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ESA-PL Strong 2.3

Bruce Perens <bruce@perens.com> Fri, Mar 2, 2018 at 3:42 PM
To: License submissions for OSI review <license-review@lists.opensource.org>

> 3.2.1 Compilations. In the event of the Distribution of a compilation of Software and/or Modifications with other separate and independent works, which are not by their nature extensions of the Software and/or the Modifications, and which are not combined with it such as to form a larger program, in or on a volume of a storage or distribution medium, Distribution of the compilation does not cause this License to apply to the other parts of the compilation.

I think this confuses two things: Aggregation of works together on a storage medium, and creation of a compilation. Creating a compilation is a separate work of authorship embodying some *creativity* and admitting the possibility that the compilation can be copyrighted. Mere aggregation of works together on a storage medium, by itself, does not embody creativity and a separate work of authorship that can be copyrighted. The terms in 3.2.1 should apply to aggregation, and would also be sufficient to protect compilations.

> 3.2.3 External Modules. You may create a Modification by combining Software with an external module enabling supplementary functions or services and Distribute the external module under different license terms, provided that the external module and the Software run in separate address spaces, with one calling the other, or each other interfacing, when they are run.

This could be used to arbitrarily circumvent the copyleft, leaving you to argue in court about whether some function is "supplementary" or "a service". It's not reason to disapprove of the license, it's just weaker than license users might realize.

It also makes use of address spaces as a definition of separation, where APIs might really make more sense and would not arbitrarily constrain the implementation. Again, not reason for rejection, just sort of arbitrary.

> 3.4 Service Provision.
> If You provide access to the Software and/or Modifications or make its functionality available by any means or use it to provide services for any individual or legal entity other than You, e.g. by provision of software-as-a-service, You are obliged to communicate the Source Code of the Software and/or Modifications pursuant to Sec. 3.3 to those individuals or legal entities.

Unfortunately, this refers to 3.3, but 3.3(b) still includes the language:

> 3.3(b) make the Source Code of the Software and/or Modifications freely accessible by reasonable means **for anyone who possesses the Object Code or received the Software and/or Modifications from You,**

But in the case of the software-as-a-service called out in 3.4, the user *did not* receive the things mentioned in 3.3, and thus the text is confusing or contradictory.

So, to fix this, 3.4 should read:

3.4 Service Provision.
If You provide access to the Software and/or Modifications or make its functionality available by any means or use it to provide services for any individual or legal entity other than You, e.g. by provision of software-as-a-service, You are obliged to make the source code freely available to those individuals or legal entities by reasonable means.

> 4.5 Each Contributor must identify all of its Patent Claims by providing at a minimum the patent number and identification and contact information in a text file included with the Distribution titled "LEGAL".

My experience is that patent holders don't know what they own, and are loath to search their own portfolios. What

happens if they *don't* specify their patents in that file? Are they penalized with a stronger patent grant? Do they make no patent grant at all?

> 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.

Same criticism as for these terms in the Permissive license:

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:

7.1 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.