~
{ADDITIONAL FUNCTIONS TO BE ADDED}

Relative to paragraphs (i) and (ii) above, networking software that provides server functionality other than the above is not included in Operating System Function or Advanced Operating System Function, nor are communications software, database software, language compilers, editors, debuggers, and printer software, ~~intended for use only as part of a printer.~~

(iii) "Operating System Products" means all finished products from Microsoft or IBM, one or more of whose primary functions are ~~is~~ included in the definition of "Operating System Function" (see (i) above) or "Advanced ?

Fix

-?

Operating System Function" (see (ii) above) and that include significant amounts of code or implement a significant portion [60%?] of the API's from ~~any release of~~ MS-DOS/PC DOS versions 4.0 and 5.0, Windows versions 3.0 and 3.1, OS/2 versions 1.2 and 2.0, NT-OS/2, [or any other IBM or Microsoft finished product which subsequently becomes an "Operating System Product" hereunder.] All documentation including customer publications, on-line documentation, and tutorials ~~and certain translations (to be identified)~~ are included in this definition. Notwithstanding anything to the contrary, "Operating System Product" shall not include MVS, VM, OS400, CMS, VSE, and ______ ~~and~~ ______ or future releases thereof.

OK

(iv) "Operating System Add-on" means a finished product which is not an "Operating System Product" but that ~~works with (i.e. use the APIs of)~~ Runs on and uses the API's of an "Operating System Product", whose primary function is included in the definition of "Operating System Function" ~~or "Advanced Operating System Function", and which contains Operating System Work.~~

"Resource code"

"SDK code"

~~(v) "Advanced Operating System Add-on" means a finished product from IBM or Microsoft which is not an "Operating System Product" but that works with an "Operating System Product", whose primary function is included in the definition of "Advanced Operating System Function", and which contains no Operating System Work.~~

(vi) Unless it has previously become an "Operating System Product" or an "Operating System Add-on", a finished product will not be considered an "Operating System Product" or an "Operating System Add-on" if the party offering the product offers or intends to offer a commercially viable subset product (i.e. a true subset - same release of subset code) generally at a lesser price and the difference in function between the subset and superset:

[illegible]

(a) in the case of an Operating System Product, ~~falls completely outside the definitions of~~ Operating System Function ~~and Advanced Operating System Function;~~ and

~~(b) in the case of an Operating System Add-on, falls completely outside the definition of Operating System Function.~~

(vi~~i~~) The term "finished product" as used above means all software, documentation and other materials which are packaged or licensed by the parties as part of a single product. Separate packaging generally connotes a separate "finished product", but may not where the packages are generally provided together to end-users for longer than "promotional" periods of time. For example, MS-DOS and GW-BASIC would be considered part of a single "finished product", but MS-DOS and Windows would not.

INSERT

Should be deleted.

(vii~~i~~) At its discretion at any time during the term hereof, IBM shall have the right to transfer discrete "functions" from the category of Advanced Operating System Function to the category of Operating System Function, after which time such functions shall be considered to be Operating System Function. No such transfer may be reversed without the parties' mutual consent. Transfers of function to Operating System Function shall not be effective until a reasonable period [at least 6 months] after IBM notice to allow the parties to determine the effect of such transfer and to take appropriate actions(e.g. identify and make available products which become "Operating System Add-ons" as a result of the transfer).

?

1.(b) Licenses

(i) Microsoft grants rights to IBM to all Operating System Products~~,~~ and Operating System Add-ons, finished or unfinished, and Operating System Work~~and Operating System Work~~ developed by or for Microsoft, or licensed from a third party (subject to (iii)), which was in existence on the Effective Date of this Agreement or developed during the term of the Agreement.

(ii) IBM grants rights to Microsoft to all Operating System Products~~,~~ and Operating System Add-ons, finished or unfinished, and Operating System Work ~~and Operating System Work,~~ developed by or for IBM, or licensed from a third party (subject to (iii)), during the term of this Agreement for which

[—new code in MS [illegible]. During plan cycle, at G.A., one year after G.A.?]

Microsoft pays one-half of the development costs. IBM will also grant rights to Microsoft to such existing Operating System Products, Operating System Add-ons and Operating System Work as the parties shall identify in the DLA (subject to MS payment for its share of agreed developmental costs). IBM will use reasonable efforts to compile a list of its existing finished or unfinished OSPs and OSAs which are under the control of the ESD of IBM and will disclose the same to MS.

(iii) All third party code or documentation included or to be included in an Operating System Product by a party shall be provided to the other party with full rights; ~~, except~~ provided that the Adobe ATM code shall be an exception; further provided that existing "grandfathered" device drivers for Operating System Products shall also be an exception. As to third party code or documentation included or to be included in an Operating System Add-on, the procuring party shall use its ~~best~~reasonable efforts to procure full rights for both parties~~.~~ [provided that the procuring party shall not use such code or documentation in any Operating System Add-on if it cannot at a minimum grant (a) equal rights to the other party, and (b) such rights include the right to sublicense third parties (e.g. OEMs) to reproduce and distribute the code (in binary form) and documentation as part of such Operating System Add-on]

IF MS cannot provide full rights to IBM, it will not ship the third party code. IF IBM cannot provide full rights IT will provide those rights it makes available to others and will ship the 3rd party code in an add-on.

If third party code included in an Operating System Add-on requires the procuring party to pay a ~~flat fee or~~ per copy royalty, the other party shall ~~be liable to~~ pay to the procuring party such per copy royalties.

2. LICENSE DETAILS

[If the party cannot provide full rights, IT will provide the rights IT generally makes available to others]

(a) MS to IBM license

should be deleted

(i) [Except as otherwise provided], rights equivalent to ownership to all finished and unfinished Operating System Products, Operating System Add-ons and Operating System Work. ~~, and Operating System Work.~~

- As of effective date
- Source and Object Code
- Documentation~~, (design specs, end user documentation, program to program and program to hardware interface~~

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~~descriptions, supporting materials, etc.)~~

IBM has rights to create Operating System Products, Operating System Add-ons, and Operating System Work, whether or not derivative of MS code. ~~, shall be subject to the joint management process.~~ [However, prior to "bell-ringing" ("BR") IBM may not change or delete user interfaces or APIs in Operating System Products.]

This has not been agreed to

This is also in the wrong place it should be part of Joint Mgmt Process

IBM has ~~rights to create~~ Advanced Operating ~~System Work~~ (which is not intended to be ~~part~~ of an Operating System ~~Product~~ or ~~Operating~~ System Add-on) ~~, shall be subject to prior notice to MS.~~

IBM shall have ~~full~~ access to all licensed code (source and object), documentation, tools, test cases, and other materials of MS, as agreed in the joint management process. In the absence of agreement MS shall deliver code builds and other materials on a monthly basis. ~~In the absence of agreement MS shall (at its option) either provide its code builds and other materials on a monthly basis or on an on-line system to which IBM has direct access at all times.~~

(v) MS grants to IBM a nonexclusive license ~~to use Reference~~ to use, modify, create derivative works, reproduce and distribute internally [to a limited number of IBM employees] MS Reference Code, ~~and~~ IBM shall not distribute or license Reference Code to any third party except to a contractor doing work for IBM.

(vi) MS grants to IBM a license to use, modify, create derivative works, ~~and distribute~~ reproduce and distribute SDK Code, provided IBM shall not distribute TDK Code (or any derivative thereof) prior to BR.

(ii) Unrestricted rights to distribute object code.

(iii) Right to disclose or distribute source code under nondisclosure agreement only (like the JDA) and equivalent to MS' rights to disclose or distribute. Before BR, no right to license third parties to create derivative works of licensed code except as a contractor for IBM. ?

(iv) IBM has the right to include ~~extend its licenses to~~ translated versions of Operating System Products and Add-ons upon payment of 1/2 the development (translation) costs.

with [illegible] product

(b) IBM license to MS for finished and unfinished Operating System Products, Operating System Add-ons and~~,~~ Operating System Work. ~~, and Operating System Add-ons~~

IBM intends, in the U.S., to include on the Retail Package of an Operating Systems Product, other than a Retail Upgrade, a notice identifying the name of the IBM and other products on which the OSP is intended to be used. Such notice will not be phased in until after MS has added similar notice to its pr.

Same as (a).

(c) Pre-BR, [IBM to label its non-upgrade product "for use on [IBM Hardware]", or equivalent. [and include a system check which provides the user a message in the event the product detects non-IBM HW.] — No

(d) Trademark Licenses

(i) New Products. The parties shall agree, pursuant to the Management Process, as to the names and trademarks for new products to be released by both parties. If the parties cannot agree, each party may use its own names and trademarks for the new product. Once agreed, the parties shall use such names/trademarks for all future releases of such product, except as provided in (vi).

(ii) Existing Products. Subject to (iii) and (iv), the parties shall use the existing product names for all current and future releases of such products. Any name change shall be jointly agreed, except as provided in (vi).

(iii) IBM will license to MS the product names/trademarks "OS/2" and "Presentation Manager", and any other trademarks that IBM uses during the term of the DLA to designate or identify Operating System Products or Add-ons, for use by MS to designate or identify all current and future releases of such products, provided the MS product meets reasonable, agreed-to quality standards.

(iv) MS licenses to IBM the product name/trademark "Windows" and any other trademarks/product names that MS uses during the term of the DLA to designate or identify Operating System Products or Add-ons, for use by IBM to designate or identify all current and future releases of such products, provided the IBM product meets reasonable, agreed-to quality standards.

(v) The above trademark licenses will survive the DLA. Trademarks will be owned by the proposing party. Composite trademarks require approval of the owner(s).

(vi) If either party terminates the DLA (with or without cause), three (3) months after the BR or notice of termination the restrictions in (i) and (ii) end. ~~either-party-may-change its-product-names.--However,-n~~Neither party shall apply to a product a ~~name-~~trademark licensed from ~~or-used-by-the~~ other party to designate or identify a different product.

(ed) Copyright and Copyright Notices

(i) Each party shall maintain a copyright notice in the licensed code in the name of the other party and any required third party notice;

(ii) Each party shall maintain a copyright notice or notices on product boot screens sufficient to protect the other party's rights therein.

(iii) Each party grants to the other party the right to enforce the granting party's copyrights in licensed code, and each agrees to provide reasonable assistance to the other in enforcement activities.

(fe) Patent Immunity

Patent immunity granted by each party for any works which fall under the definitions of Operating System Products, Operating System Add-ons, Advanced Operating System Add-ons, Operating System Work, or Advanced Operating System Work.~~to-licensee-for-code-licensed-by granting-party.~~

NO.
Patent
immunity is
granted by
the developer
to the
licensee.

(gf) Patent and Copyright Indemnity

$10 M limit for infringement.

3. FEES AND ROYALTIES OPEN

(a)

[Renegotiation
annual fee subject
to a per system
increase beyond [illegible]
[illegible]

(i) IBM will pay MS an annual fee of $____M. In addition, IBM will pay MS a per system royalty of $____ per system for each "Covered System" (see (iii) below) shipped by IBM in excess of ______________ Covered Systems during each year period.

(ii) This shall be the total amount due for worldwide use of Operating System Products, Operating System Add-ons and Operating System Work on Covered Systems.

(iii) "Covered Systems" means IBM microcomputer-systems based on the Intel X86 family of microprocessors (including compatibles), and IBM microcomputer systems (or identifiable subsets thereof) based on other processors where IBM has elected on an annual basis to ship licensed products with such systems (or the identifiable subsets thereof). "IBM systems" mean systems manufactured by or for IBM or marketed by IBM.

- annual is OK nT

- [illegible]

(b) Paymentsreducts open

(i) IBM will pay MS quarterly payments. The annual fees shall be paid in equal quarterly installments, and the per system royalties shall be paid as they accrue. Such payments will be made within sixty (60) days after the end of each calendar quarter. Amounts due for less than a calendar quarter will be prorated.

ok

(ii) Payments as described above will be due until termination.

ok

(c) Excess License Royalties open

(i) IBM payments to MS

(a) IBM will pay MS 25% of the MS relevant wholesale price for each Operating System Product or Operating System Add-on licensed for use to an end-user on a non-IBM system, and _____% of the MS relevant wholesale price for each such Product or Add-on licensed for use to an end-user on an IBM non-Covered System [which system is shipped by IBM after the effective date?].

- [illegible]

- No payment
For use
[illegible]
price to
— on old
products

(b) IBM will owe no excess license royalties to MS on the distribution of Operating System Product or Operating System Add-ons to end-users on IBM systems which were shipped by IBM prior to the effective date of the DLA.

- ok

(c) IBM owes no excess license royalties on Operating System Add-ons that MS elects not to license (i.e. MS doesn't pay 1/2 the development costs).

- ok

(ii) MS payments to IBM

(a) MS will pay to IBM 25% of the MS relevant wholesale price for each Operating System Product or Operating System Add-on licensed for use to an end-user on an IBM Covered System, and ____% of the MS relevant wholesale price for each such Product or Add-on licensed for use to an end-user on an IBM non-Covered System. - ?

(b) Notwithstanding (ai) MS shall owe no excess license royalties to IBM on the distribution of Operating System Products or Add-ons to end-users on IBM systems which systems were shipped by IBM prior to the effective date of the DLA. — No

(iii) Notwithstanding the above, after termination the excess license royalties for MS-DOS/PC DOS versions 4._ and lower shall be zero dollars for both parties, and for OS/2 versions 1.2x— and lower shall be $9.00 for IBM and zero dollars for MS. Neither party owes excess license royalties for pirated copies. — No

(d) International Shipments [to be completed] — OPEN

(e) Audit

(i) An independent company ("auditor") will be used to statistically determine the number of Products/Add-ons licensed by IBM after the effective date for use on non-IBM systems and IBM non-Covered Systems [shipped by IBM after the effective date?], and the number of Products/Add-ons licensed by MS or its OEMs after effective date for use on IBM Covered and un-Covered Systems shipped by IBM after the effective date. Based on this information the auditor will determine the total amount of the IBM excess license royalties to MS and the total amount of the MS excess license royalties to IBM . The amount of the excess license royalty must first be determined and netted on a product-by-product basis and then can be summed to a total excess royalty payment.

Language
needs
work (see
notes)

(ii) Unless the parties otherwise agree, this audit will be performed on an annual basis with the costs to be split evenly by MS and IBM.

(iii) Arbitration process to deal with disputes over the results of the audit. — To Be Defined. One Arbitor - limited power.

4. DEVELOPMENT/MANAGEMENT PROCESS AND DEVELOPMENT COSTS

(a) Joint Management Process

Microsoft will be primarily responsible for development of Operating System Products, and Operating System Add-ons~~, and Operating System Work~~ under this Agreement subject to the joint management process described below. [However, prior to BR any IBM work in these categories ~~must~~ also be reviewed in this process before IBM does ~~such work~~] and MS shall have a right of first refusal to do such work as part of the annual budget and management process, provided MS agrees to meet IBM's requirements and schedules. This right of first refusal applies only to work commenced after the effective date. IBM and MS will also disclose to the other their planned Advanced Operating System Work [prior to commencing such work.]

go to the [illegible] feasibility study stage,

No - IBM will notify when we start work.

Right of 1st Refusal. should be a notice and opportunity to develop procedure not a [illegible] on our right to do work.

Prior to the [illegible]

~~The parties will determine in such process which subsystem interfaces to document, such as:~~ — OPEN

- ~~Shells~~
- ~~Device drivers~~
- ~~Physical file systems~~
- ~~Fonts~~
- ~~Font management~~
- ~~Presentation management~~
- ~~Presentation management drivers, e.g., display and printer~~
- ~~Object management~~
- ~~Memory management~~

Overall management direction for Operating System Products, Operating System Add-ons, and Operating System Work will be provided by a management board comprised of a senior MS person and a senior IBM person. These senior MS and IBM people will have an equal voice on all matters which should come before the board. The Management Board is responsible for reviewing and approving a written annual plan which includes: (i) product plans, content, ~~and~~ schedules, extent of documentation of subsystem interfaces, and product names, and

(ii) project staffing levels and budgets (for both MS and IBM development costs), and (iii) delivery and support process. The annual plan represents MS' agreement to perform in accordance with the plan, provided that MS may deviate from the plan after escalating the same to Executive Board review. The Joint Management Board is also responsible for solution of issues which may occur between MS and IBM on projects or products under this Agreement. — ?

The Joint Management Board will execute its responsibilities utilizing a small staff [<12]~~, several joint boards (e.g., design, assurance, and product planning) and~~ the product managers designated by MS for specific Operating System Products, Operating System Add-ons, and Operating System Work projects, and the program managers designated by IBM to coordinate IBM's activities for each product or project under the management process.

The initial process that will guide the Joint Management Board is described more fully in Appendix A. This process may be changed from time-to-time by the Joint Management Board and incorporated into the Agreement by reference through a memorandum signed by both senior people comprising the Joint Management Board.

Disagreements between the members of the Joint Management Board will be taken to an IBM/MS Executive Board comprised of the IBM General Manager ~~Group Executive~~ for Personal Systems and the Chairman of MS. The only ground rules which govern deliberations of the IBM/MS Executive Board are that:

- Escalations will be scheduled promptly; and

- Previously agreed-to plans and schedules will not be unilaterally changed in a material way before escalation to and review by the IBM/MS Executive Board. X

A small team (i.e., <25) of IBM development people will be located at MS and will be integrated into MS' operating systems development group The IBM people will work under the "functional direction" of MS development management, but will take day-to-day personnel management direction (i.e., including personnel matters such as salary, appraisal, travel, home leave, etc.) from an IBM manager who will also be located at MS. The IBM development people will work on technical projects assigned by MS development managers in cooperation with the on-site IBM manager with the objective to create the Operating System Products, Operating System Add-ons and Operating System Work which are being produced under this Agreement.

For each project under this Agreement, MS will target an agreed-to number of IBM hardware configurations as determined by IBM (not to exceed ____ unless MS otherwise agrees) that span the range of IBM Personal Systems offerings as implementation targets for Operating System Products, Operating System Add-ons, and Operating System Work.

(b) Costs

IBM and MS will share equally MS development costs for Operating System Product, Operating System Add-ons and Operating System Work up to the budgeted amount agreed-to annually by the Joint Management Board or, in the case of disagreement on the annual budget, the total amount IBM will pay MS for shared development costs will not exceed the amount IBM paid in development costs the prior year. The first year annual budget for MS development costs shall be $____ M. These development costs will include all imputed MS costs (up to ~~[110% of?]~~ the budgeted amount) in creating the products(s) including, but not limited to, costs of code, documentation, ~~localized versions, translations,~~ tutorials, product names, trademarks, testing, product research, product specification and acquisition of appropriate third party rights. MS costs will include its personnel costs and direct third party costs (i.e., license fees, trademark filings, contractor fees, outside market research (if shared with IBM), etc.). MS personnel costs will be computed by multiplying the development employee man-years involved in Operating System Products, Operating System Add-ons and Operating System Work by $120,000 (adjusted annually for inflation and to be validated by independent certified public accountants). IBM development costs will be its personnel costs (similar basis as for MS) for its team at MS, which shall be $____ per man year.

Development employees shall mean all employees of a party who are actively and directly involved in the design, development, build, test, translation and/or maintenance of particular licensed code and documentation; but excluding all managers above second-line managers, all IBM program managers assigned to product or projects under this Agreement, all administrative or staff personnel (clerical, secretarial, facilities, personnel, procurement, contracting, legal, financial, business planning, public relations, etc.) and product manufacturing, distribution and marketing employees, as well as employees engaged in the adaptation of the licensed code to operate on particular ~~(IBM-or-non-IBM)~~ systems or non-targeted IBM systems. Employees who spend part of their time working on projects other than the above shall be deemed development employees only for the portion of their time actually spent working on the above projects.

IBM and MS will share equally other ~~post-effective date-IBM~~ development costs for Operating System Products, Operating System Add-ons and Operating System Work which MS elects to license (under the DLA. From IBM IBM development costs will include only post-effective date costs and will be calculated similarly to those calculated as MS development costs. ~~MS shall have the right of first refusal to do such work before IBM commences the same.~~

IBM and MS will pay each other quarterly its share of the other's development costs, as appropriate.

If either MS or IBM terminates the Agreement without cause, development cost budgets will be frozen for the time from BR to termination at not more than the levels existing in the year preceding BR.

If at any time IBM reasonably concludes that MS is acting unilaterally (i.e., having not reached mutual decisions at the Joint Management Board, MS implements decisions without escalation to and resolution by the Executive Board; or after having escalated to the Executive Board, MS changes plan/schedules in a significant way without mutual consent by IBM), IBM may reduce its quarterly payments of development costs to MS by up to 20% until MS has corrected its unilateral actions or the parties are back in agreement, but no more than four consecutive quarters for a particular unilateral action. Inability to meet schedule which is not the result of a unilateral, intentional act by MS will not constitute an action for which the 20% charge may be assessed. Either party retains the right to "ring the bell" if it chooses.

MS (and IBM, if applicable) will provide a quarterly breakdown of development costs by project and subsystem, etc. Development costs will be subject to audit by independent auditors.

5. TERM AND TERMINATION

(a) Term: 7 ~~Five (5)~~ years with an imputed BR at 5 years. ~~automatic renewal for two (2) year terms.~~

(b) Termination "without cause" (i.e., BR) by either party:

  (i) BR leads to termination two years later; but BR is not exercisable before one year after effective date.

  (ii) Business as usual during two years after BR (except that management process will/may change);

  (iii) All payments and royalties end at termination, except that the parties' excess license royalties continue after termination, as follows:

  - IBM: shall pay excess license royalties for 4 years, if and to the extent that its excess license royalties exceed MS' excess license royalties (if any) each quarter.

  - MS: for 3 years MS' excess license royalties are netted against and reduce IBM's excess license royalties~~,~~ (on a product-by-product basis), but MS pays zero if its excess license royalties exceed IBM's for any quarter.

(c) Termination for "cause" (i.e., for "material breach").

  (i) Same as termination without cause (except that "BR" does not occur until the 60 day cure period has passed, and "termination" occurs two years thereafter), except as follows.

  (ii) injured party's obligation to deliver code and to make payments for development costs, annual fees or per system royalties ceases immediately.

(iii) injured party at its option may continue to receive code for two years without obligation to pay annual fees or per system royalties or share development cost, but the injured party is required to continue to pay excess license royalties.

→ ? [Should have to pay for 1/2 of what it takes.

(iv) breaching party's obligation to deliver code and to pay annual fees and applicable royalties (including "excess license royalties") continues just like termination without cause.

(v) breaching party's obligation to share development costs continues for two years (i.e., until "termination").

(vi) Regardless of which party breaches, both parties pay "excess license" royalties for the same period as would be required under a termination without cause.

— ? Not much of a remedy if MS breaches.

(vii) "Material breach" means:

(1) intentional failure of a party to do any of the following, when the obligation to do so is not reasonably in doubt or dispute:

- pay any material amount due to the other party; or
- withhold delivery of any material amount of code or other deliverables that the other party is entitled to receive; or

(2) reckless or intentional conduct resulting in unauthorized disclosure of the other party's material source code to third parties.

No other breach is considered a material breach or cause to terminate under this section.

Cure Period -
Provision for breach which cannot be cured.

(viii) In the case of any breach:

(1) All rights and license to delivered code and associated trademarks continue; and

(2) **The breaching party consents to any suit by the injured party for specific performance of any unfulfilled obligation on the part of the breaching party to deliver possessions of any code.**

(~~viii~~ix) **Termination with cause requires 60 days' notice and failure to cure by the breaching party.**

6. **NO SOLICITATION**

Neither party shall knowingly hire or enter into a development on consulting agreement with any "Affected Employee" (see below) of the other party for a period of two (2) years after the Affected Employee has left the employ of the other party, unless the other party gives its consent. "Affected Employees" shall be those developers (including the IBM employees located on-site at Microsoft) who work on Operating System Products, Operating System Add-ons, or Operating System Work during the term of the DLA, and those in the ____ levels of direct management above them.

No

7. MS REMEDY FOR IBM "ABANDONMENT" [to be completed]

[Can't assess 20% charge more than four consecutive quarters for a particular "abandonment".]

This should be limited to the IBM employees assigned to M/S and their Mgmt Chain.

AND

Any MS employees at IBM sites [or maybe a list of employees identified by MS] who will not be hired at Boca or Austin.

include explanatory text.

( ) — [illegible] our version of per system.

Dick C 5/11 6:15pm N.Y.

3. **ROYALTIES**

a) IBM Per System Royalties...

"Covered systems:" All IBM PC's based on Intel's X86 processors except:

1. IBM PC's categorically excluded from the per system method. (IBM Exclusions)

   a) all systems based on Intel 808x processors.

   b) IBM's PC designed for the home, code named "ASCOT"

   c) U.S. Gov't. systems delivered via special bid..designated on a bid-by-bid basis at IBM's selection

   d) Industrial Remarketer (IR) systems specifically excluded by IBM on an IR-by-IR basis

IBM exclusions will not total more than 30% of the total IBM PC's shipped annually ...

IBM may select exclusion categories once a year ..

IBM PC's shipped to IBM authorized dealers or customers prior to the effective date of this agreement will be licensed and considered covered under this Agreement without additional charges.

b. Royalty Charges .. per system ..

Education systems...all systems sold by IBM Academic Information Systems (ACIS) and IBM Educational Systems (IES) will incur a royalty of $3 per system subject to the exclusions described as IBM exclusions. Any systems donated by IBM to educational institutions will be exempt from any per system royalty... Education systems will not be subject to a royalty greater than that applied to "all other IBM PC's."

"All other IBM PC's" will be subject to the following royalty charges:

MS proposal ⇒ a) Shipments in the year of this Agreement will be subject to an $8 per system royalty,

[illegible] $/sys charging

or $6-286, $8-386SX, $10-386, $12-486, $14-586

The above charges are for U.S. shipments. Shipments outside of the U.S. are subject to their corresponding U.S. charge multiplied by the average of 1. and 2. described below:

1. The ratio of the wholesale M/S windows price in a subject country to the wholesale M/S windows price in the U.S.

2. The ratio of the wholesale M/S OS/2 Standard Edition price in a subject country if such a product exists or its retail upgrade equivalent. If neither product exists then non-U.S. per system royalties will be determined solely by 1. above.

c. Payment

1. Per system royalties will be paid within 90 days after the end of each calendar quarter...system shipments will be defined as dealer shipments through IBM's National Distribution Division (NDD) and shipment to customers through IBM's direct sales force...systems returned to IBM in any quarter will receive a per system royalty credit against royalties due in that quarter.

d. Effective Date and Term

1. Per system royalties will be due on all covered systems as described above shipped after the date this Agreement has been executed.

2. Per system royalties will be due until two years after final receipt of any M/S source code delivered under this Agreement, two years after the termination of the agreement or until per system royalties expire whichever occurs first.

e. Per Copy Royalties

1. IBM payments to M/S

i) IBM will pay M/S 25% of the M/S relevant client operating system wholesale price for each client operating system or client operating system add-on product that is sold to an end-user on a non-IBM system.

ii) IBM will pay M/S 15% of the above described prices for similar sales on IBM excluded systems described under Royalty Section a.

iii) Per copy royalties will continue for two years after the termination of this Agreement or three and one-half years after availability of a release whichever is later.

2. M/S Payments to IBM

i) M/S will pay to IBM 25% of the relevant M/S client operating system wholesale price for each client operating system or client operating system add-on product sold to an end-user on an IBM covered system.

ii) M/S will not owe IBM any payments on sales of above defined operating systems to end-users of IBM systems defined as IBM exclusions.

3. Payments for non-U.S. sales will be ratioed using the same methodology as described in the Royalty charges section.

f. Audit

SAME AS M/S TERM SHEET WITH MINOR CHANGES. (Attached)

4. **DEVELOPMENT/MANAGEMENT PROCESS AND DEVELOPMENT COSTS**

A) Joint Management Process

Microsoft will be primarily responsible for development of Operating System Products, Add-on's, and work under this Agreement subject to the joint management process described below.

Open, published subsystem interfaces shall be provided such as to allow replacement and/or distribution of subsystems and resource managers such as:

- Shells
- Device drivers
- Physical file systems
- Fonts
- Font management
- Presentation management
- Presentation management drivers, e.g., display and printer
- Object management
- Memory management
- etc.

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TERM SHEET
FOR
AGREEMENT BETWEEN MICROSOFT AND IBM

TOPICS	TERMS
PRODUCTS COVERED:	how define? ALL "CLIENT OPERATING SYSTEMS" SOFTWARE, INCLUDING BUT NOT LIMITED TO ALL VERSIONS OF DOS, WINDOWS, OS/2 AND OS/2-NT, DESIGNED OR DEVELOPED BY OR FOR MICROSOFT WHICH IBM ELECTS TO BE INCLUDED UNDER THIS AGREEMENT. must pay for.
WORK TO BE DONE BY:	MICROSOFT WILL TAKE THE LEAD IN DEVELOPMENT OF ALL PRODUCTS UNDER THIS AGREEMENT. A SMALL TEAM (<30) OF IBM DEVELOPMENT PEOPLE WILL BE LOCATED IN REDMOND, WA, AND WILL BE INTEGRATED INTO MICROSOFT OPERATING SYSTEM DEVELOPMENT TEAMS. THE INDIVIDUAL IBM'ers WILL TAKE FUNCTIONAL DIRECTION FROM MICROSOFT DEVELOPMENT MANAGERS, BUT FOR ALL OTHER MATTERS WILL REPORT TO AN IBM MANAGER ALSO STATIONED IN REDMOND.
JOINT MANAGEMENT:	OVERALL SENIOR MANAGEMENT DIRECTION FOR PRODUCTS DEVELOPED UNDER THE AGREEMENT WILL BE PROVIDED JOINTLY, AND WITH EQUAL VOICE, BY THE MICROSOFT VICE PRESIDENT OF Systems AND THE IBM PS VICE PRESIDENT OF ________. THEY WILL

TOPICS	TERMS
JOINT MANAGEMENT: (CONTINUED)	ESTABLISH A PROCESS FOR MANAGING THE DAY-TO-DAY WORK. THIS PROCESS WILL INCLUDE ANY REVIEW, STANDARDS-SETTING OR MANAGEMENT BOARDS FROM TIME-TO-TIME DEEMED NECESSARY. ALL TECHNICAL PLANS, BUDGETS, RESOURCES, AND SCHEDULES FOR THE PRODUCTS UNDER THE AGREEMENT WILL BE REVIEWED AND APPROVED BY THIS SENIOR MANAGEMENT TEAM. MUTUAL AGREEMENT IS REQUIRED FOR JOINT PRODUCT PLANS TO BE PUT INTO EFFECT. WHEN DISAGREEMENT EXISTS WITHIN THE SENIOR MANAGEMENT TEAM, THE ISSUE(S) WILL BE PROMPTLY ESCALATED TO A JOINT BOARD CONSISTING OF THE CHAIRMAN OF MICROSOFT AND THE GENERAL MANAGER OF THE IBM PS LINE OF BUSINESS. THE ONLY GROUND RULES WHICH GOVERN DELIBERATIONS AT THIS LEVEL ARE THAT:
how break deadlocks? — IBM not required to take that release or product and doesn't pay hiring costs?	- ESCALATIONS WILL BE SCHEDULED AND CONDUCTED PROMPTLY; AND - PREVIOUSLY AGREED-TO PLANS AND SCHEDULES WILL NOT BE CHANGED WITHOUT MUTUAL AGREEMENT.
DEVELOPMENT COSTS: max of $25m/year for IBM	OVERALL DEVELOPMENT COSTS FOR THE PRODUCTS UNDER THE AGREEMENT WILL BE SHARED EQUALLY BETWEEN MICROSOFT AND IBM, UP TO A MAXIMUM CONTRIBUTION BY IBM WHICH WILL NOT EXCEED $25M UNLESS IBM SPECIFICALLY AGREES TO FUND PROJECTS IN EXCESS OF THAT AMOUNT. ALL PRODUCT EFFORTS UNDER THIS AGREEMENT WILL UTILIZE INDIVIDUAL PROJECT AGREEMENTS ON DESIGN AND CODING IMPLEMENTATION. ? Phase II;

TOPICS	TERMS
DEVELOPMENT COSTS: (CONTINUED)	THE PROJECT AGREEMENTS SHALL INCLUDE THE FOLLOWING ITEMS AT A MINIMUM:

1. FUNCTIONAL DESCRIPTION OF EACH PLANNED JOINT RELEASE OF EACH PRODUCT FAMILY (MAY JUST REFERENCE PRODUCT SPECIFICATIONS).
2. SCHEDULE FOR EACH JOINT RELEASE.
3. DESCRIPTION OF ANY FEASIBILITY AND PROTOTYPING STUDIES FOR POTENTIAL FUTURE JOINT RELEASES.
4. BRIEF DESCRIPTION OF ANY OPERATING SYSTEM DEVELOPMENT EFFORT OF MS WHICH IBM HAS NOT ELECTED TO RECEIVE (OR TO PAY ANY OF THE DEVELOPMENT EXPENSE FOR).
5. SEPARATE DESCRIPTION OF ANY IBM DEVELOPMENT OR DESIGN CONTRIBUTION COMMITTED FOR ANY PLANNED RELEASE.
6. ESTIMATED DEVELOPMENT, TESTING, AND MAINTENANCE HEADCOUNT TO BE ASSIGNED BY EACH PARTY TO EACH PRODUCT FAMILY BY CALENDAR QUARTER.
7. BUDGETS FOR PROJECT RESOURCES AND OUT-OF-POCKET EXPENDITURES. INDIRECT COSTS SUCH AS OCCUPANCY COSTS, SENIOR MANAGEMENT TIME, ETC. WILL NOT BE CONSIDERED SHARED EXPENSES.

Includes all expenses of IBM on-site developers, [illegible] [illegible] no, quarterly —

TOPICS	TERMS
DEVELOPMENT COSTS: (CONTINUED)	PAYMENTS WILL BE MADE BY IBM TO MICROSOFT IN ACCORDANCE WITH MILESTONES TO BE ESTABLISHED FOR EACH PRODUCT. IN GENERAL, THE APPLICABLE PAYMENT WILL BE MADE UPON COMPLETION OF THE MILESTONE. TWENTY PERCENT OF TOTAL SHARED DEVELOPMENT COSTS FOR A PROJECT WILL BE HELD UNTIL THE FINAL MILESTONE IS ACHIEVED. THIS SUM IS AT RISK TO MICROSOFT IF THE FINAL MILESTONE IS NOT ACHIEVED OR IS ACHIEVED MORE THAN SIX (6) MONTHS LATE WITHOUT MUTUAL AGREEMENT BY IBM. IBM's COSTS FOR ITS TEAM IN REDMOND WILL BE NETTED AGAINST THE TOTAL SHARED COSTS FOR PROJECTS BEFORE ANY PAYMENTS ARE MADE TO MICROSOFT.
IBM's RIGHTS TO MICROSOFT SYSTEM SOFTWARE PRODUCTS:	IBM RECEIVES RIGHTS, EQUIVALENT TO OWNERSHIP, TO ALL MICROSOFT "CLIENT OPERATING SYSTEM" SOFTWARE INCLUDING SOURCE CODE, OBJECT CODE, RESOURCE CODE, AND DOCUMENTATION FOR ALL PRODUCTS UNDER THE AGREEMENT. MICROSOFT AGREES TO PROVIDE ALL SUCH MATERIALS TO IBM AT THE TIME MICROSOFT RELEASES SUCH MATERIALS INTERNALLY (i.e., COMPONENT TEST), AND BEFORE ANY OF SUCH MATERIALS ARE MADE AVAILABLE TO A THIRD PARTY.

20%? the what amount is fixed in advance?

which costs —

O.K

?

O.K

No — only software IBM pay own expenses for —

TOPICS	TERMS
MICROSOFT RIGHTS TO IBM "IMPROVEMENTS-TO" CODE DELIVERED BY MICROSOFT:	MICROSOFT RECEIVES AN OPTION FOR RIGHTS, EQUIVALENT TO OWNERSHIP, TO ALL IBM PRODUCED "IMPROVEMENTS-TO" CODE (EXCLUDING ITEMS SUCH AS DEVICE DRIVERS, EXISTING SOFTWARE NOT SUBJECT TO THIS AGREEMENT, ETC.) WHICH ARE DERIVED FROM AND ARE DERIVATIVE WORKS OF CODE DELIVERED BY MICROSOFT UNDER THIS AGREEMENT INCLUDING SOURCE CODE, OBJECT CODE, AND DOCUMENTATION WHICH IBM HAS THE RIGHT TO LICENSE TO MICROSOFT. THIS OPTION MAY BE EXECUTED AT ANY TIME DURING THE AGREEMENT, UPON WRITTEN REQUEST BY MICROSOFT AND PAYMENT OF ONE-HALF OF IBM'S DEVELOPMENT COSTS (i.e., ON SAME BASIS ON WHICH IBM PAYS MICROSOFT FOR ONE-HALF OF ITS DEVELOPMENT COSTS).
	[FOR SIGNIFICANT IBM IMPROVEMENTS (i.e., THOSE WITH TOTAL DEVELOPMENT COSTS IN EXCESS OF $XM), IBM MAY DEEM APPROPRIATE A PAYMENT OF ROYALTY BY MICROSOFT FOR USE OF THE IMPROVEMENT. IN SUCH CASE, IBM WILL NEGOTIATE IN GOOD FAITH TO ESTABLISH SUCH ROYALTY WHICH WILL BE NO LESS FAVORABLE THAN IT PROVIDES TO OTHERS AND IN NO CASE WILL EXCEED 12.5% OF THE APPLICABLE MSRP.]

IBM DDs excludes device drivers?

how define?

Significant IBM improvements? - royalty

Which SRP is applicable if it is an improvement we don't have?

c:0421cr01.

TOPICS **TERMS**

define — FO8X or something else?

ROYALTIES: IBM WILL PAY A ROYALTY TO MICROSOFT UP TO A TOTAL CUMULATIVE ANNUAL ROYALTY OF $25M FOR EACH SYSTEM UNIT SOLD BY IBM WITHIN DESIGNATED CATEGORIES OF PS/2 SYSTEMS (FOR EXAMPLE, 286, 386 OR 486 SYSTEMS). CERTAIN EXCLUSIONS WILL APPLY e.g., PS/1 SYSTEMS, ALL DOS-ONLY SYSTEMS, ALL SYSTEMS SOLD IN THE EDUCATION ENVIRONMENT, NO AND UP TO 100,000 MACHINES ANNUALLY (U.S.A.) THAT ARE SOLD UNDER SPECIAL BID TO GOVERNMENT CUSTOMERS OR TO INDUSTRY REMARKETERS FOR WHICH WINDOWS AND OS/2 ARE NOT REQUIRED. IBM, IN ITS SOLE DISCRETION, CAN DESIGNATE THE SYSTEMS TO WHICH IT WILL APPLY THE "PER SYSTEMS" ROYALTY. FOR SUCH OTHER SYSTEMS AND EXCLUDED SYSTEMS, IBM WILL PAY A "PER COPY" ROYALTY OF $X PER COPY OF WINDOWS OR OS/2 LICENSED FOR USE WITH SUCH SYSTEMS. THE "PER COPY" ROYALTY FOR THE EDUCATION ENVIRONMENT FOR "CLIENT OPERATING SYSTEMS" OTHER THAN DOS IS $3. THERE WILL BE NO ROYALTIES FOR DOS.

max $25 m/year

— per system for designated classes — PS/2's —

? — all

X86 X-86 Systems

?

max 100K non-GSA

?

★ how — this ~~[illegible]~~ is consistent with the previous statement —

how determine

assume every [illegible] not bound? to ?

Education = $3; per copy of what

DOS royalties = ¢

THE INITIAL "PER SYSTEM" ROYALTY WILL BE $8 FOR THE FIRST YEAR OF THE AGREEMENT. THIS ROYALTY REDUCES TO $6 PER SYSTEM IN THE SECOND YEAR, AND FURTHER REDUCES TO $4 PER SYSTEM IN THE THIRD YEAR AND THEREAFTER. FOR ANY PARTICULAR RELEASE OF A PRODUCT UNDER THE AGREEMENT, ALL ROYALTIES WILL CEASE AFTER 3-1/2 YEARS.

What does this mean when IBM is paying per system royalties

for all system?

No reduction

TOPICS **TERMS**

more or less than 100% ?

EXCESS LICENSE PROVISION:

on a product by product or cumulative basis ?

IBM WILL PAY MICROSOFT A ROYALTY EQUAL TO 12.5% (OR 25% OF WHOLESALE) OF MSRP FOR IBM LICENSES OF PRODUCTS WHICH EXCEED ___% OF THE HARDWARE SYSTEMS FOR WHICH IT HAS PAID MICROSOFT A PER SYSTEM ROYALTY (i.e., "EXCESS SOFTWARE SALES") AND WHICH ARE USED ON NON-IBM SYSTEMS.

how determine ? Shouldn't this be the only criterion ?

Should be non-covered systems

MICROSOFT WILL PAY IBM A ROYALTY EQUAL TO 12.5% (OR 25% OF WHOLESALE) FOR MICROSOFT LICENSES OF PRODUCTS WHICH ARE USED ON IBM HARDWARE SYSTEMS (i.e., "SHORTFALL SOFTWARE SALES").

No — only on covered systems!

? THESE EXCESS LICENSE PROVISIONS WILL CEASE FOR ANY PARTICULAR RELEASE AFTER 3-1/2 YEARS.

— perpetual —

IBM AND MICROSOFT WILL DEFINE AND ESTABLISH A MUTUALLY AGREEABLE ANNUAL PROCESS UTILIZING INDEPENDENT AUDITORS TO DETERMINE ANY SUCH "EXCESS" OR "SHORTFALL" SOFTWARE SALES. EITHER PARTY CAN INITIATE THIS PROCESS TO DETERMINE ANNUAL "EXCESS" OR "SHORTFALL" SALES AND, IF INITIATED, WILL BEAR ITS EXPENSE.

but if neither initiate it, how do we get the data?

TOPICS **TERMS**

TERM AND TERMINATION:

THE TERM OF THE AGREEMENT WILL BE THREE YEARS AND WILL BE AUTOMATICALLY RENEWED FOR A TWO YEAR PERIOD UNLESS EITHER PARTY PROVIDES SIX MONTHS WRITTEN NOTICE OF ITS INTENTION NOT TO RENEW.

3 yrs + 2 yrs ~~[illegible]~~ extension unless 6 month notice not to extend

EITHER PARTY MAY TERMINATE THE AGREEMENT BY PROVIDING SIX MONTHS WRITTEN NOTICE OF ITS INTENTION TO TERMINATE. SUCH NOTICE CANNOT BE PROVIDED DURING THE FIRST YEAR OF THE AGREEMENT. ?

EFFECTS OF TERMINATION:

IF NOTICE OF TERMINATION WITHOUT CAUSE IS PROVIDED BY ONE PARTY, THE FOLLOWING CONDITIONS PREVAIL:

- THE RIGHTS AND OBLIGATIONS OF THE PARTIES WILL REMAIN IN EFFECT FOR A TWO YEAR PERIOD FOLLOWING THE DATE OF TERMINATION EXCEPT THAT: (1) IF MICROSOFT TERMINATES, IBM's OBLIGATIONS TO PAY per system ROYALTIES SHALL CEASE TWO YEARS AFTER THE DATE OF TERMINATION, AND IBM SHALL NOT BE OBLIGATED TO DELIVER ANY "IMPROVEMENTS-TO" AND (2) IF IBM TERMINATES, IBM's OBLIGATIONS TO PAY ROYALTIES SHALL CONTINUE FOR TWO YEARS AFTER THE DATE OF THE LAST RELEASE DELIVERED IT UNDER THE AGREEMENT.

following date of termination or date of notice?

per system licenses ?

can't license [illegible]

Not the conflict, royalties

NO

we have option @ 50%

on notice

which?

per system and conflict?

includes deliveries during interim, etc.

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TOPICS	**TERMS**
EFFECTS OF TERMINATION: (CONTINUED)	- ALL AGREED-TO PROJECT AGREEMENTS WILL BE COMPLETED EVEN IF THEY EXTEND BEYOND THE END OF THE TWO YEAR PERIOD. - DEVELOPMENT COSTS WILL BE SHARED THROUGH THE COMPLETION OF THE TWO YEAR PERIOD OR THE COMPLETION OF AGREED-TO PROJECT AGREEMENTS, WHICHEVER IS LATER. ALL LICENSES GRANTED UNDER THIS AGREEMENT SURVIVE TERMINATION.
TERMINATION WITH CAUSE:	ANY ROYALTIES OWED BY THE BREACHING PARTY CONTINUE PER THE TERMS OF THIS AGREEMENT (i.e., 3.5 YEARS). ANY ROYALTIES OWED BY THE NON-BREACHING PARTY CEASE. THE NON-BREACHING PARTY'S RIGHT TO FUTURE RELEASES, SUCCESSOR PRODUCTS, "IMPROVEMENTS-TO" AND/OR DERIVATIVE WORKS CONTINUE FOR TWO YEARS. RIGHTS OF THE BREACHING PARTY TO FUTURE RELEASES, SUCCESSOR PRODUCTS, "IMPROVEMENTS-TO" AND/OR DERIVATIVE WORKS BY THE INJURED PARTY TERMINATE.

including IBM payment of dev. expenses

only very serious cause -

Immu. ok

What does this mean? The per system royalties too?

~~What~~ What about the non-breaching party's payment of dev. expenses - the breaching ~~[illegible]~~ party!

TOPICS **TERMS**

TERMINATION WITH CAUSE:
(CONTINUED)

- THE BREACHING PARTY'S OBLIGATION TO DELIVER PRODUCTS UNDER AGREED-TO PROJECT AGREEMENTS CONTINUE AT THE OPTION OF THE INJURED PARTY FOR THE AGREED-TO PHASE I's AND PHASE II's.

Subject to payment of add'l expenses?

- THE NON-BREACHING PARTIES' OBLIGATION TO DELIVER RELEASES, SUCCESSOR PRODUCTS, "IMPROVEMENTS TO" AND/OR DERIVATIVE WORKS CEASE.

- LIQUIDATED DAMAGES ARE APPLICABLE FOR CERTAIN BREACHES.
  - HIRING OTHER PARTIES' EMPLOYEES.
  - FAILURE TO DELIVER COMMITTED RELEASES.

TOPICS	TERMS
ANNOUNCEMENTS:	ALL ANNOUNCEMENTS, NOTICES, PRESS STATEMENTS ON PRODUCTS UNDER THE AGREEMENT WILL BE MADE WITH MUTUAL AGREEMENT. LIKEWISE, ALL ANNOUNCEMENTS, PUBLICITY OR PRESS STATEMENTS ABOUT THIS AGREEMENT WILL BE MADE WITH MUTUAL AGREEMENT.
"FAVORED NATIONS" STATUS:	SHOULD MICROSOFT GRANT MORE FAVORABLE TERMS OR PRICES TO ANOTHER FIRM, MICROSOFT WILL OFFER SUCH TERMS AND PRICES TO IBM.
PERSONNEL NON-SOLICITATION:	MICROSOFT WILL NOT SOLICIT NOR HIRE IBM EMPLOYEES OR FORMER EMPLOYEES FOR TWO YEARS AFTER THEY HAVE LEFT IBM AND AGREES SUCH SOLICITATION OR HIRING WILL BE A BREACH OF THIS AGREEMENT.
TRADEMARKS:	ALL TRADEMARKS FOR PRODUCTS COVERED BY THIS AGREEMENT WILL BE LICENSED TO THE OTHER PARTY.

limited to those involved in the project -