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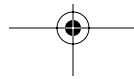
The OSL and the AFL

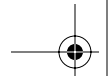
Academic or Reciprocal?

The academic and reciprocal licenses described in this book so far have been very different from each other. This is at least in part because the two major categories of licenses—academic (BSD, MIT, Apache, etc.) and reciprocal (GPL, MPL, CPL, etc.)—have very different roots in the open source community, and they developed from different core philosophical beliefs about software freedom.

Proponents of academic licenses demand the freedom to incorporate open source software into any kinds of works, including proprietary works. Proponents of reciprocal licenses believe that freedom lies in a large public commons of software that grows through the contribution of derivative works back to the commons.

Because of their very different ancestry, good licensing concepts seldom crossed the license category boundaries. Academic licenses remained brief and vague like the BSD, while reciprocal licenses grew to include provisions relating to patents, source code publication, and protection of contributors' integrity. But times are changing. Efforts are now underway within some open source projects to relicense their software under more robust academic licenses, but that process is slow.



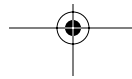


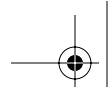
(I discuss relicensing in Chapter 10.) For example, the Apache project has just approved a new version of its license—thus inevitably rendering partly obsolete my discussion of the older Apache license in Chapter 5. The new Apache license is much closer in language and structure to the CPL, although it does not include reciprocity obligations.

Another reason that open source licenses vary so much is that licensing often reflects corporate intellectual property policies of licensors—and those policies vary widely. As open source licenses began to deal with patents and other forms of intellectual property and with the complex commercial laws that relate to software, they evolved into complicated legal documents with their own special rules about what licensees owe back to the public commons. As their corporate authors began to deal with important intellectual policy issues that the GPL left out, reciprocal licenses began to resemble the traditional license agreements that were used for proprietary software.

I have written two licenses that cross that academic/reciprocal divide. These licenses reflect one core set of provisions applicable to both academic and reciprocal open source licensing. Only in a few specific places do the licenses differ, and those few places relate solely to the reciprocity obligation.

The Open Software License (OSL) is a reciprocal license. The Academic Free License (AFL) is the exact same license without the reciprocity provisions. Because these two licenses are direct and short—less than eight pages in the Appendices—there is some prospect that licensors and licensees will actually read and understand the licenses rather than just click “I ACCEPT” when the open source license is presented for approval.



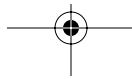
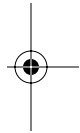


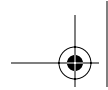
Both the OSL and AFL are *unilateral contracts*. That means that the licensor is the only one making *promises*, although the license also establishes certain *conditions* that must be met by all licensees. As with all unilateral contracts, licensees must satisfy the conditions—including the reciprocity condition—in order for them to enforce the promise by the licensor that permits them to exercise otherwise exclusive copyright and patent rights.

I will describe these two licenses in this chapter differently than I did for earlier licenses. I will explain each license section in turn, noting the four places where the AFL differs from the OSL because of the reciprocity provision. But then I will also describe how each section compares to provisions in the other licenses. This chapter, then, can be read as a summary of open source license provisions in all the licenses in this book.

Every license described in this book guarantees the five Open Source Principles that I listed in Chapter 1—but they do it in different ways. You will immediately recognize as I compare licenses in this chapter that the differences among licenses are often subtle. Some licenses rely on the definition of *derivative work*; others add or subtract from that concept for reciprocity purposes. Some licenses contain express patent grants, others do not; every express patent license contains a field of use restriction of some sort.

This chapter is for comparison purposes. I will leave to the next chapter the important issues of choosing an appropriate open source license among the alternatives available to you.





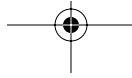
Initial Paragraph of OSL/AFL

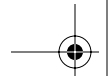
OSL	AFL
This Open Software License (the “License”) applies to any original work of authorship (the “Original Work”) whose owner (the “Licensor”) has placed the following notice immediately following the copyright notice for the Original Work: Licensed under the Open Software License version 2.0	This Academic Free License (the “License”) applies to any original work of authorship (the “Original Work”) whose owner (the “Licensor”) has placed the following notice immediately following the copyright notice for the Original Work: Licensed under the Academic Free License version 2.0

This is how the OSL/AFL serve as templates. To distribute an “Original Work” under one of these licenses, merely place the appropriate licensing notice after the copyright notice for that work. Although the law doesn’t require a copyright notice, this OSL/AFL requirement serves as a friendly reminder that placing a copyright notice on your writings is always a good idea.

This provision gives the license a name and defines the owner (“Licensor”) of intellectual property broadly described as an “original work of authorship.” You will recognize that term of art from copyright law:

Copyright protection subsists ... in original works of authorship fixed in any tangible medium of expression....
(17 U.S.C. § 102.)





The use of that copyright term of art and the later explicit references to the copyright law (see OSL/AFL sections 9 and 11) suggest that these licenses are intended to be interpreted in light of copyright law and terminology.

The OSL/AFL are also intended to be useful for documentation, pictures, art works, music, and other copyrightable works that often accompany software. Therefore you will not see the words *software* or *program* or other words that might limit the reach of this license except in the name of the OSL license itself and in section 10 (referring specifically to “a patent applicable to software” and “combinations of the Original Work with other software”).

The OSL and AFL are not just open source *software* licenses. They are open *content* licenses.

Comparison to Other Licenses

Some open source template licenses (BSD, MPL) require a licensor to modify the words of the license or to append an exhibit to the license in order to associate the license with particular open source software. (MPL sections 1.10, 3.5, 5, and 6.3 and Exhibit A.)

The GPL contains a notice provision similar to the OSL/AFL. A licensor places a notice in his or her *Program*, but the GPL does not specify where the notice is to be placed. (GPL section 0.)

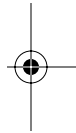
The CPL is a license between a *Contributor* and a *Recipient*. The license applies to the “accompanying program.” (CPL first paragraph.) How that program *accompanies* the license is not specified.





1. Grant of Copyright License

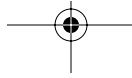
OSL	AFL
<p>Licensor hereby grants You a world-wide, royalty-free, non-exclusive, perpetual, sublicensable license to do the following:</p> <ul style="list-style-type: none"> a) to reproduce the Original Work in copies; b) to prepare derivative works (“Derivative Works”) based upon the Original Work; c) to distribute copies of the Original Work and Derivative Works to the public, <u>with the proviso that copies of Original Work or Derivative Works that You distribute shall be licensed under the Open Software License;</u> d) to perform the Original Work publicly; and e) to display the Original Work publicly. 	<p>Licensor hereby grants You a world-wide, royalty-free, non-exclusive, perpetual, sublicensable license to do the following:</p> <ul style="list-style-type: none"> a) to reproduce the Original Work in copies; b) to prepare derivative works (“Derivative Works”) based upon the Original Work; c) to distribute copies of the Original Work and Derivative Works to the public; d) to perform the Original Work publicly; and e) to display the Original Work publicly.

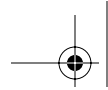


This first section of the OSL/AFL is the all-important open source license grant under copyright law. The license satisfies Open Source Principles # 2 and 3.

The underlined words in section 1(c) are in the OSL but not the AFL. This is the reciprocity provision that distinguishes academic and reciprocal open source licenses.

This section identifies the licensee as *You*. See OSL/AFL section 14 for the definition of that word.





The OSL/AFL grant to *You* a license for all five of the exclusive rights in copyrighted works from U.S. copyright law—copy, create derivative works, distribute, perform, and display. (17 U.S.C. § 106.) There are no exclusive rights under the copyright law withheld by the Licensor.

In case there might be any doubt, the term *Derivative Works* is defined to be *derivative works*. This obviously doesn't answer the question, "What is a derivative work of software?" (I'll discuss that problem further in Chapter 12.) But what it does accomplish is to bring into the OSL/AFL licenses the term of art, *derivative work*, as that term is defined in copyright law (17 U.S.C. § 101).

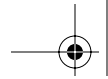
The underlined proviso in section 1(c) of the OSL, absent from the AFL, is a clear statement of reciprocity that applies broadly to "copies of Original Work or Derivative Works." Such works may be distributed, but only under the same OSL license. *You* can *sublicense* your rights under the copyright owner's license to others, but only under the same license as you received the work.

Because it has no reciprocity provision, the AFL allows *You* to *sublicense* your rights under any license you please.

The OSL/AFL copyright license is:

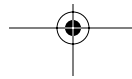
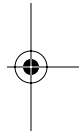
- *World-wide*—No territory is excluded. Of course, there is no such thing as a common law of copyright or contract that applies world-wide, and all nations have the authority to make their own laws to govern intellectual property licenses undertaken within their jurisdiction. For example, export control laws prevent some software from being exported to certain other countries regardless of the license. Also, at least in theory, a country somewhere could forbid this license

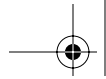




entirely. The relationship between local laws and the law of the contract is addressed further by section 11 of the OSL/AFL.

- *Royalty-free*—The license is at *zero price*. This does not restrict any licensee from setting his or her own prices for copies and derivative works. Any such restrictions on licensees setting their own prices would be an unfair business practice in many countries.
- *Non-exclusive*—There may be other licensees besides *You*.
- *Perpetual*—As far as we know, nothing in the universe really is forever. These licenses are perpetual only in the sense that the *Licensor* promises not to terminate them—except perhaps under the termination provisions in sections 9 and 10. Note also that, in the United States and other countries, a license to an *Original Work* (other than a work for hire) is terminable under certain circumstances regardless of what the license says. (17 U.S.C. § 203.)
- *Sublicensable*—The term *sublicensable* means that *You* can pass these rights on to anyone else you want. This simplifies the process by which open source software containing many contributions can be distributed without requiring each downstream licensee to go back to the original authors of contributions for licenses.





Comparison to Other Licenses

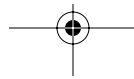
The BSD and Apache licenses permit “redistribution and use.” (BSD license first paragraph; Apache license first paragraph.) Everyone assumes this means all the exclusive rights under copyright law, but those licenses aren’t explicit. The BSD and Apache licenses are not sublicensable.

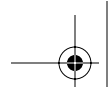
The MIT license permits everyone to “deal in the Software without restriction,” including “without limitation” many of the same rights as listed in the OSL/AFL. (MIT license first paragraph.) Everyone assumes this means all the exclusive rights under copyright law. The MIT license is sublicensable.

The Artistic License grants permission to “make and give away verbatim copies; apply bug fixes...; modify your copy ... in any way...;” and “distribute....” (Artistic License sections 1 through 4.) Everyone assumes this means all the exclusive rights under copyright law. The Artistic License is not sublicensable.

The GPL ignores all activities other than “copying, distribution and modification,” and then grants a license to “copy and distribute” and “modify ... and distribute.” (GPL sections 0, 1, and 2.) The only reference to sublicensing rights in the GPL is ambiguous. (GPL section 4.) In practice the GPL is worldwide, royalty-free and nonexclusive. The GPL’s “at no charge” requirement for derivative works (GPL section 2[b]) is not found in the OSL/AFL; indeed, the GPL’s “at no charge” provision may be an illegal restraint of trade in certain countries.

The MPL copyright grant is explicitly “world-wide, royalty-free, non-exclusive” and “sublicensable.” It includes all the exclusive rights under copyright law. (MPL sections 2.1 and 2.2.)





The CPL copyright grant is explicitly “worldwide, royalty-free, non-exclusive” and “ sublicensable.” It includes all the exclusive rights under copyright law. (CPL section 2.)

The OSL/AFL reciprocity provision applies to “derivative works.” By comparison, the MPL applies only to modified “files,” and the CPL applies only to “additions to the Program which ... are separate modules of software.” The GPL’s reciprocity provision is ambiguous and the LGPL confuses it even further with its references to “linking,” as I described at length in Chapter 6. These subtle but important differences can have significant effects on the licensing requirements for derivative works. Be sure to consult an attorney if you are at all uncertain about the import of open source license reciprocity obligations.

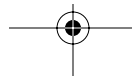
2. Grant of Patent License

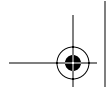
Both OSL and AFL

Licensor hereby grants You a world-wide, royalty-free, non-exclusive, perpetual, sublicensable license, under patent claims owned or controlled by the Licensor that are embodied in the Original Work as furnished by the Licensor, to make, use, sell and offer for sale the Original Work and Derivative Works.

The OSL/AFL patent license grants “world-wide, royalty-free, non-exclusive, perpetual sublicensable” rights coextensive with the copyright license grant.

The license grant to “make, use, sell and offer for sale” is intended to encompass the patent owner’s rights under the patent laws to practice the claimed invention. (35 U.S.C.





§ 154.) Unfortunately, this patent grant neglects to mention the right to import.

The patent license applies only to a specific set of the Licensor's patent claims, namely those that are "embodied in the Original Work as furnished by the Licensor." It is not a license to the *Licensor's* entire patent portfolio.

Those licensed patent claims are available for both the Original Work and Derivative Works. This is not a license to embody those patent claims in independent works.

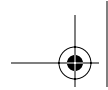
Comparison to Other Licenses

Of the other licenses discussed in this book, only the MPL and CPL grant an express patent license. For the other licenses, we can only assume that there is an implied license to make, use, sell or offer for sale, or import the original licensed software—at least as long as they are *contracts* and not *bare licenses*.

The MPL grants a patent license only for the *Original Code* and the *Contributions*. No patent license is expressly granted for *derivative works* as such, and so depending on the specific patent claims and the specific software under the license, the MPL patent license may not extend to derivative works. (MPL sections 2.1[b], 2.1[d], 2.2[b], 2.2[d].)

The CPL's patent license applies only to each *Contribution*, but only if the patent license covered the work at the time the *Contribution* was added. Otherwise, *derivative works* may not be covered. (CPL section 1 definition of *Licensed Patents* and section 2[b].)





3. Grant of Source Code License

Both OSL and AFL

The term “Source Code” means the preferred form of the Original Work for making modifications to it and all available documentation describing how to modify the Original Work. Licensor hereby agrees to provide a machine-readable copy of the Source Code of the Original Work along with each copy of the Original Work that Licensor distributes. Licensor reserves the right to satisfy this obligation by placing a machine-readable copy of the Source Code in an information repository reasonably calculated to permit inexpensive and convenient access by You for as long as Licensor continues to distribute the Original Work, and by publishing the address of that information repository in a notice immediately following the copyright notice that applies to the Original Work.

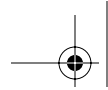
Because the OSL and AFL are *unilateral contracts*, only the licensor makes promises. One of those promises is an explicit one to provide source code for any software he or she distributes under the license.

This section defines source code and guarantees its availability for the licensed software. Again, this provision is a commitment for the licensor, not the licensee, to disclose source code. Licensees must provide source code for their *derivative works* only if they are subject to the *reciprocity* obligation.

Source code in the OSL/AFL includes “documentation describing how to modify the Original Work.” This goes beyond most other open source licenses to prevent the intentional obscuring of the source code. If the licensor has documentation about how to modify the work, it must be made available.

This documentation requirement does not include documentation on how to use the software. It only applies to documentation on how to modify the software.





These licenses provide two ways to satisfy the source code obligation. Either the licensor can include source code along with the executable software he or she distributes, or the licensor can provide an online copy that licensees can access.

Comparison to Other Licenses

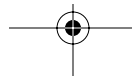
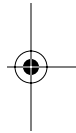
Most of the licenses described in this book do not contain explicit source code requirements. The BSD, MIT, and Apache licenses, for example, permit licensors to distribute source code but do not require it.

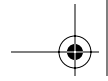
The Artistic license requires the licensee to make source code available, but the license provides alternatives that would allow a licensee to avoid that obligation under certain circumstances.

The GPL requires licensees to provide source code for derivative works they distribute. (GPL section 3.) The definition of *source code* in the GPL does not include any documentation.

Under the MPL, licensees must provide source code for files containing derivative works they distribute. (MPL section 3.2.) That requirement can be satisfied by making the source code available online. *Source code* is defined to include “associated interface definition files, scripts used to control compilation and installation,” and “source code differential comparison.” The MPL expressly allows *source code* to be in compressed or archival form. (MPL section 1.11.)

Under the CPL, each *Contributor* grants the *Recipient* a license to the work “in source code and object code form.” (CPL section 2[a].) The term *source code* is not defined. Contributors under the CPL must “inform licensees how to obtain it in a reasonable manner on or through a medium customarily used for software exchange.” (CPL section 3.)





4. Exclusions from License Grant

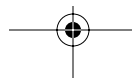
Both OSL and AFL

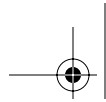
Neither the names of Licensor, nor the names of any contributors to the Original Work, nor any of their trademarks or service marks, may be used to endorse or promote products derived from this Original Work without express prior written permission of the Licensor. Nothing in this License shall be deemed to grant any rights to trademarks, copyrights, patents, trade secrets or any other intellectual property of Licensor except as expressly stated herein. No patent license is granted to make, use, sell or offer to sell embodiments of any patent claims other than the licensed claims defined in Section 2. No right is granted to the trademarks of Licensor even if such marks are included in the Original Work. Nothing in this License shall be interpreted to prohibit Licensor from licensing under different terms from this License any Original Work that Licensor otherwise would have a right to license.

This OSL and AFL provision is intended primarily to make explicit what most other licenses don't say: There are some rights that the original owner will not license. By doing this explicitly, there will be no uncertainty by either party about implied licenses to intellectual property.

This provision prohibits the use by any licensee of the name and trademarks of the licensor. This section later makes it clear that, even if the licensor's trademarks are present in the software, there is no license to those trademarks for derivative works. In other words, the author of a derivative work may actually have to remove references to the licensor's trademarks from his or her derivative works.

Second, the OSL/AFL exclude *all* implied copyright and patent licenses; only express licenses are granted, limited by





the words of the express grants. (See OSL/AFL sections 1 and 2.)

Finally, the OSL/AFL make it clear that the licensor reserves the right to license original works under other licenses besides this one.

Comparison to Other Licenses

None of the other licenses described in this book contains a specific section excluding certain rights from the license grants. This does not mean that those licenses *include* the licenses that are excluded by the OSL/AFL, but only that the exclusion is left to implication.

The BSD license excludes the right to use the name of the licensor or any contributors “to endorse or promote products” derived from the software.

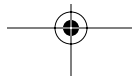
The Apache license excludes the right to use *Apache* or *Apache Software Foundation* in derivative works “to endorse or promote products.” (Apache license sections 4 and 5.)

The Artistic License excludes the right to use the name of the *Copyright Holder* in derivative works to endorse or promote products. (Artistic license section 8.)

The GPL contains no explicit statement of exclusion from license grant.

The MPL grants intellectual property rights from the Initial Developer and Contributor, but excludes trademark rights. (MPL sections 2.1[a] and 2.2[a].) It also requires every licensee to rename derivative works of the license itself and to remove references to the Mozilla and Netscape trademarks.

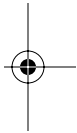
The CPL contains no explicit statement of exclusion from license grant.





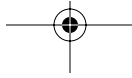
5. External Deployment

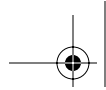
OSL	AFL
<p>The term “External Deployment” means the use or distribution of the Original Work or Derivative Works in any way such that the Original Work or Derivative Works may be used by anyone other than You, whether the Original Work or Derivative Works are distributed to those persons or made available as an application intended for use over a computer network. As an express condition for the grants of license hereunder, You agree that any External Deployment by You of a Derivative Work shall be deemed a distribution and shall be licensed to all under the terms of this License, as prescribed in section 1(c) herein.</p>	<p>(This section is deleted in its entirety.)</p>



Because the AFL does not include the section 1(c) reciprocity provision, there is no need for it to include an expanded definition of distribution. Under the AFL, distribution of software does not result in any additional obligations.

The reciprocity provision of the OSL requires licensees to use the OSL for “copies of the Original Work or Derivative Works that you distribute.” (OSL section 1[c].) The word *distribute* was not defined there, although it certainly includes such activities as selling or giving copies of software away to others.





The Internet and high-speed data connections have made it possible now for companies to make software available to third parties for execution even though it is not physically distributed to them. This section 5 of the OSL makes it clear that these activities are, for purposes of OSL license interpretation, to be treated as a *distribution*.

This expanded definition of *distribution* is to prevent companies from escaping the reciprocity obligation by avoiding a physical distribution while still allowing third parties to use the software over a network.

Consider, for example, open source software that is a component of an electronic mail system. Under typical reciprocity provisions (such as are found in the GPL, MPL, and CPL licenses), there is no distribution unless third parties actually receive copies of derivative works of that software to run on their computers. Mere use of that email system software over a network is not a distribution.

Under section 5 of the OSL, if a derivative work of an OSL-licensed component is used for an electronic mail system that has third party users, that derivative work must be licensed under the OSL. It is subject to the reciprocity obligation.

Comparison to Other Licenses

The section 5 definition of *external deployment* is a modified version of a provision originally found in the Real Networks Public Source License. That license reads:

“Externally Deploy” means to Deploy the Covered Code in any way that may be accessed or used by anyone other than You, used to provide any services to anyone other than You, or used in any way to deliver any content to anyone other than You, whether the Covered Code is distributed to those parties, made available as an application intended for use





over a computer network, or used to provide services or otherwise deliver content to anyone other than You. (Real Networks Public Source License section 1.7.)

This definition is far broader than the one in the OSL. In particular, it includes as an *external deployment* the use of the software “to deliver any content to anyone other than You.” If a derivative works of a Real Networks–licensed component is used for an email system that delivers mail (i.e., *content*) to third parties, that derivative work is subject to the Real Networks reciprocity provision even if third parties don’t actually use the email system. The OSL/AFL are much narrower in effect.

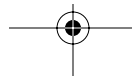
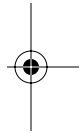
None of the academic licenses described in this book deals at all with restrictions or conditions on distribution. For that reason, as in the AFL, a definition of *external deployment* is unnecessary.

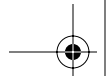
None of the reciprocal licenses described in this book (the GPL, MPL, and the CPL) contains a similar definition of *external deployment*. Under those licenses, only the distribution of a physical or electronic copy would invoke the reciprocity obligation.

6. Attribution Rights

Both OSL and AFL

You must retain, in the Source Code of any Derivative Works that You create, all copyright, patent or trademark notices from the Source Code of the Original Work, as well as any notices of licensing and any descriptive text identified therein as an “Attribution Notice.” You must cause the Source Code for any Derivative Works that You create to carry a prominent Attribution Notice reasonably calculated to inform recipients that You have modified the Original Work.





Section 6 of the OSL/AFL is intended to protect the reputations of contributors and distributors as their Original Works are copied, modified, and distributed by downstream licensees.

Note that this provision deals with the *Source Code* of the *Original Work* or *Derivative Works*. It does not affect executable versions of the software in any way.

The first sentence prevents licensees from removing any notices in the *Source Code* that would reasonably serve to identify the *Original Work*. Such notices include “copyright, patent or trademark notices” (such as the copyright notice on this book); “licensing notices” (such as the licensing notice described in the first paragraph of the AFL/OSL licenses); and “any descriptive text identified therein as an Attribution Notice.”

The second sentence prevents licensees from implying that the original licensor is responsible for their *Derivative Works*. Licensees must place notices in the *Source Code* of their *Derivative Works* that would reasonably serve to notify recipients that the *Original Work* has been changed.

Comparison to Other Licenses

This provision of the OSL/AFL is intended to accomplish what the Artistic License sought without the confusing other terms and conditions of that license. (See the discussion in Chapter 5 about the Artistic License.)

The advertising clause that the University of California removed from the BSD license was a much more onerous version of the first sentence of the OSL/AFL *attribution rights* provision. That provision read:





All advertising materials mentioning features or use of this software must display the following acknowledgement: This product includes software developed by the University of California, Berkeley and its contributors. (BSD license provision now deleted.)

That BSD advertising clause affected “all advertising materials,” but the OSL/AFL only affects the Source Code.

7. Warranty of Provenance and Disclaimer of Warranty

Both OSL and AFL

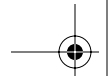
Licensor warrants that the copyright in and to the Original Work and the patent rights granted herein by Licensor are owned by the Licensor or are sublicensed to You under the terms of this License with the permission of the contributor(s) of those copyrights and patent rights. Except as expressly stated in the immediately preceding sentence, the Original Work is provided under this License on an “AS IS” BASIS and WITHOUT WARRANTY, either express or implied, including, without limitation, the warranties of NON-INFRINGEMENT, MERCHANTABILITY or FITNESS FOR A PARTICULAR PURPOSE. THE ENTIRE RISK AS TO THE QUALITY OF THE ORIGINAL WORK IS WITH YOU. This DISCLAIMER OF WARRANTY constitutes an essential part of this License. No license to Original Work is granted hereunder except under this disclaimer.

A warranty is a promise that a proposition of fact is true. The licensor intends that the licensee rely on that promise, and under contract law may be required to compensate licensees for any loss if the fact warranted proves untrue.

The first sentence of section 7 is a warranty of provenance.

The word *provenance* (from the French *provenir*, “to originate”) is used in the art and antiques world to refer to an

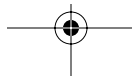


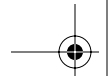


object's history and ownership. Knowing the provenance of an art object is equivalent to knowing the chain of title to a piece of land. When used in the context of open source software, it indicates that the chain of title to the intellectual property in the software is known. (Refer to the discussion on chain of title to copyrights and patents in Chapter 2.)

The OSL/AFL provide a warranty of provenance to reassure customers that the origins and ownership of the intellectual property in the licensed open source software are known and legitimate. A licensor is in an ideal position to know the origins of his or her software and therefore to make such a warranty:

1. The licensor may have written the software him- or herself and, as the author of an *original work of authorship*, is the owner of the copyright in that software. A warranty of provenance is obviously justified in this situation.
2. The licensor may have received a written assignment of copyright from the original author. (In the United States, copyright assignments must be in writing. 17 U.S.C. § 204.) A written copyright assignment is appropriate evidence of authenticity and authority to grant licenses to the original work. A *warranty of provenance* is justified in this situation.
3. The licensor may have received a license—perhaps an open source license or a contributor agreement—authorizing him or her to sublicense the contribution or derivative works to third parties. Such a license is reasonable proof that the software is being transferred legitimately





to third parties. Such a license may be proven by written records or by the conduct of the contributor when he or she sent a contribution to the project. A *warranty of provenance* is justified in this situation.

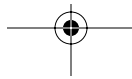
Unfortunately, some open source projects may not have the kinds of records of contributions that would allow them to provide a warranty of provenance. Those projects cannot use the OSL/AFL licenses.

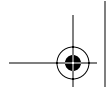
It may come to pass that, despite careful record keeping and formal licensing procedures, an open source project discovers that a contribution is not authentic, a contribution agreement has been breached, or a contributor has not been entirely honest. The warranty of provenance is suddenly no longer appropriate. Continued distribution of the infringing contribution, of course, must be stopped; that much is true even without a warranty of provenance. But what is the licensor's potential liability under that warranty for past breaches? I defer an answer to this question to the discussion of section 8 of the OSL/AFL, Limitation of Liability.

Note also that, even in the absence of a warranty of provenance, the intentional or reckless distribution of software for which you don't have a license may be punishable as fraud or an unfair business practice, or even as a criminal act of distributing stolen property.

The remainder of section 7 is a disclaimer of all other warranties, express or implied.

A warranty of "merchantability or fitness for a particular purpose" promises that the software is fit for the ordinary purposes for which such software is used, and that it conforms to the promises or affirmations of fact made in advertisements or in the software documentation. Because open source software





is typically distributed without charge, it is expected that licensees will accept the risk that the software won't perform as designed or intended.

A warranty of “non-infringement” promises that the software does not infringe the copyrights or patents of third parties. Because it is generally impossible for any software distributor to determine whether copyright or patent claims from third parties will be made, and because the software is distributed at no charge, a warranty of noninfringement is not reasonable. The licensee is expected to accept that risk.

Note that a warranty of noninfringement is different from a warranty of provenance. The former is a promise that there will be no third party copyright or patent claims that may suddenly appear; the latter is a promise that the licensor's right to license the work is based on ownership or license.

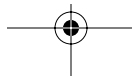
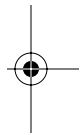
The “including, without limitation” language in the warranty disclaimer indicates that the list of warranties (i.e., non-infringement, merchantability, and fitness for a particular purpose) is by way of example only. Any other express or implied warranties are also excluded.

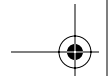
There are no express warranties in the OSL/AFL except for the warranty of provenance. In all other respects, the software is “AS IS” and “WITHOUT WARRANTY.”

Comparison to Other Licenses

No other open source licenses provide a warranty of provenance under that title. But other licenses contain similar representations. The MPL, in its section 3.4(c), and CPL, in its section 2(d), come closest.

All other open source licenses in this book provide a similar disclaimer of warranty. While the wording of those disclaimers differs among licenses, all include the *AS IS* phrase. Not all





licenses specifically list the warranty of noninfringement, but it is implied by the “including, without limitation” language found in all warranty disclaimer provisions.

8. Limitation of Liability

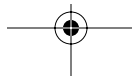
Both OSL and AFL

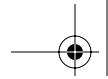
Under no circumstances and under no legal theory, whether in tort (including negligence), contract, or otherwise, shall the Licensor be liable to any person for any direct, indirect, special, incidental, or consequential damages of any character arising as a result of this License or the use of the Original Work including, without limitation, damages for loss of goodwill, work stoppage, computer failure or malfunction, or any and all other commercial damages or losses. This limitation of liability shall not apply to liability for death or personal injury resulting from Licensor's negligence to the extent applicable law prohibits such limitation. Some jurisdictions do not allow the exclusion or limitation of incidental or consequential damages, so this exclusion and limitation may not apply to You.

Section 8 of the OSL/AFL disclaims liability for damages.

An attorney drafting a liability disclaimer on behalf of a licensor has an interesting challenge. The attorney must identify all possible ways in which a licensee may suffer damages (i.e., loss, detriment, or injury), and then the attorney must expressly announce that the licensor will pay for none of that. In that way, the limitation of liability provision in most licenses protects the licensor—not the licensee.

The OSL/AFL limitation of liability provision first identifies the possible legal theories under which a licensee may claim damages. *Tort (including negligence)* is the civil law that deals with private wrongs or injuries; *contract* is the civil law that deals with breaches of written or oral agreements. The





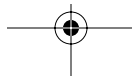
phrase “under no circumstances and under no legal theory” at the beginning of the sentence, and the phrase “or otherwise” at the end of that list of legal theories, is intended to mean a total and complete limitation on liability.

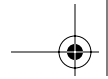
As I shall explain, such a total and complete limitation isn’t actually allowed by the law.

Liability can potentially extend *to any person*. For example, software may be incorporated into a commercial product that causes injuries to persons other than the licensee. Consider what might happen, for example, if defective software were used to run a nuclear power plant or control a space shuttle.

Although the OSL/AFL (and most other open source licenses) disclaim liability *to any person*, those third parties are not subject to the limitation because they have never agreed to the license—and they remain free to sue whoever they believe is liable for their injuries. The purpose of this language is to clarify that, as between the *licensor* and the *licensee*, it is the *licensee* who is potentially liable for injury to third parties. So if damages are ultimately assessed for injury to third parties, the *licensee* will pay them. (The effect on injured third parties of this limitation of liability provision is similar to an indemnification provision under which the licensee indemnifies the licensor for injuries to third parties.)

The OSL/AFL limitation of liability provision next identifies the types of damages that courts may potentially award. “Direct” damages are those that follow immediately upon the act done; in the case of a breach of contract, as one court put it, they are damages which, in the ordinary course of human experience, can be expected to result from breach. “Indirect” damages, of course, are those that are not direct. “Special” damages are those that do not arise from the wrongful act itself, but depend on circumstances peculiar to the injury or the parties; in contract law, they are damages that were not





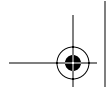
contemplated by the parties at the time the contract was made. “Incidental” damages are those expenses that result from an injured party taking commercially reasonable steps to deal with the wrongful act. “Consequential” damages are those that do not flow directly and immediately from the wrongful act, but only from some of the consequences or results of such act; anyone who deals with computer technology in modern commerce realizes the substantial potential financial consequences, for example, of replacing defective software.

As if that list were not enough, the OSL/AFL licenses then list specific examples of damages for which the licensor disclaims liability. Computer software can be such an integral part of a licensee’s business that its failure risks the business itself. The OSL/AFL disclaim liability for that, mentioning specifically “loss of goodwill, work stoppage, computer failure or malfunction, or any and all other commercial damages or losses.”

The intent of the first long sentence of this limitation of liability provision is to limit liability for absolutely everything the licensor can think of. Of course, the law doesn’t really allow someone to simply write a liability disclaimer and then get away with outrageous commercial activities. Licensors always remain liable—regardless of a disclaimer of liability—for criminal activities, for unfair business practices (including anti-trust), and for fraudulent behavior that induces licensees to accept the defective or dangerous software under the license.

Consider the effect of the *limitation of liability* provision in light of the express *warranty of provenance* in OSL/AFL section 7. Even in the event of a breach of that warranty of provenance, liability for damages may still be limited. Licensors may not have to pay damages even if it is discovered that the licensor didn’t actually have authority to grant a sublicense to the software. For example, suppose a contributor lied about the provenance of his or her contribution to a project and the





project, in reliance on that contributor's license, distributes the work under the OSL/AFL. The OSL/AFL disclaim liability for direct, indirect, etc., damages resulting from any such breach of warranty.

That liability disclaimer may not always be effective. In particular, in most jurisdictions, if a licensor provides a *warranty of provenance* with full knowledge that the promise he or she made is untrue or knowing that he or she does not have a reasonable basis for making the promise of provenance, that licensor may be liable for fraud despite his or her limitation of liability.

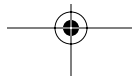
And so, the second and third sentences of the OSL/AFL *limitation of liability* provision remind licensees that *applicable law* may prohibit certain limitations of liability. That applicable law may be national, state, or local. In such situations, the licensor remains potentially liable regardless of what the OSL/AFL say. Only your own attorney can properly advise you of what that potential liability might be.

Once again, licensors should not rely on a limitation of liability provision to protect themselves from fraudulent or criminal or outrageous business behavior. They can, however, rely on limitation of liability provisions to protect them from the effects of accidental and unexpected breaches of the *warranty of provenance* or other implied or express warranties.

Comparison to Other Licenses

Every open source license in this book contains a limitation of liability clause.

The only time the specific wording will matter is if a licensee or third party suffers an injury and his or her attorney identifies a type of liability that the open source licensor's attorney forgot to disclaim. It requires that we speculate with-



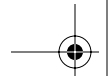


out bound about future events. For that reason, I'll leave any further discussion about liability to Chapter 12.

9. Acceptance and Termination

OSL	AFL
<p>If You distribute copies of the Original Work or a Derivative Work, You must make a reasonable effort under the circumstances to obtain the express assent of recipients to the terms of this License. Nothing else but this License (or another written agreement between Licensor and You) grants You permission to create Derivative Works based upon the Original Work or to exercise any of the rights granted in Section 1 herein, and any attempt to do so except under the terms of this License (or another written agreement between Licensor and You) is expressly prohibited by U.S. copyright law, the equivalent laws of other countries, and by international treaty. Therefore, by exercising any of the rights granted to You in Section 1 herein, You indicate Your acceptance of this License and all of its terms and conditions. This License shall terminate immediately and you may no longer exercise any of the rights granted to You by this License upon Your failure to honor the proviso in Section 1(c) herein.</p>	<p>If You distribute copies of the Original Work or a Derivative Work, You must make a reasonable effort under the circumstances to obtain the express assent of recipients to the terms of this License. Nothing else but this License (or another written agreement between Licensor and You) grants You permission to create Derivative Works based upon the Original Work or to exercise any of the rights granted in Section 1 herein, and any attempt to do so except under the terms of this License (or another written agreement between Licensor and You) is expressly prohibited by U.S. copyright law, the equivalent laws of other countries, and by international treaty. Therefore, by exercising any of the rights granted to You in Section 1 herein, You indicate Your acceptance of this License and all of its terms and conditions.</p>





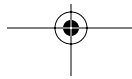
The OSL/AFL licenses are designed to be enforced as contracts, and the law requires that parties to a contract expressly assent to its terms. Most courts don't really care what form that assent takes, as long as it is manifested by some definite action. For software, this often means a shrink-wrap or click-wrap procedure by which the licensee indicates awareness of the license and accepts it, but the OSL/AFL mandate neither procedure.

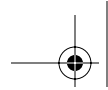
The OSL/AFL requires that downstream licenses for *Copies* and *Derivative Works* also be accepted as contracts. They mandate no particular method, but they require that downstream licensors exercise a "reasonable effort under the circumstances" to obtain assent. If those reasonable efforts are undertaken, the OSL/AFL will be enforceable as contracts.

But even ignoring contract law, the second and third sentences of section 9 make it clear that "nothing else but this license" allows anyone to use this software. This provision was taken from the GPL license, because it describes, in clear terms, the interdependence of copyright and contract law.

Here's how the argument goes: Anyone who copies, modifies, or distributes the licensor's software without a license is an *infringer*. The law punishing infringers is the U.S. copyright law, the equivalent laws of other countries, and international treaties. So anyone found using the software is either an infringer or a licensee. The OSL/AFL say that, by exercising the licensor's exclusive rights, either a user indicates acceptance of the license, or else the user is admitting that he or she is an infringer.

The final sentence of section 9 applies only to the OSL, because only the OSL contains a reciprocity provision. Once a contract is in effect it can be terminated. The OSL terminates if the licensee fails to honor the reciprocity condition in section 1(c). This puts teeth into the reciprocity bargain. A licensee cannot pick and choose which parts of this license to honor. Failure to distribute derivative works under the same





OSL is a breach of contract and grounds for terminating the license immediately.

Comparison to Other Licenses

The BSD, MIT, Apache, and Artistic licenses say nothing about contract formation or termination.

The basic concept for section 9 of the OSL/AFL came from the GPL. It uses similar language to assert the primacy of copyright law. However, the GPL is not intended to be enforced under contract law, so the first sentence of OSL/AFL section 9 (express assent) and the last sentence of OSL section 9 (termination for failure to honor the reciprocity provision) don't have analogues in the GPL.

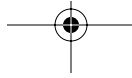
The MPL says nothing about contract formation but it does include two termination clauses. The first says that the MPL license terminates:

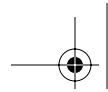
*...If You fail to comply with terms herein and fail to cure such breach within 30 days of becoming aware of the breach.
(MPL section 8.1.)*

That termination provision is broader and applies in more situations than the termination provision of the OSL, which automatically terminates only for failure to honor the reciprocity provision. Terminating the OSL for other forms of breach would probably require the licensor to file a lawsuit. (See the discussion of the attorneys' fees provision in section 12, below.)

The second termination clause of the MPL will be discussed in section 10, termination for patent action.

The CPL also contains two termination provisions. One, relating to termination for patent action, will be discussed in section 10 below. The other is similar to the MPL:





All Recipient's rights under this Agreement shall terminate if it fails to comply with any of the material terms of conditions of this Agreement and does not cure such failure in a reasonable period of time after becoming aware of such noncompliance. (CPL section 7.)

Again, this is broader and applies in more situations than the OSL's termination for failure to honor the reciprocity condition, but in either situation a licensor may have to go to court to terminate the license. This is discussed in more detail in Chapter 12, Open Source Litigation.

10. Termination for Patent Action

Both OSL and AFL

This License shall terminate automatically and You may no longer exercise any of the rights granted to You by this License as of the date You commence an action, including a cross-claim or counterclaim, for patent infringement (i) against Licensor with respect to a patent applicable to software or (ii) against any entity with respect to a patent applicable to the Original Work (but excluding combinations of the Original Work with other software or hardware).

Patents are formidable property interests. Patents can be the basis for enormously profitable monopolies, and patents can bring infringing competitors to their knees. Like them or not, patents are enshrined in the Constitution of the United States (see Article I, section 8) and in the constitutions and laws of most countries around the world. We must deal with them for they are perceived by many to be a real threat to the openness of software.

Throughout this book I have described the ways that open source licenses deal—or don't deal—with the threat of third party patents. There aren't many reasonable options. Even if a





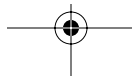
licensor is thoroughly diligent to review patent databases, and almost regardless of the care that a licensor takes to avoid infringing other companies' patents, such submarines can appear suddenly and can stop an open source project dead in the water.

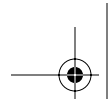
This has long been an issue in the software world. Proprietary software vendors deal with third party patent claims all the time. The big companies negotiate patent licenses and pay royalties where necessary. Those royalties are included in the cost of software. The price of software adjusts to compensate.

That isn't usually an option for free software, of course. Open source distributors don't have the same resources to simply bargain over the price of a royalty-bearing patent license, because they usually can't recover royalties in their own software prices. (See Open Source Principles # 2 and 3.)

Major software vendors often use defensive strategies to protect themselves from third party patents. The strategy of the biggest companies, it appears, is to create huge portfolios of intellectual property, which they can withhold from those people who threaten them. As an intellectual property defense it resembles the cold war threat that kept civilized countries from bombing each other into oblivion: "If you bomb me, I'll bomb you worse." Because their private intellectual property is so embedded in products used throughout the world, the mere threat to withdraw rights to valuable intellectual property is a deterrent to infringement lawsuits against these big patent owners.

Of course, if a third party doesn't actually benefit from the infringer's intellectual property, a threat to withdraw that intellectual property isn't worth much. Defensive use of intellectual property requires that the intellectual property that may be withdrawn be perceived as valuable. Thus defensive strategies are particularly valuable in software licenses. Licen-





sees are presumed to need the licensor's software. A threat to withhold that software from the licensee may be enough to discourage a patent infringement lawsuit by that licensee.

Such a defensive strategy in the open source context also has the smell of justice being served. It just feels wrong to let a licensee benefit from free software and then turn around and sue that generous licensor for patent infringement. You shouldn't be allowed to have your cake and eat it too.

It feels right for a license to say: *If you sue me for patent infringement relating to software, or if you sue my customers for patent infringement by this licensed software, your license to this software terminates.*

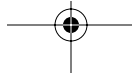
Comparison to Other Licenses

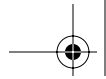
It is perhaps easier to understand OSL/AFL section 10 by comparison to other licenses. For this we can ignore the other academic licenses (i.e., the BSD, MIT, Apache, and Artistic licenses) because none of them provides any form of patent defense.

Provisions for the defensive use of intellectual property are in the MPL and CPL licenses, and in most of the OSI-approved commercial open source licenses listed at *www.open-source.org*. Companies such as IBM, Nokia, Sun, Apple, and many others have released open source software under licenses containing defensive termination provisions.

Sections 8.2 and 8.3 of the MPL deal with license termination in the event of patent infringement. Here are the key differences between the OSL/AFL and MPL termination provisions:

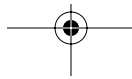
- The MPL excludes *declaratory judgment actions*. Those are lawsuits in which a party seeks only to

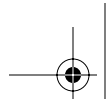




have the court declare that it is the owner of a patent, but doesn't seek damages. (MPL section 8.2.) The OSL/AFL do not draw this distinction.

- The MPL refers only to lawsuits against *Initial Developer* and *Contributor*. (MPL section 8.2.) The OSL/AFL also terminate the license if the licensee files an infringement lawsuit against a customer or user of the licensed software for infringement by the specific software being licensed.
- If someone sues for infringement by *Participant's Contributor Version*, then all *copyright and patent* licenses to that person in the MPL terminate. (MPL section 8.2[a].) If someone sues for infringement by *any software, hardware, or device, other than such Participant's Contributor Version*, then only the *patent* licenses to that person terminate. (MPL section 8.2[b].) Under the OSL/AFL, both *copyright and patent* license grants terminate.
- The MPL suggests settlement of the infringement dispute for a reasonable royalty and payment arrangement. The license can continue if the parties settle within a sixty-day period. (MPL section 8.2[a].) There is no equivalent provision in the OSL/AFL, but there are almost always advance notice and negotiation before companies undertake patent litigation.





- The *reasonable value of the license* is to offset the royalty for any patent license, which the parties negotiate. (MPL section 8.3.) There is no equivalent provision in the OSL/AFL.

The CPL's patent termination provision is in the second paragraph of its section 7. The major difference between the CPL's provision and the one in the OSL/AFL is that the CPL terminates only its patent license; the CPL's copyright license continues. If there are no licensor patents actually embodied in the software and licensed under the CPL, then the CPL license to the software does not terminate.

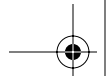
The CPL's provision makes sense when one considers that the author of that license, IBM, has the largest patent portfolio of any company in the world. That company has a tradition of using its patent portfolio to defend itself against patent infringement lawsuits. It generally hasn't needed to use its *copyrights* to protect against patent infringement lawsuits.

The OSL/AFL, on the other hand, by terminating both the *copyright and patent* licenses, use the entire intellectual property in the software—both its copyright component and its patent component—to protect that software and the licensor from patent infringement lawsuits. This is more appropriate than IBM's defensive strategy for open source contributors and distributors who, for the most part, don't have patents to license but who do have their copyrights.

The GPL's patent defense strategy is subtly different from all these others. Here is what the GPL says:

If, as a consequence of a court judgment or allegation of patent infringement or for any other reason (not limited to patent issues), conditions are imposed on you (whether by court order, agreement or otherwise) that contradict the conditions of this License, they do not excuse you from the con-





ditions of this License. If you cannot distribute so as to satisfy simultaneously your obligations under this License and any other pertinent obligations, then as a consequence you may not distribute the Program at all. For example, if a patent license would not permit royalty-free redistribution of the Program by all those who receive copies directly or indirectly through you, then the only way you could satisfy both it and this License would be to refrain entirely from distribution of the Program. (GPL section 7.)

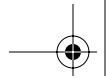
The GPL is incompatible with royalty-bearing patent licenses because they impose conditions *that contradict the conditions of this License*, in particular the *at no charge* requirement of GPL section 2(b). If such a license affects the software, then the software cannot be distributed under the GPL, and so a licensee may not distribute the Program at all.

There may be other license incompatibilities besides a requirement for patent royalties. A patent license that is limited as to *field of use* so that it prevents the creation of certain types of derivative works might ultimately turn out to be incompatible with the GPL. Any licensing incompatibilities *that contradict the conditions* of the GPL are sufficient to prevent further distribution under the GPL.

GPL section 7 effectively terminates only the license to distribute, not the license to copy and create derivative works. Those rights continue under the GPL. And GPL section 7 is designed to take effect when the *Program* infringes a patent, not every time the licensor is sued for patent infringement. In these ways it is very different from the termination provisions in the MPL, CPL, and OSL/AFL licenses. That GPL provision is unique among open source licenses.

What then happens if a GPL licensee wins a patent infringement lawsuit against a GPL licensor because the *Pro-*





gram infringes, and then the licensee refuses to license the patent royalty-free? The software can no longer be distributed by the licensee under the GPL license. (GPL section 7.) Can anyone else continue to distribute the software under the GPL? The GPL provides the following answer:

It is not the purpose of this section to induce you to infringe any patents or other property right claims or to contest validity of any such claims; this section has the sole purpose of protecting the integrity of the free software distribution system, which is implemented by public license practices. Many people have made generous contributions to the wide range of software distributed through that system in reliance on consistent application of that system; it is up to the author/donor to decide if he or she is willing to distribute software through any other system and a licensee cannot impose that choice.
(GPL section 7.)

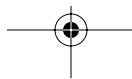
Section 7 of the GPL is a form of patent defense, but it is unlike anything in any other open source license. Indeed, the GPL suggests that it is more than a license condition:

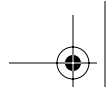
This section is intended to make thoroughly clear what is believed to be a consequence of the rest of this License. (GPL section 7.)

The consequences of GPL section 7—indeed, the consequences of any of the patent defense provisions in any open source licenses—have never been tested in court.

Breaking News about OSL/AFL Version 2.1

The main criticism of section 10 of OSL/AFL version 2.0 is that it creates a substantial business risk to licensees who own patents. If they someday seek to assert one of their patents against the licensor, they may lose the right to the software





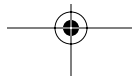
being licensed. They risk nonenforceability of their present patents—and even perhaps their future patents—if they someday sue a licensor for patent infringement. That risk cannot easily be measured.

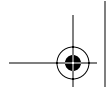
A difficult challenge in any license—open source or proprietary—is to balance the interests and rights of licensees who own patents with the interests and rights of licensors who own software. Parties to software licenses traditionally negotiate license terms and conditions and, through the process of negotiation, some balance is achieved between the interests of the licensor and the licensee. But mass-market software licenses are not negotiated and so, when you buy Windows or Linux, for example, you take the software under its license or leave it. It requires a sophisticated licensee to stand up to a mass-market software license and say, “This isn’t a fair provision, and I won’t accept the software under those terms.”

The problem lies in subsection (i) of section 10 in OSL/AFL version 2.0. Here for easy reference is the provision again:

Termination for Patent Action. This License shall terminate automatically and You may no longer exercise any of the rights granted to You by this License as of the date You commence an action, including a cross-claim or counterclaim, for patent infringement (i) against Licensor with respect to a patent applicable to software or (ii) against any entity with respect to a patent applicable to the Original Work (but excluding combinations of the Original Work with other software or hardware). (OSL/AFL version 2.0, section 10.)

Because of the phrase “patent applicable to software” in subsection (i), the licensor is conditioning the license for this “Original Work” on the licensee’s not suing for patent infringement of *any patent* applicable to *any software*. For a li-





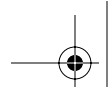
censee with a big patent portfolio, there is no easy way to assess that cost or to limit that risk. Such a company may come to discover that important *unrelated* patents in its portfolio have been emasculated because the company has in-licensed some software under an open source license containing this section 10. Its *other* patents relating to *other* software can no longer effectively be asserted against infringers who happen to be licensors of valuable open source software. Better, they say, given the uncertainty of the risk, not to accept *this* software under such licenses in the first place.

Note that the problem with section 10 of the OSL/AFL version 2.0 is virtually identical to the problem with MPL sections 8.2 and 8.3, CPL section 7, and several other approved commercial open source licenses. It is a major open source licensing problem that has adversely affected the acceptance of software under those licenses. Such license provisions are simply unacceptable to some licensees with large, diverse patent portfolios. They cannot assess the risk to unrelated patents in their portfolios if they in-license software under licenses containing such defensive provisions and so they refuse to in-license such software at all.

Here is the new language in section 10 in OSL/AFL version 2.1:

Termination for Patent Action. This License shall terminate automatically and You may no longer exercise any of the rights granted to You by this License as of the date You commence an action, including a cross-claim or counterclaim, against Licensor or any licensee alleging that the Original Work infringes a patent. This termination provision shall not apply for an action alleging patent infringement by combinations of the Original Work with other software or hardware. (OSL/AFL version 2.1, section 10.)





This new section 10 defensive provision terminates the license to *this Original Work* only if the licensee asserts a patent claim against *this Original Work*. The condition relating to *unrelated software* is removed. The termination provision now applies if an infringement lawsuit is filed against “Licensor or any licensee”; the previous version included “any entity.” These differences significantly reduce the scope of the patent termination provision and make it friendlier to patent-owning companies.

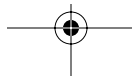
The whole point of this change is that such companies can now feel more comfortable in-licensing open source software. The community will grow, and more open source software will be created.

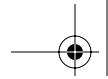
There is no such thing as a *fairest* license. As I have repeatedly suggested, each license in this book creates a legitimate open source bargain, albeit in sometimes vastly different ways from other licenses. But I personally agree with some who suggest that OSL/AFL version 2.1 is *fairer* to licensees than the earlier version. In the hope of mitigating some but not all of the patent risk, some of us have negotiated this compromise.

11. Jurisdiction, Venue, and Governing Law

Both OSL and AFL

Any action or suit relating to this License may be brought only in the courts of a jurisdiction wherein the Licensor resides or in which Licensor conducts its primary business, and under the laws of that jurisdiction excluding its conflict-of-law provisions. The application of the United Nations Convention on Contracts for the International Sale of Goods is expressly excluded. Any use of the Original Work outside the scope of this License or after its termination shall be subject to the requirements and penalties of the U.S. Copyright Act, 17 U.S.C. § 101 et seq., the equivalent laws of other countries, and international treaty. This section shall survive the termination of this License.





Potentially—perhaps inevitably—there will be litigation concerning the OSL/AFL. *Jurisdiction* determines which courts shall have the power to hear the case. *Venue* determines the location of that court. And *governing law* determines whose laws shall apply. There are only three choices for jurisdiction, venue, and governing law: (1) the licensor’s home turf; (2) the licensee’s home turf; or (3) some neutral territory (is there such a place?).

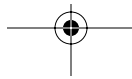
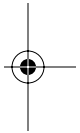
The OSL/AFL licenses forthrightly give the advantage to the licensor by specifying the licensor’s jurisdiction, venue, and governing law. I believe that is appropriate considering that the licensor is the party giving away the open source software. It would be unfair to subject a licensor to the licensee’s courts for something that he or she gave away for free.

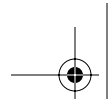
The provision doesn’t necessarily mean that litigation will take place in the licensor’s resident state or country. A licensee may choose to bring litigation in any jurisdiction “in which Licensor conducts its primary business.” A major distributor that conducts its *primary business* throughout the world is subject to being sued in any of those jurisdictions. That also seems to me to be a just way of softening what would otherwise be a licensor’s unfair advantage.

The reference to the “United Nations Convention on Contracts for the International Sale of Goods” is intended to ensure that an OSL/AFL-licensed *Original Work* is treated as intellectual property, not as goods. The laws relating to goods are far more complex than I can deal with in this book.

The third sentence of this section is particularly important:

Any use of the Original Work outside the scope of this License or after its termination shall be subject to the requirements and penalties of the U.S. Copyright Act, 17 U.S.C. § 101 et seq., the equivalent laws of other countries, and international treaty.





This ensures that the requirements and penalties of copyright law will be effective to punish anyone who copies, creates derivative works, distributes the *Original Work* without a license (i.e., if the formalities of offer, acceptance, or consideration fail), or after the license is terminated.

Comparison to Other Licenses

None of the academic licenses in this book (i.e., BSD, MIT, Apache, or Artistic) says anything about jurisdiction, venue, or governing law.

The authors of the GPL intend the governing law to be copyright law. The license itself says nothing about jurisdiction or venue.

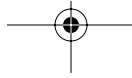
Under the MPL, jurisdiction is the Federal Courts of the Northern District of California, venue is in Santa Clara County, California, and governing law is California. The MPL also excludes the application of the United Nations Convention on Contracts for the International Sale of Goods.

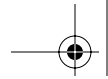
Under the CPL, jurisdiction and venue aren't specified, but governing law is the law of New York and the intellectual property laws of the United States of America. Jurisdiction and venue aren't specified. Any licensor intending to distribute software under the CPL should consult with an attorney to determine jurisdiction and venue in the absence of a license provision stating it.

12. Attorneys' Fees

Both OSL and AFL

In any action to enforce the terms of this License or seeking damages relating thereto, the prevailing party shall be entitled to recover its costs and expenses, including, without limitation, reasonable attorneys' fees and costs incurred in connection with such action, including any appeal of such action. This section shall survive the termination of this License.





Litigation over software licenses can be expensive. One tactic often used by litigation bullies is to file suit even if they may lose on the merits, because the cost of litigation alone will often force the other party to settle. In the United States (but not in all countries), each party is typically responsible for paying its own costs and attorneys' fees. Some important exceptions to this rule are:

- Certain statutes, such as the U.S. Copyright Act, provide that the prevailing party can recover attorneys' fees and costs at the discretion of the court. (17 U.S.C. § 505.)
- Under contract law, the contract itself can specify that the winner of a lawsuit is entitled to recover his or her attorneys' fees and costs from the loser.

The OSL/AFL licenses take the second approach.

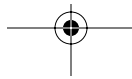
Sometimes people avoid filing suit over a contract if they can't afford to hire an attorney. When attorneys' fees and costs can be recovered, however, some attorneys will offer to take such cases on a contingency basis. An attorneys' fees provision can help small contributors and distributors obtain access to attorneys.

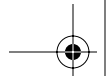
For these same reasons, large companies often don't like attorneys' fees provisions. They fear that it tends to encourage litigation and makes them more vulnerable to lawsuit.

The OSL/AFL attorneys' fees and costs provision takes the side of the small contributor or distributor as against the large companies.

Comparison to Other Licenses

The academic licenses (i.e., BSD, MIT, Apache, and Artistic) and the GPL say nothing about attorneys' fees.





The *losing party* under the MPL is “responsible for costs, including without limitation, court costs and reasonable attorneys’ fees and expenses.” (MPL section 11.)

The CPL does not contain an attorneys’ fees provision. This is as one would expect in a license by a large company (e.g., IBM) with a huge budget for attorneys.

13. Miscellaneous

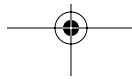
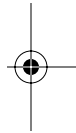
Both OSL and AFL

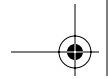
This License represents the complete agreement concerning the subject matter hereof. If any provision of this License is held to be unenforceable, such provision shall be reformed only to the extent necessary to make it enforceable.

These provisions are common in professionally written licenses.

The first sentence avoids the confusion that can result when people say different things about a license than what the license itself says. I described one such situation in Chapter 6, where Linus Torvalds has written publicly that his interpretation of the GPL is different than that of the license’s authors at the Free Software Foundation. The OSL/AFL handles such situations by saying that the words of the license prevail over extraneous statements by either party.

The second sentence may help to convince courts not to be too drastic in reforming the license when the license is found to be improper under some law. Judges are discouraged from radically reforming the license.





Comparison to Other Licenses

All the major reciprocal licenses in this book contain *miscellaneous* provisions. I leave those as an exercise for the reader.

14. Definition of “You” in This License

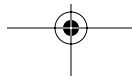
Both OSL and AFL

“You” throughout this License, whether in upper or lower case, means an individual or a legal entity exercising rights under, and complying with all of the terms of, this License. For legal entities, “You” includes any entity that controls, is controlled by, or is under common control with you. For 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.

Every license has to identify the parties. The first paragraph of the OSL/AFL identifies parties as the *Licensor* and *You*. Section 14 defines the word *You*.

Everyone understands that a licensee can be an individual. It can also be a *legal entity*, such as a corporation or partnership. The OSL is clear that all parts of an entity, the controlling parts, the controlled parts, or parts under common control (e.g., holding companies, subsidiaries, divisions of the same company) are collectively treated as a single licensee.

This has important legal consequences: The creation and distribution of derivative works strictly within the organizational parts of a single licensee company is not a distribution for purposes of the reciprocity obligation. All such parts are a single You.





Comparison to Other Licenses

This OSL/AFL provision is essentially copied from the MPL section 1.12, the definition of *You*.

The BSD license doesn't identify the second party to the license. It is assumed to be *everyone*.

The MIT license extends to *any person*.

The Apache license doesn't identify the second party to the license. It is assumed to be *everyone*.

The Artistic license defines *You* as "you, if you're thinking about copying or distributing this Package." As I snidely commented when discussing the Artistic license in Chapter 5, this provision is ridiculous.

The GPL states that *each licensee is addressed as "you"*. (GPL section 0.)

The CPL refers to *Recipient*, defined as anyone who receives the *Program* under this *Agreement*.



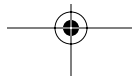
15. Right to Use

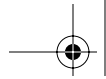
Both OSL and AFL

You may use the Original Work in all ways not otherwise restricted or conditioned by this License or by law, and Licensor promises not to interfere with or be responsible for such uses by You.

This sentence is intended to accomplish two things. First, it declares that the *use* of the *Original Work* is a right of every licensee. It is a restatement of Open Source Principle # 1.

More important for the Licensor, it declares the Licensor's promise that he or she shall not *interfere with or be responsible for* such uses. *You*—not the Licensor—are responsible for complying with any local laws regarding the *Original Work*, such as the export control laws or the product safety laws. *You*,





not the Licensor, have sole discretion to do what you want with the *Original Work*. Don't look to the Licensor for comfort or authority, and exercise your freedom responsibly.

Comparison to Other Licenses

Of the licenses discussed in this book, only the GPL contains a vaguely similar statement:

Activities other than copying, distribution and modification are not covered by this License; they are outside its scope. The act of running the Program is not restricted, and the output from the Program is covered only if its contents constitute a work based on the Program (independent of having been made by running the Program). Whether that is true depends on what the Program does. (GPL section 0.)

This GPL provision is often read as a license to use, although it doesn't expressly say so.

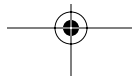
Copyright and Licensing Notice

Both OSL and AFL

This license is Copyright (©) 2003 Lawrence E. Rosen. All rights reserved. Permission is hereby granted to copy and distribute this license without modification. This license may not be modified without the express written permission of its copyright owner.

Most licenses identify their author and copyright owner. The OSL/AFL licenses do also.

Because of the risk of proliferation of different versions of the OSL and AFL licenses, I do not currently license others to modify them. I recognize that this conflicts in a subtle way with the Open Source Principles. But I am allowed, under the copyright laws, to do precisely that. I am merely exercising my





exclusive right, under the copyright law, to control derivative works of my licenses.

This provision assumes that a software license is copyrightable subject matter, but it isn't clear to me that the *expression* of a license doesn't merge with its *ideas*, rendering it uncopyrightable. Anyone who has made it this far into this book and wants to engage in a philosophical discussion about that topic is invited to send me email about whether a license can be copyrighted.

Comparison to Other Licenses

The BSD, MIT, and Apache licenses say nothing about license ownership.

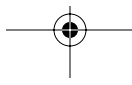
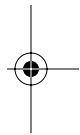
The Artistic license says nothing about license ownership. There are various versions of the Artistic license in use today. For example, notice that section 10 of the Artistic License doesn't appear in all versions of that license.

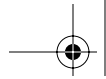
The GPL contains the following copyright and license notice:

*Copyright (C) 1989, 1991 Free Software Foundation, Inc.,
59 Temple Place, Suite 330, Boston, MA 02111-1307
USA. Everyone is permitted to copy and distribute verbatim
copies of this license document, but changing it is not al-
lowed. (GPL first paragraph.)*

The MPL contains no copyright notice but it says this about the license:

*If You create or use a modified version of this License (which
you may only do in order to apply it to code which is not al-
ready Covered Code governed by this License), You must (a)
rename Your license so that the phrases "Mozilla",
"MOZILLAPL", "MOZPL", "Netscape", "MPL", "NPL"
or any confusingly similar phrase do not appear in your li-*





cence (except to note that your license differs from this License) and (b) otherwise make it clear that Your version of the license contains terms which differ from the Mozilla Public License and Netscape Public License. (Filling in the name of the Initial Developer, Original Code or Contributor in the notice described in Exhibit A shall not of themselves be deemed to be modifications of this License.) (MPL section 6.3.)

The CPL contains no copyright notice but it says this about the license:

Everyone is permitted to copy and distribute copies of this Agreement, but in order to avoid inconsistency the Agreement is copyrighted and may only be modified in the following manner. The Agreement Steward reserves the right to publish new versions (including revisions) of this Agreement from time to time. No one other than the Agreement Steward has the right to modify this Agreement. IBM is the initial Agreement Steward. IBM may assign the responsibility to serve as the Agreement Steward to a suitable separate entity. (CPL section 7.)

