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ESA Permissive PL 2.3

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To: License submissions for OSI review <license-review@lists.opensource.org>

Sorry, I didn't participate in the first review, and am taking this opportunity to comment upon things that may have already been opened to comment some months ago. I've not read the previous discussion.

I'll review each license under a separate subject heading.

ESA Permissive PL 2.3

3.1 No Copyleft.

You may Distribute the Software and/or Modifications, as Source Code or Object Code, under any license terms, provided that

- (a) notice is given of the use of the Software and the applicability of this License to the Software; and
- (b) You make best efforts to ensure that further Distribution of the Software and/or Modifications (including further Modifications) is subject to the obligations set forth in this Sec. 3.1 (a) and (b).

The title "No Copyleft" is confusing and incorrect, since the terms of that section actually *do* permit distribution under a copyleft license, and they still apply even if the downstream licensor uses a non-copyleft license. The actual effect of the terms is to guarantee that whatever license is used, the ESA Permissive PL 2.3 license is still available as an *alternative license*, and the downstream licensor has to make a notice to that effect.

And thus, I'd suggest that you state the actual text of the notice the poor un-counseled Open Source developer has to make in that case. Here's my suggested rewrite:

3.1 Continued Availability of This License.

You may Distribute the Software and/or Modifications, as Source Code or Object Code, under any license terms, provided that

- (a) you convey this notice with the software:

This software contains a portion licensed under the ESA Permissive PL 2.3. For that portion, the ESA Permissive PL 2.3 terms are available as an alternative to any other license applied to this software. The portion was downloaded from, or is available at: _____

- (b) you add to the notice the online location where you downloaded the Software, or the location where it is currently available in Source Code form as separate software entirely under this license. This may be an online location or a subdirectory within your own software distribution.
- (c) You make best efforts to ensure that further Distribution of the Software and/or Modifications (including further Modifications) is subject to the obligations set forth in this Sec. 3.1 (a), (b), and (c).

7.1 If You have knowledge that exercising rights granted by this License **infringes** third party's intellectual property rights, including without limitation copyright and patent rights, You must take reasonable steps (such as notifying appropriate mailing lists or newsgroups) to inform ESA and those who received the Software about the infringement.

7.2 You acknowledge that continuing to use the Software knowing that such use infringes third party rights (e.g. after receiving a third party notification of infringement) **would** expose you to the risk of being considered as intentionally infringing third party rights. In such event You **should** acquire the respective rights or modify the Software so that the Modification is non-infringing.

The problem here is that neither ESA nor the licensee is the court. Neither party can determine that the software

under this license reliably *does* infringe upon any third party's intellectual property rights, *unless a court has already ruled to that effect*. Nor is any third-party notification actually proof of infringement unless there is an existing ruling. I could thus make a case that 7.1 and 7.2 apply *only after* a court ruling. Which is rather late for the sort of notification you're asking for. I'm sure counsel wants to know earlier than that.

Thus, I suggest this language:

If You have knowledge that exercising rights granted by this License **may infringe a** third party's intellectual property rights, including without limitation copyright and patent rights, You must take reasonable steps (such as notifying appropriate mailing lists or newsgroups) to inform ESA and those who received the Software about the **potential infringement**.

7.2 You acknowledge that continuing to use the Software knowing that such use **may infringe** third party rights (e.g. after receiving a third party notification of infringement) **may** expose you to the risk of being considered as intentionally infringing third party rights. In such event You **should seek legal counsel regarding whether to** acquire the respective rights or modify the Software so that the Modification is non-infringing.