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[License-review] Resolution on NOSA 2.0

Bruce Perens <bruce@perens.com> Thu, Feb 22, 2018 at 10:40 AM
To: License submissions for OSI review <license-review@lists.opensource.org>, bryan.a.geurts@nasa.gov, "Karan, Cem F CIV USARMY RDECOM ARL (US)" <cem.f.karan.civ@mail.mil>, "Rob (ARC-DL)" <robert.m.padilla@nasa.gov>

Here is my second pass at marking up the NASA license 2.0 . It's only different from the first in a few comments.

> *NASA OPEN SOURCE AGREEMENT VERSION 2.0*
>
> *This open source agreement ("Agreement") defines the rights of use, reproduction, modification and redistribution of certain software*
> *released by the United States Government ("Government") as represented by the Government Agency listed below ("Government Agency").*

Although I would not actually *recommend* that any entity other than the United States Government make use of this license, it doesn't make sense to have a license that *requires* that the project be originated by only one legal entity, the United States Government. Should OSI then accept licenses that require the project to be originated by Canada and 210 other nations, and by IBM and a large number of other corporations? It wouldn't make sense for OSI or the developer community. I think you can make this text work for the government or another contributor without losing any of the legal protection you wish to have.

> *The United States Government, as represented by Government Agency, is an intended third-party beneficiary of all subsequent redistributions of the Subject Software.*

Please explain what "intended third-party beneficiary" means in this context. Why is it necessary for the U.S. Government to be this beneficiary, rather than all of the contributors?

> *Anyone who uses, reproduces, modifies or redistributes the Subject Software, as defined herein, or any part thereof, is, by that action, accepting in full the responsibilities and obligations contained in this Agreement.*
>
> *Government Agency: _____*
> *Government Agency Original Software Designation: _____*
> *Government Agency Original Software Title & Ver. No. : _____*
> *Government Agency Point of Contact: _____*
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How about:
Government Agency or Other Entity:
Original Software Designation:
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> *1. DEFINITIONS*
> *A. "Contributor" means Government Agency and any other person or entity that creates or contributes to the creation of Subject Software.*

Shouldn't "and" be "or" here? Otherwise, it rules out any contribution without participation of a Government Agency.

> *B. "Contribution" means any Work, including Your own Works and Works of other Contributors, that are Derivative Works of the Subject Software and that are intentionally submitted by You or other Contributors to Government Agency for inclusion in, or documentation of, the Subject Software.*

This is connected with your re-definition of Derivative Works later in the document. But when you define Subject Software, you define it in part as "Derivative Works and Contributions", where here you define that a Contribution *is* a derivative work. See criticism later in the document regarding re-defining "Derivative Works" when it exists in law and case law.

> *C. "Covered Patents" means any patent claims licensable by a Contributor that are necessarily infringed by the manufacture, import, use, offer for sale, or sale of a Contributor's Derivative Works or Contributions alone or when combined with the Subject Software.*

Is this intended to be a strong or a weak patent clause? If it's on the strong side, any modification of the subject software *after* the contribution that necessarily makes use of the patent claim is covered. If weak, only the patent claim *exactly* as exercised in the contribution by the patent holder is covered. Some corporations that own patent portfolios are loath to join into licenses with strong patent clauses, but will accept weak ones. I am no fan of software patents, it's just my duty to inform you.

> D. "Derivative Work" means a Work that is based on (or derived from) the Subject Software and for which the revisions, annotations, or other modifications, as a whole, represent an original work of authorship.

This is circular: *derivative work* is *derived from.* A derivative work combines two or more original works of authorship. GPL 3 specifically avoids defining anything that legislation or case law would define for the court. So, it uses "combined work" and "modifications". You have already defined Contribution and can probably define a Combined Work of the Initial Work (you call it "Original Software", but "Initial Work" is less confusing) and Contributions without contradicting some court on what is or is not derivative.

> *Derivative Works shall not include (i) Works that remain separate from, or merely link to, the Subject Software,*

Here you talk about two things: aggregation (just placing two unrelated programs on a storage medium), and linking. And you apply terms to linking that would not apply to textual inclusion of the same software, which has the exact same effect. The problem here is that you need to define separable modules better, using language about APIs, and then you need not talk about linking. Define Aggregation separately. Your language about linking and derivative works, as written, contradicts the appeals court's ruling in *Oracle v. Google* on whether calls to an API can be derivative, which is why it's better to define a Combined Work than a Derivative Work. The next case may rule differently, but it's a gray area right now. The license text should avoid argument with courts, especially on recent cases.

> *or (ii) additions to the Subject Software which are separable modules of software distributed in conjunction with the Subject Software,*

You need a better definition of a separable module, or this is going to be reason for long argument at great expense regarding what is or is not separable, if this license goes to court. Arguably it's Open Source and everything is separable since it can be edited into separate units by using spme finite number of edits. Talk about APIs being the boundary of a separable module.

> *or parts of the Subject Software, under their own license agreement.*

I think you mean to talk about Aggregation here. This text is unclear as written and will work better if you define Aggregation.

> *Including Subject Software or parts thereof in a Larger Work is not in and of itself a Derivative Work.*

This definition incorporates "Larger Work" before you have defined it.

> *E. "Larger Work" means software that combines Subject Software, or portions thereof, with software that remains separate from, or is merely linked to, the Subject Software and that is not governed by the terms of this Agreement.*

So, here we're defining a larger work as *either* Aggregation (for example, storage of separate programs on a disk

medium) or a program that is linked (static or dynamic does not matter, apparently). Thus applying one word to two entirely different things. What you should do here is define Aggregation, and then make your language on separability above make it clear that an API is the boundary of a separable module. This language is also circular several times. Larger Work is included in the definition of Derivative Works. What is *governed by the terms of this agreement* is the Subject Software, which includes the definition of Derivative Works and Larger Work (for negation). And so on. You can say Subject Software (or I would prefer Combined Work) instead of relying on whether the module is governed by the terms of this agreement.

> *F. “Original Software” means the software first released under this Agreement by Government Agency with the Government Agency designation and title listed above, including source code, object code and accompanying documentation, if any.*

I think "Initial Work" is less confusing. Other licenses use that term. Also, this definition is exclusive to Government and I don't see that this is necessary simply to define an initial work.

> *G. “Subject Software” means the Original Software, Derivative Works, or Contributions, and any combination or respective parts thereof.*

What you mean to do here is define a Combined Work. If you did that and used "Combined Work" rather than "Subject Software" throughout the license text, people would understand better what you are talking about.

> *H. “Work” means an original work of authorship fixed in a tangible medium of expression,*
>
> *now known or later developed, from which it can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device, including Derivative Works.*

I would have thought that *"Work" means an original work of authorship fixed in a tangible medium of expression"* was sufficient, and that you would not have to go on to attempt to define fixation for yourself, including mentioning that some media might not yet exist but that this license would still apply to them, as if someone could create a new storage medium that copyright did not apply to.

> *A work is original if it is independently created by You, as opposed to copied from other works, and it possesses at least some minimal degree of creativity.*

This is only necessary because you're trying to define derivative works separately from existing legislation and case law. If you use "Combined Work" you don't have to argue about originality, and you can separately define what is separable and be done with it.

> *I. “You” or “Your” means an individual or a legal entity exercising rights under, and complying with all the terms of, this Agreement. For legal entities, “You” or “Your” includes an entity and any other entity that controls, is controlled by, or is under common control with such entity. For the purposes of this definition, “control” means (i) the power, direct or indirect, to cause the direction or management of such entity, whether by contract or otherwise, or (ii) ownership of fifty percent (50%) or more of the outstanding shares, or (iii) beneficial ownership of such entity.*
>
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17 USC § 105 says this:

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This is the strong patent clause. See Larry's comments at https://www.rosenlaw.com/lj9.htm

> *Irrevocable except* is awkward. If someone sues, just terminate their license. State here that the patent grant terminates if the license terminates.
>
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> *1. Submission. Unless You explicitly state otherwise, any Contribution intentionally submitted for inclusion in Subject Software by You to the Government Agency shall be governed by the terms and conditions of this Agreement, without any additional terms or conditions. Notwithstanding the above, nothing herein shall supersede or modify the terms of any separate agreement you may have executed with the U.S. Government regarding such Contributions.*

Please explain what happens to the global Open Source community other than the U.S. Government when a the contributor has a separate agreement with the Government. What license applies to everyone else? That must be clear in the text.

> *2. Representation. You represent that each of Your Contributions is Your own Work or is the Work of another Contributor that You are authorized to submit.*

By "authorized to submit", are you saying that I can contribute a work by someone else that is under a compatible Open Source license? Because that would solve one fundamental objection to the license. Or do you simply mean that I can contribute my employer's work if they've explicitly authorized me to do so (in which case they should really be the ones entering into the license, because they own the patent rights, and we want to make sure those come under the license).

> *You represent that Your submission(s) of Contributions that are the Work of another Contributor, that You are authorized to submit, include complete details of any agreements, licenses, or other restriction (including, but not limited to, related copyright, patents and trademarks) of which You are aware that will impose additional terms and conditions on the Subject Software.*
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> *B. Applicable Law: This Agreement shall be subject to United States Federal law for all purposes, including, but not limited to, determining the validity of this Agreement, the meaning of its provisions and the rights, obligations and remedies of the parties.*
> *NOSA Ver 2 final draft clean 2013Mar26*

Sorry this is so much. Thanks for asking.

Thanks