MICROSOFT WORK GROUP SERVER PROTOCOL PROGRAM
EXTENSION TERM LICENSE AGREEMENT
(NO PATENTS)
FOR DEVELOPMENT AND PRODUCT DISTRIBUTION

This **Microsoft Work Group Server Protocol Program Extension Term License Agreement (No Patents) for Development and Product Distribution** (the "**Agreement**") is entered into between Microsoft Corporation, a Washington corporation, with offices at One Microsoft Way, Redmond, Washington 98052-6399 U.S.A. ("**Microsoft**"), and the person(s) or company(ies) identified as Licensees below, all of whom are jointly and severally liable under this Agreement ("**Licensee**"), effective as of the date it has been signed on behalf of all parties (the "**Effective Date**").

> Licensee Full Legal Name: **Protocol Freedom Information Foundation**
> Type of Legal Entity (corporation, company, partnership, sole proprietorship or other): **Non-profit Corporation**
> State/Province Organized: **Delaware**
> Street Address: **1995 Broadway**
> City, State (or equivalent), Country and Postal Code: **New York, New York 10027 U.S.A.**
> Licensee Contact Name: **Ms. Tanisha Madrid**
> Phone Number: **212-461-1914**
> email: **tanisha@softwarefreedom.org**

BACKGROUND

Microsoft and Licensee entered into the Microsoft Work Group Server Protocol Program License Agreement (No Patents) for Development and Product Distribution on December 20, 2007 (the "2007 Agreement") and Licensee thereafter timely elected to extend the 2007 Agreement in accordance with **Section 9.1(b)** thereof. Microsoft and Licensee each desire to extend the 2007 Agreement as of the Effective Date on the terms set forth below reflecting developments in administration of WSPP (defined below) including Microsoft's public posting of the WSPP Documentation (defined below).

Appendices:

Appendix 1   WSPP Pricing Principles
Appendix 2   Third Party IP Claims (as of the Effective Date)
Appendix 3   European Union and United States Patents and Patent Applications

0.   **Purpose and Scope.** This Agreement extends the 2007 Agreement on the terms and conditions set forth below. The terms and conditions of this Agreement shall supercede the terms of the 2007 Agreement as of the Effective Date.

1.   **Definitions.** Capitalized terms used in this Agreement are defined in this **Section 1** or elsewhere in this Agreement.

1.1   "**Commission**" means the Commission of the European Communities.

1.2   "**Confidential Information**" has the meaning set forth in **Section 5.1**.

1.3   "**Decision**" means the Commission of the European Communities Decision dated March 24, 2004 relating to a proceeding under Article 82 of the EC Treaty (Case COMP/C-3/37.792-Microsoft-Decision).

1.4   "**Distribute**" or "**Distribution**" means licensing (including the right to modify and redistribute source code versions of Implementations), distributing, providing online access to, importing or otherwise making available in any manner to a third party.

1.5   "**Licensed Protocols**" means the WSPP Protocols. For the avoidance of doubt, all WSPP Protocols (including new WSPP Protocols added to WSPP after the Effective Date) shall automatically constitute Licensed Protocols under this Agreement.

1.6   "**Microsoft Licensed Intellectual Property**" means the following intellectual property in the WSPP Protocols or WSPP Documentation that Microsoft owns or has the right to sublicense without a fee: (a) know-how, industrial secrets, trade secrets and confidential information embodied in the WSPP Protocols or disclosed by the WSPP Documentation; and (b) copyrights in the WSPP Documentation, and, to the extent necessary for Licensee to exercise its rights under the scope of the license granted in **Section 2.1** of this Agreement, in the WSPP Protocols. For purposes of clarification, Microsoft Licensed Intellectual Property does not include any rights under Microsoft patents or patent applications. Microsoft acknowledges that by signing this Agreement, Licensee is not waiving its right to contest the validity of any of Microsoft's patents, know-how, industrial secrets, trade secrets and confidential information embodied in the WSPP Protocols and disclosed by the WSPP Documentation, or copyrights.

1.7   "**Protocol**" means a set of rules of interconnection and interaction between various instances of Windows Server Operating Systems and Windows Client Operating Systems running on different computers in a Windows Work Group Network.

1.8   "**Service Pack**" means updates that Microsoft makes commercially available as a "service pack" to a Windows Client Operating System or a Windows Server Operating System, under the applicable end user license agreement for such product.

1.9   "**Subject Patent Claims**" means those claims of Microsoft-owned or Microsoft-controlled patents that are contained in a patent or patent application that: (a) is listed in **Appendix 3**; (b) issues from any of the pending patent applications listed in **Appendix 3**; (c) issues from an application with a priority date that is after the Effective Date, provided Microsoft has provided Licensee with an updated version of **Appendix 3** that contains such patent application no later than 45 days after the date such patent application has been filed; (d) is added to **Appendix 3** following an update to the WSPP Documentation that causes such patent or patent application to read upon the WSPP Documentation, provided Microsoft has provided Licensee with an updated version of **Appendix 3** that contains such patent or patent application no later than 45 days after the date the updated WSPP Documentation is made available to Licensee; (e) issues from any continuation, continuation-in-part, or divisional that has priority based upon any of the patents described in (a), (b), (c), or (d) above; or (f) is a re-issue, renewal, substitution, re examination or extension of any of the patents described in (a), (b), (c), (d), or (e) above. Microsoft typically publishes patent applications within eighteen (18) months after the date of the application. In addition, upon Licensee's request at any time after notice under (c) or (d) is provided to Licensee (or, with respect to the applications listed in **Appendix 3** as of the Effective Date, then upon Licensee's request any time after the Effective Date), Microsoft will promptly provide Licensee with a copy of any unpublished application identified in such notice, together with the citation list to prior art cited in such application or its counterparts. Subject Patent Claims also do not include any claims (1) to any underlying or enabling technology that may be used or needed to make or use an Implementation, or (2) to any implementation of specifications or technologies that are merely referred to in the body of the WSPP Documentation. For purposes of this **Section 1.9**: (x) each updated version of **Appendix 3** shall be deemed to have been provided to Licensee upon delivery by Microsoft by e-mail or other reasonable method to the address specified on the first page of this Agreement (regardless of whether Microsoft also provides a confirmation copy by other means); and (z) each updated **Appendix 3** provided to Licensee in accordance with this **Section 1.9** shall become the new **Appendix 3** to this Agreement and shall supercede the immediately preceding **Appendix 3**.

1.10   "**Trustee**" means a trustee appointed by the Commission pursuant to the Decision and the Commission Decision of 28.7.2005 (C (2005) 2988 final) or, if at the time in question there is no such trustee, either the Commission or any person or entity to whom the Commission has properly delegated the determinations identified for the "Trustee" under this Agreement.

1.11   "**Update**" means any critical fix or recommended modification to, or updated component for, a Windows Client Operating System or a Windows Server Operating System, that Microsoft develops and makes commercially generally available (e.g., through its website or any other general distribution means) for the product to which the update applies, under the applicable end user license agreement for such product.

1.12   "**Windows Client Operating Systems**" means the software marketed, distributed and licensed by Microsoft as Windows 98, Windows 98 Second Edition, Windows Millennium Edition, Windows NT

Workstation 4.0, Windows 2000 Professional, Windows XP Professional, Windows XP Home, or Windows Vista, including updates (which include, without limitation, security patches) and upgrades (both described in **Section 3.2(a)**) thereto, or their successors (including updates and upgrades thereto) for use on personal computers. "Windows Client Operating Systems" do not include Windows XP Embedded or its successors, Windows CE or its successors, or any other operating system designed for use with non-PC devices such as gaming consoles, television set-top boxes, mobile telephones and personal digital assistants.

1.13   "**Windows Server Operating Systems**" means the software marketed, distributed and licensed by Microsoft as Windows NT Server 4.0, Windows 2000 Server Standard Edition, Windows Server 2003 Standard Edition, and Windows Server 2008, including updates (which include, without limitation, security patches) and upgrades (both described in **Section 3.2(a)**) thereto, or their successors (including updates and upgrades thereto).

1.14   "**Windows Work Group Network**" means any group of (i) personal computers connected to a network and on each of which a Windows Client Operating System is installed and (ii) Windows Work Group Servers, linked together via a computer network.   "**Windows Work Group Server**" means a computer connected to a network and on which a Windows Server Operating System is installed.

1.15   "**WSPP**" means the Microsoft Work Group Server Protocol Program licensing program made available by Microsoft and described at the WSPP Website.

1.16   "**WSPP Development Agreement**" means a then current version of a Microsoft no patent protocol license agreement for development and product distribution entered into by Microsoft and a licensee under the WSPP.

1.17   "**WSPP Development Licensee**" means another licensee under a WSPP Development Agreement.

1.18   "**WSPP Documentation**" means the specifications for the WSPP Protocols, including updates and corrections per **Sections 3.2** and **3.3(a)**, provided by Microsoft on the WSPP Documentation Website pursuant to Article 5 of the Decision and under this Agreement (and absent a specific reference to WSPP IDL Documentation, includes any applicable WSPP IDL Documentation).

1.19   "**WSPP Documentation Website**" means the website located at http://msdn.microsoft.com/en-us/library/gg285297.aspx or successor site.

1.20   "**WSPP IDL Documentation**" means the Interface Definition Language (IDL) specifications for the WSPP IDLs.

1.21   "**WSPP IDLs**" means the file & print and user & group administration IDLs associated with certain WSPP Protocols.

1.22   "**WSPP Protocols**" means the file & print and user & group administration Protocols disclosed by Microsoft pursuant to Article 5 of the Decision and that are available for license under the WSPP (and absent a specific reference to WSPP IDLs, includes any applicable WSPP IDLs). This includes all WSPP Protocols for which specifications are made available on the WSPP Documentation Website as of the Effective Date and include updates and corrections thereto per **Sections 3.2** and **3.3(a)** of this Agreement.

1.23   "**WSPP   Website**"   means   the   website   located   at http://www.microsoft.com/openspecifications/en/us/programs/wspp/default.aspx or successor site.

2. License Grant; Implementations; License Clarifications; No Microsoft Statements; No Other Rights; Discussion of Licensing Terms; Notification Regarding Other Licenses

2.1 <u>License Grant</u>.

(a) <u>General</u>. Microsoft hereby grants to Licensee a world-wide, non-exclusive, personal license under the Microsoft Licensed Intellectual Property to (i) make copies of the WSPP Documentation and to receive and use the Confidential Information in order to develop, make, use, and Distribute Implementations (as defined below), subject to all provisions of this Agreement, (ii) Distribute portions of such WSPP Documentation in its Implementations using the corresponding WSPP technologies or in Licensee's documentation as necessary to properly document the Implementation; and (iii) Distribute in its Implementation, with or without modification, any schema, IDL's, or code samples that are included in the WSPP Documentation.

(b) <u>Subcontracting</u>. Licensee may contract with a third party to develop, consistent with all of the terms of this Agreement, Implementations on Licensee's behalf (**"Subcontractor"**) provided that any such contract must contain terms requiring any and all third party Subcontractors to comply with obligations no less restrictive than the applicable terms of this Agreement, including but not limited to **Sections 2** and **5** of this Agreement. Further, nothing in this Agreement shall preclude any such third party Subcontractor from performing similar development work for any other WSPP Development Licensee, pursuant to their WSPP Development Agreement.

2.2 "**Implementation(s)**" means only those portion(s) of software developed by or for Licensee or derived therefrom that implement the Licensed Protocols.

2.3 <u>License Clarifications</u>. Except as provided in **Sections 2.1(b)** and **5.2(b)**, the licenses granted to Licensee in this Agreement do not include any right to modify or Distribute the WSPP Documentation (or to modify or Distribute WSPP IDL Documentation), except that Licensee may annotate those copies of the WSPP Documentation made available by Microsoft to Licensee under this Agreement, for the purpose of Licensee's development activities under the license granted in **Section 2.1(a)**. Confidential Information (other than Confidential Information included in source code) obtained from the WSPP Documentation may not be Distributed in any manner other than as part of an Implementation.

2.4 <u>No Microsoft Statements</u>. This Agreement does not authorize Licensee to make any claim, representation, warranty (whether express, implied or statutory), or other statement on behalf of Microsoft, including any statement that:

(a) Creates or purports to create any support or other obligations on the part of Microsoft, with respect to the Implementation or otherwise;

(b) Allows any recovery of damages by any third party directly from Microsoft under any theory of liability for any matter related to the Implementation; or

(c) States or suggests that Microsoft is responsible for, or had any part in, selecting or providing the Implementation.

2.5 <u>No Other Rights</u>. Except as expressly provided in this Agreement, no other rights are granted under this Agreement by implication or estoppel or otherwise.

2.6 <u>Discussion of Licensing Terms; Notification and Opportunity Regarding Other Licenses</u>. Microsoft acknowledges that this Agreement must be reasonable and non-discriminatory under the terms of the Decision. In the event that Licensee believes any term in this Agreement is unreasonable, Licensee may advise Microsoft of the issue and the reasons why Licensee believes the term or terms are unreasonable. Microsoft agrees to work with Licensee in good faith to appropriately resolve the issue in a reasonable and timely manner, i.e. within 60 days after Microsoft received notice from Licensee. In the event that Microsoft and Licensee are unable to achieve agreement on such terms after good faith efforts, Microsoft is willing to submit the matter for review by the Trustee. If any other WSPP Development Licensee enters into a WSPP Development Agreement for the same or substantively equivalent (in terms of grouping, value, technical complexity, etc.) Licensed Protocols as licensed by Licensee under this Agreement (such WSPP Development Agreement, an **"Other License"**), and the License Fee (as

defined below) and/or other terms of that Other License are more advantageous to that other WSPP Development Licensee than the terms of this Agreement, Microsoft will notify Licensee and Licensee will have the opportunity to enter into the same agreement as that Other License. Licensee will also have the opportunity to receive a refund (if applicable) of the License Fee already paid by Licensee under this Agreement, that reflects the same License Fee adjustment as received by the licensee under that Other License.

3. Deliverables; Updates; Support; Comments and Suggestions

3.1   <u>WSPP Documentation – Delivery</u>.   Microsoft will provide Licensee with access to WSPP Documentation online via the WSPP Documentation Website or other reasonable method determined by Microsoft from time to time as described in this **Section 3.1** and **Section 3.2.**

3.2   <u>WSPP Documentation – Updates</u>.

(a) <u>General</u>. Microsoft will make updated WSPP Documentation for modified and new WSPP Protocols (that are added to WSPP after Microsoft initially provides WSPP Documentation to Licensee under **Section 3.1**) available for license by Licensee under this Agreement:

(i)   if applicable, upon release of the First Beta for the relevant Service Pack to the relevant product, or new version of that product, that includes the modified or new WSPP Protocol (documentation provided in such instance, a "**Preliminary Documentation Update**"), or

(ii) if no such First Beta is released, then at least 15 days before the:

(A) commercial release of the Service Pack to the relevant product (i.e., Windows Client Operating System or Windows Server Operating System), or new version of that product, that includes the modified or new WSPP Protocol, or

(B) the day on which the final version of any other Update is released.

"**First Beta**" means the first public beta testing version of the Service Pack or new version of the relevant Windows operating system product made available by Microsoft via an MSDN (Microsoft Developers Network) subscription offering or of which 150,000 or more copies are distributed.

Licensee will be given automatic access via the WSPP Documentation Website to the WSPP Documentation for any WSPP Protocol modifications made available under this **Section 3.2**, as well as for any new WSPP Protocols added after the Effective Date for no additional charge beyond the License Fee. For the avoidance of doubt, giving Licensee such access shall also constitute making the applicable WSPP Documentation available for license for purposes of **Section 3.2(a)**.

(b) <u>Preliminary Documentation Updates</u>. When a Preliminary Documentation Update is made available to Licensee, Microsoft will also make the WSPP Documentation for the commercially released version of the relevant Service Pack or new product version (such documentation, a "**Final Documentation Update**") available to Licensee within 15 days after the relevant date production is authorized for the manufacture of copies of software for commercial availability. THE WARRANTY PROVISIONS OF **SECTIONS 3.3(a)** AND **6.3** DO NOT APPLY TO PRELIMINARY DOCUMENTATION UPDATES, BUT DO APPLY TO FINAL DOCUMENTATION UPDATES. SINCE THE FIRST BETA CODE, FEATURES AND/OR FUNCTIONALITY MAY BE SIGNIFICANTLY DIFFERENT FROM THE CODE, FEATURES AND/OR FUNCTIONALITY OF THE COMMERCIALLY RELEASED VERSION, LICENSEE IS ADVISED THAT THERE ARE RISKS IN ANY RELIANCE ON PRELIMINARY DOCUMENTATION UPDATES, AND TO THE EXTENT THAT LICENSEE INCURS ADDITIONAL DEVELOPMENT OR ANY OTHER COSTS AS A RESULT OF SUCH RELIANCE, IT DOES SO AT ITS OWN RISK.

(c) <u>Availability</u>. Once a protocol becomes a WSPP Protocol under the WSPP, Microsoft will continue to make WSPP Documentation for that protocol available during the Term. Subject to the foregoing, nothing in this Agreement requires Microsoft to (i) deliver any WSPP Documentation for any modified or new protocol other than as provided in this **Section 3.2** or (ii) continue to implement any WSPP Protocol in any Windows Client Operating System or Windows Server Operating System.

However, Microsoft will provide notice in the relevant portion of the WSPP Documentation of WSPP Protocols that remain available for license but which are no longer used by Microsoft in Windows Client and Server Operating Systems, generally in accordance with the timeframe in **Section 3.2(a)(i)**.

3.3   Support.

(a) Correction Assistance.   Microsoft (either itself or through a third party) will (i) specifically acknowledge (i.e., beyond an auto-generated email) any Licensee requests for correction assistance regarding any inaccuracies or omissions in the WSPP Documentation within 24 hours of such request, and (ii) correct within a reasonable time any confirmed inaccuracies or omissions that prevent the WSPP Documentation from complying with the warranty in **Section 6.3** ("**Correction Assistance**") (including any documents, information or protocols that Licensee believes should be included in the WSPP Documentation). Microsoft and Licensee will coordinate on communications to ensure that Licensee has access to Correction Assistance, and that Correction Assistance (and, at License's option, the technical support under **Section 3.3(b)**) will provide the primary vehicle to address both issues within the WSPP Documentation and items that Licensee believes should be included in the WSPP Documentation (as well as any Licensee-suggested improvements to the WSPP Documentation), including a mechanism to enable Licensee to report issues and to ensure that Licensee can track issues to resolution. Correction Assistance does not include development or delivery of any software (including any computer program or code, any product related bug fixes, workarounds, patches, beta fixes or beta builds), or any resolution to implementation issues.

(b) Additional Technical Support. Licensee may, at its option, obtain free and unlimited managed technical support regarding Microsoft's WSPP Documentation and Windows operating systems products, by entering into an Agreement for Support Services Regarding Microsoft Work Group Server Protocol Program Protocols (a form of which is available upon request to protocol@microsoft.com or such other address as may be identified by Microsoft from time to time). Microsoft technical support personnel will have access to internal Microsoft technical resources such as its product engineering organization, and Windows operating system products source code as needed. Such technical support may include (i) information about WSPP Protocols or WSPP Documentation; (ii) information about Windows operating systems products publicly or programmatically available to Microsoft's customers or ISVs (independent software vendors), other than source code; and/or (iii) assistance with debugging and verifying actual operation of WSPP Protocols between Windows Server and Windows Client Operating Systems products. Such technical support will not include (A) Licensee access to source code of Windows operating systems or other Microsoft products, other than by entering into a WSPP Source Code License Addendum (form of which available upon request to protocol@microsoft.com or such other address as may be identified by Microsoft from time to time); (B) any writing by Microsoft support personnel of source code for Implementations; or (C) any assistance regarding Licensee implementations of any underlying server functionality (as contrasted with the WSPP Protocols). Any information and assistance provided in connection with support described in this **Section 3.3(b)** concerning the behavior, meaning or interdependencies of Microsoft's products or protocol implementations is provided for reference only and Licensee does not obtain any additional license rights under this Agreement as a result of any disclosure contemplated by this **Section 3.3(b)**.

(c) Third Party IP Rights and Claims.

(i) Rights. Although Microsoft warranty and notice obligations regarding Third Party IP Claims (as defined below) are provided in **Sections 3.3(c)(ii), 6.2**, and **6.4**, it is also possible that third parties may have intellectual property rights in the WSPP Protocols of which Microsoft is unaware or under which it is not free to sublicense. Licensee acknowledges that no such intellectual property rights are licensed under this Agreement.

(ii) Claims. If the Microsoft Law and Corporate Affairs Department receives in its possession during the Term a Third Party IP Claim in which Microsoft is an IP Defendant, Microsoft will provide Licensee with written notice identifying that Third Party IP Claim. Also, if Licensee receives in its possession during the Term a Third Party IP Claim in which Licensee is an IP Defendant, Licensee may provide Microsoft with written notice identifying that Third Party IP Claim. "**Third Party IP Claim(s)**" means, with respect to the entity (either Microsoft or Licensee) who is named as a defendant or against whom a claim is made (the "**IP Defendant**") (i) litigation in which the IP Defendant is named as a

defendant and served with process or (ii) a written threat of litigation against the IP Defendant that a third party or its authorized agent sends to the IP Defendant, and the IP Defendant and the IP Defendant's internal legal department (to the extent the IP Defendant has one) receives in its possession, which alleges that a WSPP Protocol (or its implementation in a Windows Client Operating System or a Windows Server Operating System) or the WSPP Documentation infringes that third party's own intellectual property rights for which Licensee is licensed under **Section 2.1(a),** with specificity and in sufficient detail for the IP Defendant to identify (A) the allegedly infringing WSPP Protocol (or its implementation in a Windows Client Operating System or a Windows Server Operating System) or WSPP Documentation, (B) the allegedly infringed intellectual property and (C) the legal and technical basis of the allegation.

(d) Other. Except for the Microsoft obligations expressly described in **Sections 3.3(a), (b)** and **(c)**, as between Microsoft and Licensee, Licensee is solely responsible for all support issues relating to Implementations.

3.4 Comments and Suggestions. Microsoft invites Licensee's comments and suggestions on the WSPP Documentation and other items or information provided by Microsoft under this Agreement (**"Comments and Suggestions"**). If Licensee voluntarily provides (in connection with correction assistance or otherwise) any Comments and Suggestions relating to the WSPP Documentation or matters contained therein, Microsoft may, in connection with Microsoft products and services, use, disclose or otherwise commercialize in any manner, any of those Comments and Suggestions without obligation or restriction based on intellectual property rights or otherwise except that the foregoing does not permit the Comments or Suggestions to be licensed by Microsoft on a standalone basis.

4.   **License Fee and Payments.**

4.1 License Fee. Licensee has paid Microsoft a one-time license fee of 10,000 Euros under the 2007 Agreement ("**License Fee**"). Nothwithstanding anything to the contrary in this **Section 4** or elsewhere in this Agreement, no additional license applies to the initial term of this Agreement. Additional fees may apply to a subsequent extension of this Agreement to the extent permitted under **Section 9.1(b)**.

4.2   Payments.

(a) Payment Terms and Instructions. Licensee will pay an invoice issued by Microsoft (or its Payment Agent) for the Licensee Fee within 30 days of receipt of the invoice. Payment will be made to the Payment Agent (i.e. payments will be made out to the Payment Agent), to the following account or address (or alternate Payment Agent, account or address upon reasonable notice from Microsoft):

Payment Agent: Microsoft Corporation

For all Wire Transfers:

Bank of America	Account # 3750891058
1401 Elm Street	ABA # 0260-0959-3
Dallas, Texas 75202 USA	SWIFT# BOFAUS3N
	Attn: Microsoft Corporation

For Approved checks sent via courier (FedEx, UPS, Airborne, etc.):

Bank of America
Attn: Microsoft Corporation #100430
6000 Feldwood Road
College Park, GA 30349-3652

<u>For Approved checks sent via National Mail:</u>

Microsoft Corporation

P. O. BOX 100430

Atlanta, GA 30384-0430

*(Please remit **one week prior** to invoice due date if paying by check. Licensee is responsible for mailing & courier fees.)*

   (b) <u>Manner of Payment</u>. The License Fee is payable in Euros. All references in this Agreement to "€" refer to Euros. The License Fee is non-refundable.

   (c) <u>Taxes</u>. This **Section 4.2(c)** governs the treatment of all taxes arising as a result of or in connection with this Agreement, notwithstanding any other provision of this Agreement.

      (i) Licensee is responsible for the billing, collecting and remitting of sales, use, value added, and other comparable taxes due with respect to the collection of any revenues by Licensee, or any portion thereof. Microsoft is not liable for any taxes (including any penalties or interest thereon), that Licensee is legally obligated to pay and that are incurred by Licensee in connection with this Agreement or any Licensee revenues or related to the licensing or other Distribution of any Implementation, and Licensee takes full responsibility for all such taxes. Licensee is not liable for any income taxes that Microsoft is legally obligated to pay with respect to any amounts paid to Microsoft by Licensee under this Agreement.

      (ii) The License Fee excludes any taxes, duties, levies, fees, excises or tariffs imposed on any of Licensee's activities in connection with this Agreement. Licensee will pay to Microsoft (pursuant to **Section 4.2(a)**) any applicable taxes that are owed by Licensee solely as a result of entering into this Agreement and which are permitted to be collected from Licensee by Microsoft under applicable law, except to the extent Licensee provides to Microsoft a valid exemption certificate for such taxes. Licensee agrees to indemnify, defend and hold Microsoft harmless from any sales, use or similar taxes payable by Licensee or claims, causes of action, costs (including without limitation reasonable attorneys' fees) and any other liabilities of any nature whatsoever related to such taxes.

      (iii) If, after a determination by a tax authority outside the U.S., any taxes are required to be withheld on payments made by Licensee to Microsoft, Licensee may deduct such taxes from the amount owed Microsoft and pay them to the appropriate taxing authority; provided however, that Licensee will promptly secure and deliver to Microsoft (through its Payment Agent) an official receipt for any such taxes withheld or other documents necessary to enable Microsoft to claim a U.S. Foreign Tax Credit. Licensee will make certain that any taxes withheld are minimized to the extent possible under applicable law.

5.   Confidentiality

5.1   <u>Definition of Confidential Information</u>. All non-public information disclosed to Licensee in connection with Correction Assistance per **Section 3.3(a)**, are Microsoft's **"Confidential Information."** Neither the WSPP Documentation nor the terms of this Agreement are Confidential Information of either party, except for the specific Licensed Protocols selected by Licensee, which are Confidential Information of Licensee. Each party disclosing its Confidential Information to the other party under this Agreement is the "**Disclosing Party**", and the party receiving such Confidential Information is the "**Receiving Party**."

5.2   <u>Use and Disclosure of Confidential Information</u>.

   (a) <u>General</u>. Each Receiving Party will: (a) subject to **Sections 5.5 and 5.6**, retain Confidential Information provided by the Disclosing Party in confidence; (b) make no use of that Confidential Information except as permitted under this Agreement; and (c) protect that Confidential Information by using reasonable measures sufficient to maintain the confidentiality of such Confidential Information.

   (b) <u>Permitted Recipients</u>. Except as otherwise expressly authorized in **Sections 5.5 or 5.6**, the Receiving Party may disclose Confidential Information of the Disclosing Party only on a "need to know basis" and under a suitable written non-disclosure agreement that does not permit disclosure or use except as permitted under this Agreement. Without limiting the foregoing, Licensee may make the WSPP

Documentation available to other WSPP Development Licensees in connection with communications described in **Section 5.6(b)**.

5.3   [Reserved]

5.4   Exclusions.   Neither party's Confidential Information includes information which: (a) is in or subsequently enters the public domain or is or subsequently becomes known to the Receiving Party from a source other than the Disclosing Party, without imposition of a confidentiality obligation on the Receiving Party, and provided that entry into the public domain or disclosure does not result from any violation of laws or breach by the Receiving Party of an obligation of confidentiality owed with respect to the information; (b) was independently developed by the Receiving Party without reference to any Confidential Information of the Disclosing Party in any form; or (c) becomes publicly known or enters into the public domain through an independent analysis of the source code as given in **Section 5.6(a)**.

5.5   Independent Development/Residuals.   The terms of confidentiality under this Agreement shall not be construed to limit either the Disclosing Party or the Receiving Party's right to independently develop or acquire products without use of the other party's Confidential Information. Further, the Receiving Party shall be free to use for any purpose the residuals resulting from access to or work with the Confidential Information of the Disclosing Party, provided that, during the period such individual is accessing the WSPP Documentation and for a period of three months following the individual's last access to the WSPP Documentation, the individual shall not disclose such residuals except as otherwise expressly permitted pursuant to the terms of this Agreement. The term "residuals" means information in intangible form, which is retained in unaided memory by persons authorized by the Receiving Party who have had access to the Disclosing Party's Confidential Information per the provisions of **Section 5.2** (such persons, "**Authorized Persons**"), including ideas, concepts, know-how or techniques contained in such Confidential Information. An Authorized Person's memory will be considered to be unaided if such Authorized Person has not intentionally memorized the Confidential Information for the purpose of retaining and subsequently using or disclosing it. The Receiving Party shall not have any obligation to limit or restrict the assignment of Authorized Persons or to pay royalties for any work resulting from the use of residuals. However, this **Section 5.5** shall not be deemed to grant to the Receiving Party a license under the Disclosing Party's copyrights or patents.

5.6   Permitted Disclosures.

       (a) To the extent that Microsoft Confidential Information is embodied in and disclosed by source code (including comments to source code in line with standard industry practice) versions of Implementations, Licensee may disclose such Confidential Information as part of a distribution of such source code. For further clarification of standard industry practice, the parties intend that the standard will be the commenting and/or commit messages reasonably required from the perspective of good software engineering practices. Without limiting the sources of such standards, the kinds of practice that would typically be sources for those standards would include those described in Writing Clean Code (Steve Maguire) and Code Complete (Steve McConnell), as well as those used generally in the published source code from Samba.org as of the date of this Agreement.

       (b) Microsoft will also establish a mechanism (for example a secure mailing list) that enables Licensee to communicate with other WSPP licensees and Microsoft about the WSPP Documentation, and such communications may include discussion of the content of the WSPP Documentation among WSPP licensees. In connection with development of Implementations and with Microsoft Plugfests and similar events held for WSPP Documentation, Licensee may also communicate with other WSPP licensees about the WSPP Documentation.

       (c) **Sections 5.6(a)** and **5.6(b)** do not authorize Licensee to publish the WSPP Documentation in any manner (including in connection with or as part of Implementation source code) or to   disclose Microsoft Confidential Information in any other manner than publication of Implementation source code or works derived from it.

       (d) The Receiving Party may disclose Confidential Information in accordance with judicial or other governmental order, provided the Receiving Party (i) gives the Disclosing Party reasonable notice prior to such disclosure to allow the Disclosing Party a reasonable opportunity to seek a protective order or equivalent, or (ii) obtains written assurance from the applicable judicial or governmental entity affording

the Confidential Information the highest level of protection afforded under applicable law or regulation, provided that (except with respect to governmental orders) in no event may such level of protection be less than is reasonably necessary to maintain the confidentiality of such Confidential Information.

(e) Subject to **Section 5.6(d)**, the Receiving Party may also disclose Confidential Information in connection with the Microsoft Work Group Server Protocol Program or Microsoft's compliance with the Decision, to the Commission, to the Trustee, or, in connection with judicial enforcement of this agreement, to the High Court of Chancery as set forth in **Section 10.7**.

(f) Confidential Information disclosed under **Section 5.6(b), (c) and (e)** remains Confidential Information under this Agreement.

5.7   Publicity. Nothing in this Agreement prohibits Licensee from disclosing the fact that it has entered into this Agreement and that it has implemented WSPP Protocol(s) in Implementation(s), as long as Licensee does not use any Microsoft logo in so doing. However, Microsoft will not, without Licensee's approval, issue any press releases or similar communications during the Term regarding the fact that Licensee has entered into this Agreement, unless such fact has already been made public by someone other than Microsoft.

5.8   Acknowledgement about Implementation Details. The parties acknowledge that constraints in the protocols specified in the WSPP Documentation may require a level of similarity in some source code elements of Implementations, in comparison to the content of the WSPP Documentation, and that Licensee may choose to use the same names for protocol elements in the Implementations as Microsoft uses in the WSPP Documentation. These similarities should not be interpreted in and of themselves as evidence of a breach of the confidentiality provisions in this **Section 5**, nor will Microsoft assert any claim of copyright infringement on the basis of such similarities.

6.   Warranties, Limitations of Liability, Exclusive Remedies and Sole Liability

6.1   General. Each party warrants that (i) the person executing this Agreement on behalf of such party has all necessary power and authority to do so, and that upon such signature this Agreement is a legal, valid and binding obligation enforceable against such party, and (ii) that it is entering into this Agreement in good faith.

6.2   Additional Microsoft Warranties.

(a) Microsoft further warrants that the WSPP Protocols and the WSPP Documentation do not infringe any copyright of any third party.

(b) Microsoft further warrants that it will not assert any patent claims other than Subject Patent Claims against Licensee or any third party for developing, making, using or Distributing any Implementation. Microsoft further acknowledges that the inclusion of the Subject Patent Claims in this Agreement does not imply that Licensee's Implementation(s) infringe the Subject Patent Claims, and Microsoft acknowledges that Licensee is not waiving its right to contest the validity or applicability of any of Microsoft's patents. Any assignment or other transfer by Microsoft or its related companies of Microsoft's patent claims subject to this paragraph **6.2(b)** will be subject to Microsoft's obligations under this Agreement.

6.3   Documentation and Licensing Terms. Microsoft further represents and warrants and undertakes that

(a) the WSPP Documentation is complete and accurate as required by Article 5 of the Decision read in conjunction with Article 1 of the Decision;

(b) the WSPP Documentation is and will be kept updated on an ongoing basis and in a timely manner as required by Article 5 of the Decision read in conjunction with Article 1 of the Decision;

(c) the WSPP Documentation provided by Microsoft under this Agreement will be provided in an organized manner and in a format suitable for analysis and interpretation by software engineers

reasonably skilled in the art of server software protocols and familiar with (although not necessarily specialized in) Windows Server Operating Systems developer technologies; and

(d) in offering the terms and conditions under this Agreement to Licensee (including, without limitation, the financial provisions, warranties and any restrictions imposed on Licensee hereunder in relation to its right to access and use the WSPP Documentation), Microsoft complies and shall continue to comply with the requirement under Article 5 of the Decision that it must allow undertakings to use the Interoperability Information (as defined in Article 1 of the Decision) on terms which are reasonable and non-discriminatory. If at any time Microsoft grants any Third Party license fees, terms and conditions that may be deemed to be more advantageous, Microsoft will give prompt notice to Licensee and at Licensee's written request, will provide any additional necessary information to determine compliance with this representation and warranty.

6.4   Third Party Claims. Microsoft further warrants that as of the Effective Date, to the best of its knowledge, it does not have any Third Party IP Claims (defined in **Section 3.3(c)(ii)**) other than as may be set forth in **Appendix 2** to this Agreement.

6.5   **LIMITATIONS OF LIABILITY**. EXCEPT AS PROVIDED IN **SECTIONS 6.1-6.4** AND WITH REGARD TO THE IMPLIED WARRANTY OF TITLE AS TO ANY GOODS PROVIDED TO LICENSEE, TO THE MAXIMUM EXTENT PERMITTED BY LAW, EACH PARTY EXCLUDES ALL CONDITIONS, WARRANTIES AND OTHER TERMS WHICH MIGHT HAVE EFFECT BETWEEN THE PARTIES OR BE IMPLIED OR INCORPORATED INTO THIS AGREEMENT (INCLUDING, WITHOUT LIMITATION, IN RELATION TO (i) THE WSPP DOCUMENTATION, (ii) PRELIMINARY DOCUMENTATION UPDATES, (iii) CORRECTION ASSISTANCE, (iv) COMMENTS AND SUGGESTIONS, AND (v) ALL INTELLECTUAL PROPERTY IN ANY OF THE FOREGOING (INCLUDING, WITHOUT LIMITATION, THE MICROSOFT LICENSED INTELLECTUAL PROPERTY) (COLLECTIVELY, THE "**MATERIALS**"), WHETHER BY STATUTE, COMMON LAW OR OTHERWISE, INCLUDING, WITHOUT LIMITATION, THE IMPLIED CONDITIONS, WARRANTIES AND OTHER TERMS AS TO SATISFACTORY QUALITY, FITNESS FOR PURPOSE AND THE USE OF REASONABLE SKILL AND CARE.   EXCEPT AS PROVIDED IN **SECTION 6.2(A)** OR **6.4** AND WITHOUT LIMITING THE GENERALITY OF THE FOREGOING, MICROSOFT MAKES NO WARRANTY OR REPRESENTATION OF ANY KIND THAT (i) THE MATERIALS DO NOT INFRINGE THE INTELLECTUAL PROPERTY RIGHTS OF A THIRD PARTY OR (ii) ANY IMPLEMENTATION WILL NOT INFRINGE ANY INTELLECTUAL PROPERTY RIGHT OF ANY THIRD PARTY.

6.6   **EXCLUSIVE REMEDIES AND SOLE LIABILITY**. BOTH PARTIES AGREE THAT LICENSEE'S SOLE AND EXCLUSIVE REMEDY AND MICROSOFT'S SOLE LIABILITY IN CONNECTION WITH ANY CLAIM RELATED TO:

(a) A VIOLATION OR BREACH OF THE WARRANTY IN **SECTION 6.2(A)** IS A CLAIM FOR INDEMNIFICATION FROM THIRD PARTY CLAIMS UNDER **SECTION 7.1(a)** (SUBJECT TO THE TERMS AND LIMITATIONS SET FORTH IN **SECTION 7**), AND THAT LICENSEE IS NOT ENTITLED TO BRING ANY CLAIM FOR DAMAGES AGAINST MICROSOFT BASED ON ANY ALLEGED OR ACTUAL VIOLATION OR BREACH OF THE WARRANTY IN **SECTION 6.2(A)**;

(b) **SECTION 6.4** (INCLUDING WITHOUT LIMITATION ANY BREACH THEREOF) IS FOR LICENSEE TO TERMINATE THIS AGREEMENT WITH RESPECT TO ALL WSPP PROTOCOLS THAT ARE THE SUBJECT OF THE RELEVANT THIRD PARTY IP CLAIM AND, FOLLOWING SUCH TERMINATION, TO PURSUE A CLAIM FOR DAMAGES AGAINST MICROSOFT BASED ON A VIOLATION OR BREACH OF THE WARRANTY IN **SECTION 6.4**, PROVIDED THAT SUCH DAMAGES WILL NOT IN ANY EVENT EXCEED (REGARDLESS OF THE LEGAL THEORY UPON WHICH ANY CLAIM FOR SUCH DAMAGES IS BASED) THE AMOUNT OF THE LICENSE FEE PAID BY LICENSEE TO MICROSOFT HEREUNDER, AND TO THE EXTENT APPLICABLE, TO OBTAIN INDEMNIFICATION AND DEFENSE BY MICROSOFT WITH RESPECT TO THIRD PARTY IP CLAIMS UNDER **SECTION 7.1(b)** SUBJECT TO THE TERMS AND LIMITATIONS SET FORTH IN **SECTION 7**; AND

NOTHING IN THIS **SECTION 6.6** IS INTENDED TO LIMIT THE REMEDIES AVAILABLE TO MICROSOFT WITH RESPECT TO MISREPRESENTATIONS BY LICENSEE OR OTHER BREACHES

OF **SECTION 6.1**. NOTHING IN THIS AGREEMENT SHALL EXCLUDE MICROSOFT'S LIABILITY FOR DEATH OR PERSONAL INJURY ARISING FROM NEGLIGENCE.

7. Indemnification

7.1 <u>General</u>. Subject to **Sections 7.2** and **7.3**, Microsoft agrees at its expense and Licensee's request to indemnify and hold harmless Licensee and Licensee's subsidiaries, directors, officers, and employees ("**Indemnified Parties**"), from and against amounts awarded by (or in an award enforceable by) a court of competent jurisdiction or agreed to in a settlement pursuant to **Section 7.3** below ("**Indemnified Damages**") as a result of:

(a) third party claims, demands or actions based on allegations which, if true, would constitute a breach of Microsoft's warranty in **Section 6.2(a)**, and/or

(b) third party claims, demands or actions based on allegations which, if true, would constitute a breach of Microsoft's warranty in **Section 6.4** ("**7.1(b) Covered Claims**"; along with the claims referenced in **Section 7.1(a)**, "**Covered Claims**").

7.2 <u>7.1(b) Claims</u>. Subject to **Section 7.3**, Microsoft also agrees at its expense to defend the Indemnified Parties against 7.1(b) Covered Claims, and the costs of such defense are not capped; provided, however, that such defense obligation, and Microsoft's obligation to indemnify and hold the Indemnified Parties harmless under **Section 7.1(b)**, excludes Licensee's reverse engineered products or products created by Licensee prior to the Effective Date.

7.3 <u>Condition and Procedures</u>. Microsoft's obligation to indemnify, hold harmless and defend the Indemnified Parties under **Section 7.1 and 7.2** is conditioned on Licensee's providing Microsoft with reasonably prompt notice in writing of any Covered Claim, and tendering control of the defense of such Covered Claim to Microsoft. Microsoft will not settle any Covered Claim except with prior written permission of Licensee, which permission Licensee will not unreasonably withhold. Notwithstanding Licensee's tender of control of defense to Microsoft under this **Section 7.3**, Licensee may also participate at its own expense in such defense, provided that control over defense strategy decisions remains with Microsoft subject only to the express provisions of this **Section 7.3** regarding settlement approvals.

7.4 <u>Additional Claims</u>. Microsoft agrees at its expense and Licensee's request to defend Licensee in a lawsuit, and pay the amount of any adverse final judgment (or settlement to which Microsoft agrees in advance in writing) from such lawsuit, for any third party claim(s) that a Licensed Protocol implemented and Distributed in an Implementation in accordance with **Section 2** and the other provisions of this Agreement, infringes third party patent Necessary Claims that were not known to Microsoft as of the Effective Date (such third party claims, "**Additional Claim(s)**"); provided that:

(a) Licensee promptly notifies Microsoft in writing of the Additional Claim, in sufficient detail to identify (i) the allegedly infringing Licensed Protocol, (ii) the allegedly infringed patent Necessary Claims and (iii) the legal and technical basis of the allegation,

(b) Microsoft controls the defense and/or settlement of the Additional Claim,

(c) Licensee provides Microsoft with reasonable assistance (at Microsoft's expense) in the defense of the Additional Claim,

(d) Microsoft's obligations to defend and pay any Additional Claim shall be limited to Additional Claims wherein the Licensed Protocol alone, without combination or modification, constitutes direct or contributory infringement of such Additional Claim, and

(e) if the lawsuit identified above includes any claim, other than Additional Claim(s), that the Implementation containing the allegedly infringing Licensed Protocol(s) infringes any third party intellectual property rights ("**Other Claims**"), Licensee reimburses Microsoft for any and all attorney's fees and costs incurred by Microsoft in defending against Other Claims, provided that Licensee controls the defense and/or settlement of those Other Claims.

Notwithstanding each party's control of defense of Additional Claims and Other Claims under this **Section 7.4**, the other party may also participate at its own expense in such defense, provided that control over defense strategy decisions with respect to (i) Additional Claims remains with Microsoft and (ii) Other Claims remains with Licensee. Microsoft will have no obligations under this **Section 7.4** for any Additional Claim based on (A) Licensee's manufacture, use or Distribution of software containing an allegedly infringing Licensed Protocol more than 20 days after Microsoft has provided Licensee with at least 20 days written notice that (1) Microsoft (at its option) will stop such activity or (2) Microsoft (at its option) will modify the allegedly infringing Licensed Protocol and provide that modified Licensed Protocol to Licensee for license under this Agreement in lieu of the allegedly infringing Licensed Protocol at or prior to the end of such notice period, or (B) on Licensee's reverse engineered products or products created by Licensee prior to the Effective Date. Microsoft's liability under this **Section 7.4** will not exceed, in the aggregate, the License Fee; however, this limitation does not apply to any fees and expenses of attorneys incurred by Microsoft in defending Additional Claim(s).

8. LIMITATIONS OF REMEDIES & LIABILITY. TO THE MAXIMUM EXTENT PERMITTED BY APPLICABLE LAW, NEITHER PARTY IS LIABLE FOR ANY INDIRECT, INCIDENTAL OR CONSEQUENTIAL LOSSES OR SPECIAL DAMAGES WHATSOEVER, OR FOR LOSS OF PROFITS, ANTICIPATED SAVINGS, BUSINESS OPPORTUNITY OR GOODWILL OR LOSS OF DATA, ARISING OUT OF OR IN ANY WAY CONNECTED TO THE USE OF OR INABILITY TO USE THE WSPP DOCUMENTATION OR OTHERWISE UNDER OR IN CONNECTION WITH ANY PROVISION OF THIS AGREEMENT, WHETHER ARISING OUT OF NEGLIGENCE OR OTHERWISE. THE FOREGOING EXCLUSION APPLIES EVEN IF SUCH PARTY HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES IN ADVANCE AND EVEN IF ANY AVAILABLE REMEDY FAILS OF ITS ESSENTIAL PURPOSE, BUT DOES NOT APPLY TO (I) BREACH OF **SECTION 5** (CONFIDENTIALITY) OR **SECTION 6.3** (DOCUMENTATION AND LICENSING TERMS), (II) INDEMNIFIED DAMAGES, OR (III) ANY INFRINGEMENT OR MISAPPROPRIATION OF EITHER PARTY'S INTELLECTUAL PROPERTY RIGHTS. NOTHING IN THIS AGREEMENT EXCLUDES MICROSOFT'S LIABILITY FOR DEATH OR PERSONAL INJURY ARISING FROM NEGLIGENCE.

9. Term & Termination

9.1 Term.

(a) Initial Term. The initial term of this Agreement commences on the Effective Date and remains in effect until the date that is five years from the Effective Date, unless and until this Agreement is earlier terminated in accordance with **Section 9.2** ("**Initial Term**").

(b) Term Extensions. Unless the Agreement has been terminated prior to expiration, Licensee may extend the term of this Agreement for successive terms of five years ("**Extensions**") by giving written notice to Microsoft during the period beginning 60 days prior and ending on the expiration date of the Initial Term or then-current Extension. The Initial Term, together with any Extensions, constitutes the "**Term**" of this Agreement. To account for the availability of new technology or other developments, Microsoft reserves the right to make any Extension subject to Licensee's agreement to new or revised terms, including the License Fee amount set forth in **Section 4.1**, provided any such terms are consistent with the Decision and the WSPP Pricing Principles set forth in **Appendix 1**. Microsoft may terminate Licensee's right to obtain Extensions by giving written notice to Licensee if Microsoft receives permission from the Commission of the European Communities to do so. Following delivery of such notice, the Agreement will expire on the date that is the later of (i) the last day of the Initial Term or then-current Extension (if applicable); or (ii) three years following the date of such notice.

9.2 Termination.

(a) By Licensee Without Cause. Licensee may terminate this Agreement at any time, in its sole discretion and without cause, by providing written notice to Microsoft and complying with **Section 9.3(a)**.

(b) <u>By Microsoft for Cause</u>. Microsoft may terminate this Agreement: (i) immediately upon written notice at any time, if Licensee is in material breach of **Section 5** of this Agreement; (ii) upon written notice at any time if Licensee is in material breach of any warranty, term or condition of this Agreement and fails to remedy that breach (if such breach is capable of being remedied) within 60 days after written notice thereof; or (iii) upon written notice at any time if Licensee has received three or more written termination notices under the preceding clause (ii) within the previous 12-month period based on an actual material breach of a material warranty, term, or condition of this Agreement, even if those previous material breaches have been cured. Any material breach has to first be established by a court of competent jurisdiction.

(c) <u>Termination as to Licensee Subsidiaries; Survival</u>. Notwithstanding any other provision of this Agreement: (i) this Agreement will terminate immediately (without notice or opportunity to cure) with respect to any party identified as a Licensee subsidiary on the first page of this Agreement, at such time as such subsidiary ceases to be a wholly-owned subsidiary of the party identified as the Licensee parent on the first page of this Agreement, and (ii) upon such termination, such subsidiary will no longer be entitled to exercise any rights under this Agreement, but all obligations and liabilities of such subsidiary accruing before the termination date will survive such termination; provided that any subsidiary so terminated may enter into a new agreement on its own behalf either: (i) on the then-current terms of the WSPP Development Agreement, or (ii) for a period of 30 days after such termination, on the same terms as this Agreement (rather than the then-current terms of the WSPP Development Agreement) and for a term concurrent with this Agreement.

9.3   <u>Effect of Expiration or Termination; Survival</u>.

(a) <u>Termination</u>. Upon any expiration or termination of this Agreement: (i) the rights granted Licensee under **Section 2.1(a)** will survive, subject to the express license scope and other terms and conditions referenced in **Sections 2** and **5**. The Licensee may retain in its possession and continue to use the WSPP Documentation made available to it by Microsoft during the Term, solely to exercise such rights; (ii) Microsoft's warranty not to assert patent claims in **Section 6.2(b)** will survive; (iii) all other warranties pursuant to **Section 6** will survive with respect to any breach thereof during the Term; (iv) the provisions of **Sections 6, 7** and **8** on Limitations of Liability, Exclusive Remedies and Sole Liability; Indemnification; Limitations of Remedies & Liability will survive; (v) **Section 5** (Confidentiality) will survive, including without limitation **Section 5.5** (Independent Development/Residuals); (vi) **Section 3.2(b)** (Preliminary Documentation Updates) will survive solely as to the warranty and liability exclusions therein; and (vii) **Sections 3.4** (Comments and Suggestions), **4.2(c)** Taxes, **10** (Miscellaneous) and this **Section 9** (Termination) will also survive.

(b) <u>Ongoing Rights Following Expiration or Termination</u>. Expiration or Termination of this Agreement do not affect the rights of recipients of source code versions of Existing WSPP Implementations to copy, distribute and modify source code versions of Implementations commercially released or released for production use prior to such expiration or termination ("**Existing WSPP Implementations**"). Such expiration or termination also does not affect the rights of Licensee to copy, distribute and modify source code versions of Existing WSPP Implementations, without reference to the WSPP Documentation, and subject to **Section 5** (Confidentiality), including without limitation **Section 5.5** (Independent Development/Residuals).

9.4   <u>Remedies Not Exclusive</u>. The rights and remedies set forth in this **Section 9** are cumulative and are not exclusive of any rights or remedies available at law or in equity, subject only to the express waivers and limitations of liability set forth in this Agreement.

10.   Miscellaneous

10.1   <u>No Partnership, Joint Venture or Franchise</u>. Neither this Agreement, nor any terms or conditions contained herein, create a partnership, joint venture or agency relationship or grant a franchise as defined in the Washington Franchise Investment Protection Act, RCW 10.100, as amended, 16 CFR Section 436.2(a), or any other similar laws in other jurisdictions.

10.2   Export Laws and Regulations. Products and technical information of Microsoft are subject to U.S. export jurisdiction and other applicable national or international laws and regulations, and the licenses and deliveries of technical information and data contemplated herein may be prohibited by such laws and regulations.   Licensee   agrees   to   comply   with   all   such   export control laws.   For additional information, see http://www.microsoft.com/exporting/.

10.3   Actions on Behalf of the Parties. Microsoft and Licensee are each liable for, and will be deemed for all purposes of this Agreement to have done or failed to do, any act or omission of their respective officers, employees, temporary personnel, or independent contractors related to acts or omissions in connection with this Agreement.

10.4   Notices. All notices and requests in connection with this Agreement are deemed given on the day they are received either by messenger, delivery service, or in the United States of America mails, postage prepaid, certified or registered, return receipt requested, and addressed to Licensee using the contact information indicated on the first page of this Agreement, to Microsoft using the contact information below, or to either party at such other address as the party to receive the notice or request so designates per this notice provision:

Microsoft Corporation

One Microsoft Way

Redmond, Washington   98052-6399 U.S.A.

Attention: Associate General Counsel, Antitrust Group

Phone: (425) 882-8080

Fax: (425) 706-7329

Copy to: Law & Corporate Affairs

Fax: (425) 706-7409

10.5   Licensee Contests and Complaints.

(a) Microsoft acknowledges that by signing this Agreement, Licensee is not waiving its right to contest the validity of any of Microsoft's patents, know-how, industrial secrets, trade secrets and confidential information embodied in the WSPP Protocols and disclosed by the WSPP Documentation, or copyrights, and without prejudice to the provisions of **Section 9.2**, Microsoft will not withhold WSPP Documentation from Licensee or terminate this Agreement on the basis of such a contest by Licensee.

(b) Nothing in this Agreement will prevent Licensee from complaining to the Commission of the European Communities with respect to this Agreement or the Decision.   Without prejudice to the provisions of **Section 9.2**, Microsoft will not withhold WSPP Documentation from Licensee or terminate this Agreement on the basis of such a complaint by Licensee.

(c) This Agreement neither takes away from nor adds (except as expressly stated in this Agreement) to any rights a licensee might have under Articles 81 or 82 EC or equivalent provisions of national competition laws.

10.6   Injunctive and Equitable Relief, Liquidated Damages.

(a) Microsoft acknowledges and agrees that (i) monetary damages will not be a sufficient remedy for Microsoft's breach of its obligations under **Section 5**, and (ii) such unauthorized disclosure, use or exercise of rights will cause Licensee immediate, severe and irreparable injury. Accordingly, notwithstanding the provisions of **Section 10.7**, Microsoft acknowledges that Licensee will be entitled in such circumstances, without waiving or prejudicing any other rights or remedies, to such injunctive or equitable relief as a court of competent jurisdiction may grant.

(b) The Parties acknowledge and agree that in case of Microsoft's breach of Article 5 of the Decision or the representations, warranties, or undertakings in **Section 6.3**, (i) monetary damages will not be a sufficient remedy; (ii) in any event, the injured party will be entitled to such injunctive or equitable relief as a court of competent jurisdiction may grant, without waiving or prejudicing any other rights or remedies. In the event of any breach by Microsoft of any of the provisions of **Sections 6.3(a), (b)**, or **(c)** of this Agreement, where as a result of such breach (and as long as it continues) Licensee is unable

effectively to use the WSPP Documentation as contemplated in Article 5 of the Decision for a software development project the planning or actual execution of which is duly substantiated, Microsoft shall pay Licensee liquidated damages in the amount of One Hundred Thirty-Five Thousand Euros (135,000) per day for each day in which such breach continues. The parties acknowledge that the foregoing amount reflects their assessment of the damages which Licensee is likely to incur as a result of such breach including by reason of expected delays in developing products and launching products on the market.

(c) Licensee acknowledges and agrees that (i) monetary damages will not be a sufficient remedy for Licensee's breach of its obligations under **Section 5**, or for use of the WSPP Documentation or exercise of rights in the Microsoft Licensed Intellectual Property other than as authorized by **Sections 2 and 5** of this Agreement, and (ii) such unauthorized disclosure, use or exercise of rights will cause Microsoft immediate, severe and irreparable injury. Accordingly, notwithstanding the provisions of **Section 10.7**, Licensee acknowledges that Microsoft will be entitled in such circumstances, without waiving or prejudicing any other rights or remedies, to such injunctive or equitable relief as a court of competent jurisdiction may grant.

10.7 <u>Governing Law; Jurisdiction; Attorneys' Fees</u>. This Agreement shall be governed by and construed in accordance with English law. Each party hereby submits to the exclusive jurisdiction of the Chancery Division of the High Court of England and Wales in London. Process may be served on either party in the manner authorized by applicable law or court rule. In any formal action or suit to enforce any right or remedy under this Agreement or to interpret any provision of this Agreement, the prevailing party is entitled to recover its costs, including reasonable attorneys' fees, costs and other expenses. The Parties acknowledge and agree that any formal action or suit to enforce any right or remedy under this Agreement or to interpret any provision of this Agreement constitutes an issue relating to the application of Article 82 of the Treaty within the meaning of Article 15 of Regulation 1/2003.

10.8 <u>Assignment</u>.

(a) The party identified as the Licensee parent on the first page of this Agreement may not assign this Agreement without Microsoft's prior written consent.

(b) Microsoft may terminate this Agreement immediately upon written notice if the party identified as the Licensee parent on the first page of this Agreement assigns or otherwise transfers, whether by operation of contract, law or otherwise, fifty percent (50%) or more of such Licensee's assets, excluding this Agreement, in a single transaction or series of transactions, unless such Licensee and Microsoft expressly agree otherwise in writing.

(c) Notwithstanding any other provision of this Agreement, any party identified as a Licensee subsidiary on the first page of this Agreement does not have the right to, and will not, assign this Agreement (or its rights or obligations hereunder) in whole or in part.

(d) Any attempted assignment in violation of **Sections 10.8(a), (b)** or **(c)** is null and void and has no force or effect.

10.9 <u>Construction</u>. This Agreement shall be constructed and applied in light of the operative part of the Decision and statement of reasons for it. If for any reason a court of competent jurisdiction finds any provision of this Agreement, or portion thereof, other than **Sections 2.1, 2.2, 2.3, 2.5** (License Grant; Implementations; License Clarifications; No Other Rights), **5** (Confidentiality), **6.5** (Limitations of Liability), **6.6** (Exclusive Remedies and Sole Liability), **8** (Limitations of Remedies & Liability), or **10.8** (Assignment), to be unenforceable, the rest will remain in effect. If any of the foregoing provisions or any portion thereof are held by a court of competent jurisdiction to be unenforceable, this Agreement terminates immediately.

10.10 <u>Third Parties Rights</u>. Other than **Section 6.2(b)**, a person who is not a party to this Agreement is not a beneficiary of the rights granted to Licensee under this Agreement, and has no right under the Contracts (Rights of Third Parties) Act 1999 to enforce any term of this Agreement in contract.

10.11 <u>Entire Agreement</u>. This Agreement does not constitute an offer by Microsoft and is not effective unless and until this Agreement is signed by duly authorized representatives of both parties. This Agreement may be executed in counterparts, each of which shall be an original and all of which together shall constitute one and the same instrument. This Agreement (including its Appendices) constitutes the entire agreement between the parties with respect to its subject matter and supersedes all prior and

contemporaneous communications, agreements, arrangements and understandings between the parties in connection with this Agreement and on such subject matter. Except as provided in **Section 1.9)** (regarding updates to **Appendix 3**), no modifications of this Agreement are effective unless contained in a subsequent written agreement that expressly references this Agreement and its intent to modify its terms, and is signed by duly authorized representatives of Licensee and Microsoft.

IN WITNESS WHEREOF, the parties, through their duly authorized representatives, have entered into this Agreement, to be effective on the Effective Date.

PROTOCOL FREEDOM INFORMATION FOUNDATION   **MICROSOFT CORPORATION**