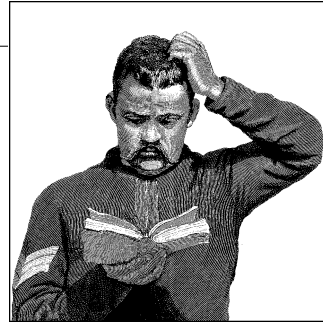


CHAPTER 5

Non-Open Source Licenses



In the previous chapters, we have examined open source and free software licenses, all of which permit, to varying extents, substantial inroads on the protections otherwise available under copyright or patent law. In this chapter, by contrast, we examine one variety of a classic proprietary license, as well as the Sun Community Source licenses and the Microsoft Shared Source Initiative.

Classic Proprietary License

The classic proprietary license needs relatively little explanation. The license does not need to distinguish, for example, between source and binary code: the source code is simply not made available. The license need not distinguish between distribution of derivative and original works: with one very narrow exception, neither is permitted. Proprietary licenses, like the one described below, may contain “open source” licensed software (under the more permissive licenses, like the MIT and BSD Licenses), but the code they license may not be included in any open source project, unless the code is licensed under a parallel non-proprietary license that permits such use.

The following license is the creation of the author. It licenses the hypothetical software of the Mildew Corporation, using terms found in virtually all proprietary licenses.

1. General. The software, documentation and any fonts accompanying this License whether on disk, in read only memory, on any other media or in any other form (collectively the “Software”) are licensed, not sold, to you by Mildew Computer, Inc. (“Mildew”) for use only under the terms of this License, and Mildew reserves all rights not expressly granted to you. The rights granted herein are limited to Mildew’s intellectual property rights in the Mildew Software and do not include any other patents or intellectual property rights. You own the media on which the Mildew Software is recorded but Mildew and/or Mildew’s licensor(s) retain ownership of the Software itself.

This provision provides that the software and associated documentation provided by Mildew are only licensed, not sold, to the consumer. This provision is substantially similar in effect to language used in the open source and free software licenses already described. The only rights granted are those specifically described in the license; all other rights are reserved.

The sentence stating that Mildew does not license any property rights other than those that it owns is likely meaningless. By licensing the Software, Mildew is implicitly representing that it has the authority to license all of its components, whether those components are its own work or not. It seems unlikely that a court would hold that Mildew was not responsible for damages to a consumer arising from infringement if the Software turned out to infringe the intellectual property rights of a third party. After all, given the closed nature of the licensed software, consumers are not allowed to determine for themselves whether the software was infringing, even if they have the inclination or the resources to do so.

The second section of the license makes clear the very strict limitations on the use of the software: not only may the end user not distribute the software, he cannot even install more than one copy of it at a time.

2. Permitted License Uses and Restrictions. This License allows you to install and use one (1) copy of the Software on a single device or computer at a time. This License does not allow the Software to exist on more than one such device or computer at a time, and you may not make the Software available over a network where it could be used by multiple devices or multiple computers at the same time.

Because of these limitations, every user of the software, whether on a network or otherwise, must be individually licensed. This type of restriction is contained in almost every proprietary license and is universally enforced by the courts. The second paragraph continues with a narrow exception to this restriction.

You may make one copy of the Software in machine-readable form for backup purposes only; provided that the backup copy must include all copyright or other proprietary notices contained on the original.

The next part of this sentence expressly bars any attempt to derive any of the utility of the code for use other than in the licensed Software.

Except as and only to the extent expressly permitted in this License or by applicable law, you may not copy, decompile, reverse engineer, disassemble, attempt to derive the source code of, modify, or create derivative works of the Software or any part thereof. Any attempt to do so is a violation of the rights of Mildew and its licensors of the Software. If you breach this restriction, you may be subject to prosecution and damages.

Breaching this provision would certainly terminate the license and would render the user liable for damages for further use. Although it is hard to see what damages, if any, Mildew would suffer from such unauthorized use beyond the sales price of another unit of the Software, such use could obviously lead to more substantial forms of infringement through the creation and distribution of derivative works. In

addition, reverse engineering or otherwise trying to derive the source code from software could violate U.S. copyright law or the Digital Millennium Copyright Act. Such source code certainly could not be used or distributed in any event, without violating the civil and criminal laws of the United States.

The final provision is a special disclaimer of liability, noting that the Software is not intended for use in high-risk applications.

THE SOFTWARE IS NOT INTENDED FOR USE IN WHICH THE FAILURE OF THE SOFTWARE COULD LEAD TO DEATH, PERSONAL INJURY, OR SEVERE PHYSICAL OR ENVIRONMENTAL DAMAGE.

The third section bars transfers or sales of the licensed software, except for the exception provided under law by the first-sale doctrine, which permits users to sell the rights acquired by license along with the physical medium, regardless of the terms under which the work was originally acquired.

3. Transfer. You may not rent, lease, lend or sublicense the Software. You may, however, make a one-time permanent transfer of all of your license rights to the Software to another party, provided that: (a) the transfer must include all of the Software, including all its component parts, original media, printed materials and this License; (b) you do not retain any copies of the Software, full or partial, including copies stored on a computer or other storage device; and (c) the party receiving the Software reads and agrees to accept the terms and conditions of this License.

This paragraph does not grant any rights to the licensee that he or she would not otherwise have by operation of law.

Like most of the open source and free software licenses already examined, the license provides for automatic termination upon any breach of the license.

4. Termination. This License is effective until terminated. Your rights under this License will terminate automatically without notice from Mildew if you fail to comply with any term(s) of this License. Upon the termination of this License, you shall cease all use of the Mildew Software and destroy all copies, full or partial, of the Mildew Software.

However, because the rights granted by the license are so limited in the first place, the effects of the termination are not likely to be severe, at least for programs purchased by individual consumers. As already noted, the measure of damages for continuing use of the licensed program is not likely to be greater than the sales price of the Software. It should be noted, however, that U.S. copyright laws provide for potentially severe penalties for unlawful distribution of copyrighted material, including punitive damages.

The fifth section provides a limited warranty for the medium on which the code of the Software is carried. Commercial software usually carries at least this minimal a warranty.

5. Limited Warranty on Media. Mildew warrants the media on which the Software is recorded and delivered by Mildew to be free from defects in materials and workmanship under normal use for a period of ninety (90) days from the date of original retail

purchase. Your exclusive remedy under this Section shall be, at Mildew's option, either a refund of the purchase price of the product containing the Software or replacement of the Software which is returned to Mildew. THIS LIMITED WARRANTY AND ANY IMPLIED WARRANTIES ON THE MEDIA INCLUDING, BUT NOT LIMITED TO, THE IMPLIED WARRANTIES OF MERCHANTABILITY AND OF FITNESS FOR A PARTICULAR PURPOSE, ARE LIMITED IN DURATION TO NINETY (90) DAYS FROM THE DATE OF ORIGINAL RETAIL PURCHASE. SOME JURISDICTIONS DO NOT ALLOW LIMITATIONS ON HOW LONG AN IMPLIED WARRANTY LASTS, SO THE ABOVE LIMITATION MAY NOT APPLY TO YOU. THE LIMITED WARRANTY SET FORTH HEREIN IS THE ONLY WARRANTY MADE TO YOU AND IS PROVIDED IN LIEU OF ANY OTHER WARRANTIES (IF ANY) CREATED BY ANY DOCUMENTATION OR PACKAGING. THIS LIMITED WARRANTY GIVES YOU SPECIFIC LEGAL RIGHTS, AND YOU MAY ALSO HAVE OTHER RIGHTS WHICH VARY BY JURISDICTION.

The following provisions restate the same limitations articulated by the second to last sentence of the fifth paragraph: Mildew disclaims all responsibility for any damages caused by the Software, except to the extent it is prohibited from doing so by law.

6. Disclaimer of Warranties. YOU EXPRESSLY ACKNOWLEDGE AND AGREE THAT USE OF THE SOFTWARE IS AT YOUR SOLE RISK AND THAT THE ENTIRE RISK AS TO SATISFACTORY QUALITY, PERFORMANCE, ACCURACY AND EFFORT IS WITH YOU. EXCEPT FOR THE LIMITED WARRANTY ON MEDIA SET FORTH ABOVE AND TO THE MAXIMUM EXTENT PERMITTED BY APPLICABLE LAW, THE SOFTWARE IS PROVIDED "AS IS", WITH ALL FAULTS AND WITHOUT WARRANTY OF ANY KIND, AND DANGER AND DANGER'S LICENSORS (COLLECTIVELY REFERRED TO AS "DANGER" FOR THE PURPOSES OF SECTIONS 6 AND 7) HEREBY DISCLAIM ALL WARRANTIES AND CONDITIONS WITH RESPECT TO THE SOFTWARE, EITHER EXPRESS, IMPLIED OR STATUTORY, INCLUDING, BUT NOT LIMITED TO, THE IMPLIED WARRANTIES AND/OR CONDITIONS OF MERCHANTABILITY, OF SATISFACTORY QUALITY, OF FITNESS FOR A PARTICULAR PURPOSE, OF ACCURACY, OF QUIET ENJOYMENT, AND NON-INFRINGEMENT OF THIRD PARTY RIGHTS. DANGER DOES NOT WARRANT AGAINST INTERFERENCE WITH YOUR ENJOYMENT OF THE SOFTWARE, THAT THE FUNCTIONS CONTAINED IN THE SOFTWARE WILL MEET YOUR REQUIREMENTS, THAT THE OPERATION OF THE SOFTWARE WILL BE UNINTERRUPTED OR ERROR-FREE, OR THAT DEFECTS IN THE SOFTWARE WILL BE CORRECTED. NO ORAL OR WRITTEN INFORMATION OR ADVICE GIVEN BY DANGER SHALL CREATE A WARRANTY. SHOULD THE SOFTWARE PROVE DEFECTIVE, YOU ASSUME THE ENTIRE COST OF ALL NECESSARY SERVICING, REPAIR OR CORRECTION. SOME JURISDICTIONS DO NOT ALLOW THE EXCLUSION OF IMPLIED WARRANTIES OR LIMITATIONS ON APPLICABLE STATUTORY RIGHTS OF A CONSUMER, SO THE ABOVE EXCLUSION AND LIMITATIONS MAY NOT APPLY TO YOU.

7. Limitation of Liability. TO THE EXTENT NOT PROHIBITED BY LAW, IN NO EVENT SHALL DANGER BE LIABLE FOR PERSONAL INJURY, OR ANY INCIDENTAL, SPECIAL, INDIRECT OR CONSEQUENTIAL DAMAGES WHATSOEVER, INCLUDING, WITHOUT LIMITATION, DAMAGES FOR LOSS OF PROFITS, LOSS OF DATA, BUSINESS INTERRUPTION OR ANY OTHER COMMERCIAL DAMAGES OR LOSSES, ARISING OUT OF OR RELATED TO YOUR

USE OR INABILITY TO USE THE SOFTWARE, HOWEVER CAUSED, REGARDLESS OF THE THEORY OF LIABILITY (CONTRACT, TORT OR OTHERWISE) AND EVEN IF DANGER HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES. SOME JURISDICTIONS DO NOT ALLOW THE LIMITATION OF LIABILITY FOR PERSONAL INJURY, OR OF INCIDENTAL OR CONSEQUENTIAL DAMAGES, SO THIS LIMITATION MAY NOT APPLY TO YOU. In no event shall Mildew's total liability to you for all damages (other than as may be required by applicable law in cases involving personal injury) exceed the amount of fifty dollars (\$50.00). The foregoing limitations will apply even if the above stated remedy fails of its essential purpose.

For a more thorough discussion of the meaning and effect of such provisions, see the discussion of warranties in Chapter 1. The last sentence of the seventh paragraph provides a fallback position for Mildew. In the event that use of the Software results in damages to the user, the most the user can collect is \$50. It seems unlikely that this provision would ever be enforced: to the extent that a court determines that Mildew is liable in spite of all the previous disclaimers, it seems unlikely to limit the injured party to \$50 in recovery.

8. Export Law Assurances. You may not use or otherwise export or reexport the Software except as authorized by United States law and the laws of the jurisdiction in which the Software was obtained. In particular, but without limitation, the Software may not be exported or re-exported (a) into (or to a national or resident of) any U.S. embargoed countries (currently Cuba, Iran, Iraq, Libya, North Korea, Sudan and Syria) or (b) to anyone on the U.S. Treasury Department's list of Specially Designated Nationals or the U.S. Department of Commerce Denied Person's List or Entity List. By using the Software, you represent and warrant that you are not located in, under control of, or a national or resident of any such country or on any such list.

The eighth section of Mildew's license does not impose additional restrictions on users so much as inform them on the limitations on their ability to transfer the software, even in the limited manner described in the third section.

The ninth section provides that U.S. government users are bound by the same terms of the license as are other users, provisions typical in commercial software licenses.

9. Government End Users. The Software and related documentation are "Commercial Items", as that term is defined at 48 C.F.R. §2.101, consisting of "Commercial Computer Software" and "Commercial Computer Software Documentation", as such terms are used in 48 C.F.R. §12.212 or 48 C.F.R. §227.7202, as applicable. Consistent with 48 C.F.R. §12.212 or 48 C.F.R. §227.7202-1 through 227.7202-4, as applicable, the Commercial Computer Software and Commercial Computer Software Documentation are being licensed to U.S. Government end users (a) only as Commercial Items and (b) with only those rights as are granted to all other end users pursuant to the terms and conditions herein. Unpublished-rights reserved under the copyright laws of the United States.

The tenth section provides choice of law and forum selection clauses as previously discussed in connection with the Mozilla Public License in Chapter 3.

10. Controlling Law and Severability and Choice of Forum. This License will be governed by and construed in accordance with the laws of the State of Colorado, as applied to agreements entered into and to be performed entirely within Colorado

between Colorado residents, that is, without giving any effect to the choice of laws provisions of the State of Colorado. This License shall not be governed by the United Nations Convention on Contracts for the International Sale of Goods, the application of which is expressly excluded. If for any reason a court of competent jurisdiction finds any provision, or portion thereof, to be unenforceable, the remainder of this License shall continue in full force and effect. You agree that the only courts in which You will bring lawsuits concerning the application or enforcement of this License are courts of competent jurisdiction located in the State of Colorado and you consent to the exercise of jurisdiction by any such court. This paragraph shall survive in full force and effect regardless of any termination of this License.

This paragraph works one minor variation on the typical forum selection clause, in that it imposes a limitation only on “You”—i.e., the licensee. The Licensor presumably could bring an action in any court having jurisdiction over the licensee, not just the courts of Colorado.

The eleventh section reflects that the Software contains code originally licensed under an open source license, in this case, code licensed under an MIT License.

11. Third Party Notices and Conditions. The Software may include or utilize certain software which is owned by Mongrel Mix, the source code of which is available under the MIT License (the “Mongrel Mix Code”). Mildew may make modifications to this Mongrel Mix Code. The license for the Mongrel Mix Code is included here as Exhibit A. Those terms are fully applicable to the use of those portions of the Software that consist of or are derived from the Mongrel Mix Code.

The conditions imposed by the MIT license are described in Chapter 2. Mildew, as a licensee of Mongrel Mix, has complied with its license obligations by noting that Mongrel Mix originated part of the code contained in the Software and by attaching the license applicable to that Code as an exhibit. As described in Chapter 2, Mildew is under no obligation to make available the source code for its modifications to the Mongrel Mix code or the original, unmodified source code. Enterprising end users, of course, can track down the original source code for themselves.

The final provision contains a merger provision and a bar on oral modifications, as previously described.

12. Complete Agreement; Governing Language. This License constitutes the entire agreement between the parties with respect to the Software licensed hereunder and supersedes all prior or contemporaneous understandings regarding such subject matter. No amendment to or modification of this License will be binding unless in writing and signed by Mildew.

A proprietary license, because it authorizes so few actions beyond the use of the program for the purpose for which it was intended, is usually simple to describe and to understand, despite the legal language. As described in Chapter 1, because the underlying code is kept closed, these licenses tend to create evolutionary dead ends. Every year, as software companies like Mildew go out of business, all of the utility of their code dies with them. Even after the rights under copyright or patent have expired, that code is essentially buried (assuming anyone, at that point, is still interested in it), because the source code for the program is unlikely to be available.

The proprietary license described here is a “shrinkwrap” license typical to single license sales of programs to individual members of the public. Like any other license, however, proprietary licenses are subject to significant variation. For example, it would not be impossible for a proprietary license to make available the source code for the licensed program but prohibit any use of that source code for some defined period of time, such as five years. This would preserve much of the benefit of the proprietary license model—the ability to make income off of a monopoly—while avoiding at least one negative outcome of the proprietary model.

As in everything else, negotiating power has considerable effect on the terms of the license in question. This license presumes highly asymmetric bargaining power. The seller of the software in question has the better bargaining position: the incremental profit increase associated with the additional sale of a single license, from its point of view, is far too little to justify individual negotiation. The buyer of the software is left essentially in a take-it-or-leave-it position and the result is a license highly favorable to the seller.

This is not always the case. In a situation in which the poles of power are reversed, such as when the seller is a small software cooperative and the buyer is a Fortune 500 company, the buyer will probably demand a number of benefits not included in this license, such as express warranties that the software will work as described, access to the source code, and perhaps the right to make changes to the source code, or even to distribute modified versions of the program.

Thus, while the Mildew proprietary license is not an atypical license for the class of licenses it represents—that is, “shrinkwrap” licenses for sales of individual licenses to the public—it is not intended to describe all proprietary licenses. Individually negotiated licenses, particularly between parties with more equal bargaining power, may contain substantially different terms and avoid some of the negative consequences of proprietary licensing.

Sun Community Source License

In addition to the varieties of open source and free software licenses already discussed, there are licenses that do not fall within the Open Source definition but incorporate some elements of open source principles. The Sun Community Source License (SCSL) is one such license, developed by Sun to incorporate some of the benefits of open source development into two proprietary Sun products, Jini and the programming language Java. Sun has been very careful not to characterize this license as an open source license; the license clearly is not such a license. The most important distinction between this license and open source licenses is the Sun-imposed compatibility requirement. While users are free to modify the licensed work, they may not deploy modified versions of that work without compatibility compliance being certified by the licensor, i.e., Sun. This puts substantial limits on the applicability of the open source model to Sun’s project. Such restrictions may,

however, be justified by Sun’s desire to ensure that Java maintains its cross-platform portability, which incremental tweaks in individual versions could quickly undermine. In addition, commercial use of the SCSL-licensed code may require the payment of a royalty, which is, again, inconsistent with the open source model.

Despite the fact that the SCSL is not an open source license, it embodies an innovative licensing principle—lying somewhere between the classic proprietary and the open source models already described—and is a natural development of the developer-centric licenses already described, such as the Mozilla Public License and the Artistic License.

Like these last two licenses, the SCSL begins with a long list of definitions that contain the most important terms in the license.

I. DEFINITIONS.

“Community Code” means Reference Code, Contributed Code, and any combination thereof.

This definition consists of two terms defined later in the license. “Community Code” is all the code governed by the license.

“Community Member” means You and any other party that has entered into and has in effect a version of this License (or who is similarly authorized and obligated by Original Contributor) for the Technology with Original Contributor.

In conformity with its emphasis on community and community development, the SCSL does not refer to “users” or the familiar “you” of other licenses but to Community Members. As is made clear, becoming a Community Member is as simple as agreeing to be bound by the license, which is a consequence of any use of the Community Code.

“Contributed Code” means (a) Error Corrections, (b) Shared Modifications and (c) any other code other than Reference Code made available by Community Members in accordance with this License.

This definition again relies on terms defined later in the license. Such references are not necessary for this definition, which is sufficiently accompanied by subsection (c)—i.e., that any code subject to the license that is not “Reference Code” is maintained by Sun, the “Original Contributor.”

“Contributed Code Specifications” means the functional, interface and operational specifications and documentation for Contributed Code.

One of the conditions of making Contributed Code is the provision of specifications to the Original Developer. This requirement is described in Section III. With this requirement, the SCSL separates itself from the more free-flowing open source and free software licenses already described: a potential contributor might, quite reasonably, ask herself whether it is worthwhile to contribute to a project that not only requires compatibility testing, but drafting of specifications, in addition to creating the code.

“Covered Code” means Community Code and Modifications.

“Error Corrections” mean Modifications which correct any failure of Covered Code to conform to any aspect of the Technology Specifications.

Covered Code includes Community Code, which has already been defined, and Modifications, which are defined separately, with a definition not substantially different than that inherent in the language. Error Corrections are a subspecies of modifications, to which special conditions attach, which are improvements made to one or another person’s code in order that they better comply with relevant specifications.

“Interfaces” means classes or other programming code or specifications designed for use with the Technology comprising a means or link for invoking functionality, operations or protocols and which are additional to or extend the interfaces designated in the Technology Specifications.

This definition encompasses any interface or portal that accesses the functionality of the Covered Code.

“Modifications” means any (a) change or addition to Covered Code, or (b) new source or object code implementing any portion of the Technology Specifications, but (c) excluding any incorporated Reference Code.

This definition brings within the definition of Covered Code not only derivative works made from the Reference Code or Covered Code, but “gap-filling” code designed to implement the Technology Specifications, which, again, is separately defined. Any part of the Reference Code, whether incorporated into a subsequent modification (even, presumably, as part of a “new” process or routine) is excluded from the definition of Modifications.

“Original Contributor” means Sun Microsystems, Inc. and its successors and assigns.

This is self-explanatory.

“Reference Code” means source code for the Technology designated by Original Contributor at the Technology Site from time to time.

This is the original code on which the project is initially based. The maintenance of the “official version” at the Technology Site allows Sun to update the Reference Code periodically.

“Research Use” means research, evaluation, development, educational or personal and individual use, excluding use or distribution for direct or indirect commercial (including strategic) gain or advantage.

This is one of the key terms of the SCSL. All the rights granted by this version of the license are only for such “Research Use”—i.e., the development of improvements for personal or individual use, excluding any commercial use. Commercial use of the Covered Code requires a separate license, which is described later in this chapter. Distribution to others is permitted, but only if they agree to similarly limited use of the Covered Code. This is a major restriction, and one that should be carefully considered before any contribution is made under the license. While a given contributor’s addition to the license may be cross-licensed (i.e., licensed under another

license as well as the SCSL), so that he may take commercial advantage of his own work or simply distribute it to others for their free use of it, including commercial use. However, given the fact that the contribution is likely to be tied closely (perhaps irremovably) to Covered Code, such a contribution may simply be of no use apart from the environment it was originally designed for. Thus, unlike all of the open source and free software licenses examined so far, the SCSL does not permit the full functional use of the original code plus modifications even by contributors to the project.

“Shared Modifications” means those Modifications which Community Members elect to share with other Community Members pursuant to Section III.B.

Modifications that are shared with other Community Members are granted with all the intellectual property rights associated with them, as described in Section III.B, which includes the right to distribute, use, and modify the contributed work. “Modifications,” except for “Error Corrections,” do not have to be shared, and the SCSL is careful in distinguishing between “Contributed Code” and “Modifications.”

“Technology Specifications” means the functional, interface and operational specifications and documentation for the Technology designated by Original Contributor at the Technology Site from time to time.

The Technology Specifications are the fundamentals of the design provided by the Original Contributor, and which operate as the foundation both for the original work—i.e., the Reference Code—and all subsequent modifications or derivative works created therefrom.

“Technology” means the technology described in and contemplated by the Technology Specifications and which You have received pursuant to this License.

This provision really adds nothing to the license as the term Technology has no meaning apart from the specifications. It is not the Technology that is being licensed, but the Reference Code and the Covered Code: the Community Code built up upon the Technology Specifications.

“Technology Site” means the website designated by Original Contributor for accessing Community Code and Technology Specifications.

This is the web site created and operated by the Original Contributor as the launching pad for the development project.

“You” means the individual executing this License or the legal entity or entities represented by the individual executing this License. “Your” is the possessive of “You.”

“You” is the licensee, the contributor, and modifier of code under the license.

II. PURPOSE.

Original Contributor is licensing the Reference Code and Technology Specifications and is permitting implementation of Technology under and subject to this Sun Community Source License (the “License”) to promote research, education, innovation and product development using the Technology.

COMMERCIAL USE AND DISTRIBUTION OF TECHNOLOGY IS PERMITTED
ONLY UNDER OPTIONAL SUPPLEMENTS/ ATTACHMENTS TO THIS LICENSE.

The purpose of this section is to make clear that the rights granted by this license do not include the right to distribute commercially or otherwise profit from the licensed work. The “research use” limitation of this license, as already described, reserves those rights to the Original Contributor. The commercial use supplement to the license, described below, provides some such rights, subject, however, to restrictions and conditions described therein.

The rights granted by this research form of the license are described in Section III.

III. RESEARCH USE RIGHTS.

A. From Original Contributor. Subject to and conditioned upon Your full compliance with the terms and conditions of this License, including Sections IV (Restrictions and Community Responsibilities) and V.E.7 (International Use), Original Contributor:

So long as the terms of the license are complied with, the licensee is granted the following, limited, rights from the Original Contributor.

1. grants to You a non-exclusive, worldwide and royalty-free license to the extent of Original Contributor’s intellectual property rights in and covering the Reference Code and Technology Specifications to do the following for Your Research Use only:

The original form of the work being licensed is embodied in the Reference Code and the Technology Specifications, and the Original Contributor is granting rights with respect to those works only.

- a) reproduce, prepare derivative works of, display and perform the Reference Code, in whole or in part, alone or as part of Covered Code;

This provision permits the duplication of the Reference Code, presumably only for the licensee’s own individual use, as is made clear later, and to make derivative works (i.e., modifications) from the Reference Code.

- b) reproduce, prepare derivative works of and display the Technology Specifications;

This grants identical rights as III(A)(1)(a), but with respect to the Technology Specifications. The licensee, however, may not “perform” the Technology Specifications. (It’s difficult to imagine staging such a performance.)

- c) distribute source or object code copies of Reference Code, in whole or in part, alone or as part Covered Code, to other Community Members or to students;

This is part of the non-commercial restrictions of the license. Distribution of the Reference Code in source code form, with or without Community Code, may be made only to other Community Members (similarly restricted against its commercial use) or to students. Section IV(A) provides an additional restriction on the exercise of this right by requiring that the distributor of the source code obtain verification (on the part of Community Members) of their status or acknowledgment (on the part of

students) of the restrictions applicable to the source code. This limitation on the availability of source code is a marked distinction between this license and the open source licenses previously examined.

- d) distribute object code copies of Reference Code, in whole or in part, alone or as part of object code copies of Covered Code, to third parties;

Object code may be distributed freely to third parties, including third parties not bound by the license, an important distinction under the SCSL. Improved versions of the original program may be distributed to third parties, at least in the form of object code.

- e) use Original Contributor's class, interface and package names only insofar as necessary to accurately reference or invoke Your Modifications for Research Use; and

This provision refers to programming elements unique to the licensed program. The intent of this provision is to limit as much as possible unnecessary duplication or editing of the Reference Code and is intended to preserve uniformity.

- f) use any associated software tools (excluding Compliance Materials), documents and information provided by Original Contributor at the Technology Site for use in exercising the above license rights.

To the extent the Original Contributor makes such tools available (as Sun, in fact, has), the licensee has the right to use them in connection with the licensed code.

B. Contributed Code. Subject to and conditioned upon compliance with the terms and conditions of this License, including Sections IV (Restrictions and Community Responsibilities) and V.E.7 (International Use), each Community Member:

This section addresses those rights that are granted by Community Members (anyone who makes a derivative work from or modifies the Reference Code) to other Community Members. The grant of such rights is a necessary condition of the license.

1. grants to each Community Member a non-exclusive, perpetual, irrevocable, worldwide and royalty-free license to the extent of such Community Member's intellectual property rights in and covering its Contributed Code, to reproduce, modify, display and distribute its Contributed Code, in whole or in part, in source code and object code form, to the same extent as permitted under such Community Member's License with Original Contributor (including all supplements/ attachments thereto).

This is an unfortunately ambiguous provision because of two separate drafting choices. The first drafting choice is the double use of the term Community Member. Each Community Member is granting the defined rights to every other Community Member. The section should be read so that the Community Member granting the rights (the "granting Community Member") grants the defined rights to his or her Contributed Code to every other Community Member (the "receiving Community Member") to the same extent that the granting Community Member grants those rights to the Original Contributor.

The second drafting choice that makes this provision somewhat ambiguous is the fact that the grant of rights to receiving Community Members is not actually defined in this section. It is defined by reference to the grant of rights in the following section, which describes those rights granted to the Original Contributor by granting community members.

The use of the term “License” further confuses matters, as the principal effect of the SCSL is the licensing of the code made available by the Original Contributor to Community Members. While the SCSL also, unambiguously, includes a license of each Community Member’s work to the Original Contributor, as described in the following section, this is not the first interpretation that an ordinary person is going to put to the term “License,” as used in this section. Nonetheless, that is the right way to read that term.

The incorporation by reference to the following section was probably done to make it easier for Sun to issue modified versions of the license (which it is entitled to do as described later) by linking the grant of rights here to the grant of rights to the Original Contributor described in the following paragraph. This does, however, somewhat obscure the meaning of this section.

The next section provides a broad grant of rights by each Community Member to the Original Contributor—Sun—and by reference to every other Community Member.

2. grants to Original Contributor a non-exclusive, perpetual, irrevocable, worldwide and royalty-free license to the extent of such Community Member’s intellectual property rights in and covering its Contributed Code and Contributed Code Specifications, to (a) use, reproduce, modify, display, prepare derivative works of and distribute Contributed Code and modifications and derivative works thereof, in whole or in part, in source code and object code form, as part of Reference Code or other technologies based in whole or in part on Reference Code or Technology; (b) prepare, use, reproduce, modify, display, prepare derivative works of and distribute Contributed Code Specifications, and modifications and derivative works thereof, in whole or in part, in connection with the exercise of such rights; and (c) sublicense any of the foregoing through multiple tiers of distribution.

This is a very broad grant of rights. The Original Contributor may use any of the work contributed by the Community Member, without any meaningful limitation, whether in the Covered Code or otherwise, including the right to license this code to others. The Original Contributor is not limited by the Research Use limitations applicable to Community Members. Again, however, the SCSL does not require that Modifications become Contributed Code.

- C. Subcontracting. You may provide Covered Code to a contractor for the sole purpose of providing development services exclusively to You consistent with Your rights under this License. Such Contractor must be a Community Member or have executed an agreement with You that is consistent with Your rights and obligations under this License. Such subcontractor must assign exclusive rights in all work product to You. You agree that such work product is to be treated as Covered Code.

This provision does not provide the Community Member with any meaningful new rights. Community Members already have the right under Section III(1)(c) and (d) to distribute source code and object code to Community Members. So long as the putative subcontractor is a Community Member and has executed the acknowledgment required by the license, the participation of that person would be consistent with the license without any further action by the Community Member or the putative subcontractor.

D. No Implied Licenses. Neither party is granted any right or license other than the licenses and covenants expressly set out herein. Other than the licenses and covenants expressly set out herein, Original Contributor retains all right, title and interest in Reference Code and Technology Specifications and You retain all right, title and interest in Your Modifications and associated specifications. Except as expressly permitted herein, You must not otherwise use any package, class or interface naming conventions that appear to originate from Original Contributor.

This provision is the equivalent of the merger clauses described in connection with licenses previously described in this book. It establishes that there is no agreement or grant of rights provided by any party other than those described in the SCSL. It is not clear what effect, if any, flows from the language that no other license is granted to use “any package, class or interface naming convention that *appear to originate* from Original Contributor” (emphasis added). As is the case with any piece of intellectual property, and as repeatedly stressed throughout this book, in the absence of a specific license (or other form of legal protection, such as fair use), the user undertakes a substantial risk by using, modifying, or distributing any work.

In addition to complying with the terms of use already described, each Community Member has certain affirmative obligations under the SCSL that are described in the following section.

IV. RESTRICTIONS AND COMMUNITY RESPONSIBILITIES.

As a condition to Your license and other rights, You must comply with the restrictions and responsibilities set forth below, as modified or supplemented, if at all, in Attachment B, Additional Requirements and Responsibilities.

Attachment B is a rider that Sun may use to impose additional restrictions or obligations in negotiations with individual users. The form of the license for the Jini package, for example, contains such additional limitations and restrictions. They are, however, not described in this book.

A. Source Code Availability. You must provide source code and any specifications for Your Error Corrections to Original Contributor as soon as practicable.

This provision imposes an affirmative obligation on the Community Member not only to provide one category of modifications to the work, Error Corrections (defined above), but to do so “as soon as practicable.” The enforcement of this provision is obviously somewhat problematic. More importantly, however, “Error Corrections” are the one category of Modifications that must be shared and that a Contribution cannot maintain a proprietary interest in.

You may provide other Contributed Code to Original Contributor at any time, in Your discretion. Original Contributor may, in its discretion, post Your Contributed Code and Contributed Code Specifications on the Technology Site.

The intent of the SCSL is to maintain modifications and improvements to the Covered Code in a centralized location available to all Community Members, i.e., the Technology Site, to maximize participation.

Additionally, You may post Your Contributed Code and/or Contributed Code Specifications for Research Use on another website of Your choice; provided, however that You may distribute or display source code of Covered Code and the Technology Specifications only for Research Use and only to: (i) Community Members from whom You have first obtained a certification of status in the form set forth in Attachment A-1, and (ii) students from whom You have first obtained an executed acknowledgment in the form set forth in Attachment A-2. You must keep a copy of each such certificate and acknowledgment You obtain and provide a copy to Original Contributor, if requested.

The SCSL also permits the posting of Covered Code on Community Members' own sites. However, this grant of rights is limited in that the source code may only be made available, consistent with the other terms of the license, to those persons who have agreed to be bound by the SCSL: students and Community Members.

B. Notices. You must reproduce without alteration copyright and other proprietary notices in any Covered Code that You distribute. The statement, "Use and Distribution is subject to the Sun Community Source License available at <http://www.sun.com/software/communitysource>" must appear prominently in Your Modifications and, in all cases, in the same file as all Your copyright and other proprietary notices.

This is a standard term in open source and free software licenses.

C. Modifications. You must include a "diff" file with Your Contributed Code that identifies and details the changes or additions You made, the version of Reference Code or Contributed Code You used and the date of such changes or additions. In addition, You must provide any Contributed Code Specifications for Your Contributed Code. Your Modifications, whenever created, are Covered Code and You expressly agree that use and distribution, in whole or in part, of Your Modifications shall only be done in accordance with and subject to this License.

As was the case with the MPL and some of the other open source licenses, the licensee has the obligation to provide to other licensees and to the Original Contributor a file identifying those changes that he has made to the Covered Code. In addition, under the SCSL, he must provide any applicable Contributed Code Specifications. The last sentence makes explicit what is implicit throughout the license, i.e., that the creation, use, and distribution of Covered Code is governed by the license.

D. Distribution Requirements. You may distribute object code of Covered Code to third parties for Research Use only pursuant to a license of Your choice which is consistent with this License.

This is a difficult provision. The only license that a Community Member can feel is comfortably "consistent" with the SCSL is the SCSL itself. While it might be possible to add or modify provisions of the SCSL, without very careful drafting, such a license would very likely limit a right the SCSL requires the grant of or appear to

grant rights the Community Member does not have the power to grant. In any event, because such distribution is for “Research Use” only, the license of that distribution is not likely to be of much value to anyone. Those who agree to be bound by the SCSL should intend to work in its framework.

E. Extensions.

1. You may create and add Interfaces but, unless expressly permitted at the Technology Site, You must not incorporate any Reference Code in Your Interfaces. If You choose to disclose or permit disclosure of Your Interfaces to even a single third party for the purposes of enabling such third party to independently develop and distribute (directly or indirectly) technology which invokes such Interfaces, You must then make the Interfaces open by (a) promptly following completion thereof, publishing to the industry, on a non-confidential basis and free of all copyright restrictions, a reasonably detailed, current and accurate specification for the Interfaces, and (b) as soon as reasonably possible, but in no event more than thirty (30) days following publication of Your specification, making available on reasonable terms and without discrimination, a reasonably complete and practicable test suite and methodology adequate to create and test implementations of the Interfaces by a reasonably skilled technologist.

As described in the definitions section, Interfaces refers to any code or protocol that makes available the functionality of the Referenced Code but is not part of the Technology as supported by the Original Contributor. Because of the substantial risk that the development of such interfaces pose to the control of the Original Contributor,* strict provisions apply to such development. The distribution of even one copy to one other person (even presumably for “Research Use,” although the language in this provision is not exactly clear on this point) triggers the requirement to make the specifications for the interface available free of all copyright restrictions (i.e., in the public domain). The developer must make available for testing (by the Original Contributor) the code implementing the interface. But the developer does not surrender his intellectual property to the interface. Assuming that the interface does not itself contain Referenced Code, it falls outside the scope of the SCSL. Moreover, as the following provision makes clear, while the specifications must be freely available for others to attempt to implement, the interface itself remains the developer’s work.

2. You shall not assert any intellectual property rights You may have covering Your Interfaces which would necessarily be infringed by the creation, use or distribution of all reasonable independent implementations of Your specification of such Interfaces by Original Contributor or a Community Member. Nothing herein is intended to prevent You from enforcing any of Your intellectual property rights covering Your specific implementation of Your Interfaces, or functionality using such Interfaces, other than as specifically set forth in this Section IV.E.2.

* Such an interface, for example, could permit the Referenced Code to be incorporated into other programs by calls or routines, permitting a potentially different and broader use of the Referenced Code than originally envisioned. Assuming that the Referenced Code is itself readily available commercially, the commercial development of such an interface could have a profound effect on the distribution and development of the Referenced Code itself. Compare the relatively slight restrictions of the LGPL for contrast.

The surrender of the intellectual property embodied in the specifications is substantial, as it presents a roadmap to developing a “reasonable independent implementation.” The SCSL strikes a balance between encouraging independent innovation and making sure that innovation remains in the community of developers under the license.

Section V of the license contains the “General Terms,” all provisions common to commercial licenses described in other variations covered earlier in this book.

V. GENERAL TERMS.

A. License Versions.

Only Original Contributor may promulgate new versions of this License. New code and specifications which You may subsequently choose to accept will be subject to any new License in effect at the time of Your acceptance of such code and specifications. Once You have accepted Reference Code, Technology Specifications, Contributed Code and/or Contributed Code Specifications under a version of this License, You may continue to use such version of Reference Code, Technology Specifications, Contributed Code and/or Contributed Code Specifications under that version of the License.

As with the GPL, the Original Contributor retains to itself the right to develop new versions of the license. Users are not bound by such licenses (but rather only by the previous version or versions that they have agreed to) until such time as they “accept”—that is, use, modify, or distribute—work licensed under that new license.

B. Disclaimer Of Warranties.

1. COVERED CODE, ALL TECHNOLOGY SPECIFICATIONS AND CONTRIBUTED CODE SPECIFICATIONS ARE PROVIDED “AS IS”, WITHOUT WARRANTIES OF ANY KIND, EITHER EXPRESS OR IMPLIED INCLUDING, WITHOUT LIMITATION, WARRANTIES THAT ANY SUCH COVERED CODE, TECHNOLOGY SPECIFICATIONS AND CONTRIBUTED CODE SPECIFICATIONS ARE FREE OF DEFECTS, MERCHANTABILITY, FIT FOR A PARTICULAR PURPOSE OR NON-INFRINGEMENT OF THIRD PARTY RIGHTS. YOU AGREE THAT YOU BEAR THE ENTIRE RISK IN CONNECTION WITH YOUR USE AND DISTRIBUTION OF ANY AND ALL COVERED CODE, TECHNOLOGY SPECIFICATIONS AND CONTRIBUTED CODE SPECIFICATIONS UNDER THIS LICENSE. NO USE OF ANY COVERED CODE, TECHNOLOGY SPECIFICATIONS OR CONTRIBUTED CODE SPECIFICATIONS IS AUTHORIZED EXCEPT SUBJECT TO AND IN CONSIDERATION FOR THIS DISCLAIMER.

This disclaimer of warranties disclaims any warranty implied or otherwise from the Technology Specifications and the Contributed Code specifications, but not from the code itself. Given that the SCSL essentially prohibits use of the code other than for “Research Use” excluding any commercial uses, at most a very limited liability could attach in any event.

2. You understand that, although Original Contributor and each Community Member grant the licenses set forth in the License and any supplements/attachments hereto, no assurances are provided by Original Contributor or any Community Member that Covered Code or any specifications do not infringe the intellectual property rights of any third party.

This provision disclaims any warranty of non-infringement as to any other person's intellectual property rights. As is the case with all the licenses (except the Creative Commons license to the extent already discussed) described so far, the user is on his own with regard to third-party intellectual property claims that may be made in connection with rights granted under the license, without recourse to the Original Contributor or any Community Member.

3. You acknowledge that Reference Code and Technology Specifications are neither designed nor intended for use in the design, construction, operation or maintenance of any nuclear facility.

This provision speaks for itself.

C. Infringement; Limitation Of Liability.

1. Original Contributor and each Community Member disclaim any liability to all Community Members for claims brought by any third party based on infringement of intellectual property rights.

This provision generally disclaims any liability above and beyond disclaiming any particular warranty.

In addition, in the event of any third-party claim, the Original Contributor reserves the right to suspend the grant of rights effected by the license.

2. If any portion of, or functionality implemented by, the Community Code, Technology or Technology Specifications becomes the subject of a claim or threatened claim of infringement ("Affected Materials"), Original Contributor may, in its unrestricted discretion, suspend Your rights to use and distribute the Affected Materials under this License. Such suspension of rights will be effective immediately upon Original Contributor's posting of notice of suspension on the Technology Site. Original Contributor has no obligation to lift the suspension of rights relative to the Affected Materials until a final, non-appealable determination is made by a court or governmental agency of competent jurisdiction that Original Contributor is legally able, without the payment of a fee or royalty, to reinstate Your rights to the Affected Materials to the full extent contemplated hereunder. Upon such determination, Original Contributor will lift the suspension by posting a notice to such effect on the Technology Site. Nothing herein shall be construed to prevent You, at Your option and expense, and subject to applicable law and the restrictions and responsibilities set forth in this License and any supplements/attachments, from replacing Community Code in Affected Materials with non-infringing code or independently negotiating, without compromising or prejudicing Original Contributor's position, to obtain the rights necessary to use Affected Materials as herein permitted.

The Original Contributor is required to reinstate those rights, but only upon securing a final non-appealable judgment of non-infringement. This would come only after what would likely be a very lengthy legal process, which the Original Contributor has no obligation to undertake. Users are, however, free to negotiate with the complaining party directly and to obtain a separate license from that person to continue to use the work alleged to be infringing. Whether this is a realistic possibility will depend on the circumstances.

3. ORIGINAL CONTRIBUTOR'S LIABILITY TO YOU FOR ALL CLAIMS RELATING TO THIS LICENSE OR ANY SUPPLEMENT/ATTACHMENT HERETO, WHETHER FOR BREACH OR TORT, IS LIMITED TO THE GREATER OF ONE THOUSAND DOLLARS (US\$1000.00) OR THE FULL AMOUNT PAID BY YOU FOR THE MATERIALS GIVING RISE TO THE CLAIM, IF ANY. IN NO EVENT WILL ORIGINAL CONTRIBUTOR BE LIABLE FOR ANY INDIRECT, PUNITIVE, SPECIAL, INCIDENTAL OR CONSEQUENTIAL DAMAGES IN CONNECTION WITH OR ARISING OUT OF THIS LICENSE (INCLUDING, WITHOUT LIMITATION, LOSS OF PROFITS, USE, DATA OR ECONOMIC ADVANTAGE OF ANY SORT), HOWEVER IT ARISES AND ON ANY THEORY OF LIABILITY (including negligence), WHETHER OR NOT ORIGINAL CONTRIBUTOR HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGE. LIABILITY UNDER THIS SECTION V.C.3 SHALL BE SO LIMITED AND EXCLUDED, NOTWITHSTANDING FAILURE OF THE ESSENTIAL PURPOSE OF ANY REMEDY.

As a fallback to the previous disclaimers, the SCSL further limits any remedy to the payment of \$1,000 or the return of whatever the purchase price may have been for the materials licensed. This provision protects only the Original Contributor.

D. Termination.

1. You may terminate this License at any time by notifying Original Contributor in writing.

This provision, while apparently simple, is complicated in practice. The following subsections addressing termination only provide for the end of the withdrawing Community Member's rights under the SCSL. Read alone, Section D might seem to indicate that the withdrawing Community Member loses his rights to the licensed work, the Original Contributor loses any rights granted by the withdrawing Community Member, but other Community Members do not lose any rights that may have been granted by the withdrawing members. However, as described below, this interpretation is almost certainly wrong.

2. All Your rights will terminate under this License (including any supplements/ attachments hereto) if You fail to comply with any of the material terms or conditions of this License (including any supplements/attachments hereto) and do not cure such failure within thirty (30) days after becoming aware of such noncompliance.

This provision is largely self-explanatory. The most frequent failure to comply with the license is likely to be the unlicensed commercial use of property granted only for "Research Use." This termination provision also governs the Commercial Use supplement described in more detail later. Unlike the GPL, termination is not immediate upon violation, but upon failure to cure within 30 days after the licensee learns of the non-compliance.

3. If You institute patent litigation against any Community Member with respect to a patent applicable to Community Code, then any patent licenses granted by such Community Member to You under this License shall terminate as of the date such litigation is filed. If You institute patent litigation against Original Contributor or any Community Member alleging that Covered Code, Technology or Technology

Specifications infringe Your patent(s), then Original Contributor may in its sole discretion terminate all rights granted to You under this License (including any supplements/attachments hereto) immediately upon written notice.

Like the GPL, the SCSL also withdraws certain rights upon the institution of patent litigation proceedings. If the patent litigation is against another Community Member, any patent rights held by that Community Member are withdrawn: depending on the circumstances, this may have no effect at all on the suing Community Member's use of the licensed property. However, if the suit is against the Original Contributor, the Original Contributor may terminate all rights under the license (including, presumably, rights granted by other Community Members) upon written notice.

4. Upon termination, You must discontinue all uses and distribution of Covered Code, except that You may continue to use, reproduce, prepare derivative works of, display and perform Your Modifications, so long as the license grants of this license are not required to do so, for purposes other than to implement functionality designated in any portion of the Technology Specifications. Properly granted sublicenses to third parties will survive termination. Provisions which, by their nature, should remain in effect following termination survive.

The withdrawing Community Member, as noted above, loses all rights granted under the license. His ownership of whatever intellectual property was contributed to the project are unaffected and he may relicense that property or otherwise act in connection with it as he sees fit. The important language in this section is the limitation of the effect of withdrawal: "Properly granted sublicenses to third parties will survive termination." Thus, properly granted sublicenses (i.e., to other Community Members) are unaffected.

If read by itself, Section D might support the inference that termination results in the withdrawal of rights previously granted by each Contributor to the Original Contributor. This inference is almost certainly wrong. Section III(B)(2) provides for a "perpetual" and "irrevocable" grant of rights by each Contributor to the Original Contributor with regard to "Contributed Code." Termination, whatever the cause, would not reverse that grant of rights.

The last sentence of this section provides that sections of the license should survive, presumably such as the limitations of liability and the choice of law and forum provisions.

E. Miscellaneous.

1. Trademark. You agree to comply with Original Contributor's Trademark & Logo Usage Requirements, as modified from time to time, available at the Technology Site. Except as expressly provided in this License, You are granted no rights in or to any Sun, Jini, Jiro or Java trademarks now or hereafter used or licensed by Original Contributor (the "Sun Trademarks"). You agree not to (a) challenge Original Contributor's ownership or use of Sun Trademarks; (b) attempt to register any Sun Trademarks, or any mark or logo substantially similar thereto; or (c) incorporate any Sun Trademarks into Your own trademarks, product names, service marks, company names or domain names.

This provision incorporates by reference the limitation on use of Sun’s trademarks provided at the Technology Site. These bar any infringing use of Sun’s trademarks.

2. Integration and Assignment. Original Contributor may assign this License (and any supplements/attachments) to another by written notification to You. This License (and executed supplements/attachments) represents the complete agreement of the parties concerning the subject matter hereof.

This provision serves two purposes. First, it provides that the Original Contributor can assign the license—sell or transfer its rights under the license—simply on written notice. Second, this provision indicates that the SCSL is the only agreement between the parties, superseding any previous agreements, oral or written, to the extent such existed, which they probably didn’t.

3. Severability. If any provision of this License is held unenforceable, such provision shall be reformed to the extent necessary to make it enforceable unless to do so would defeat the intent of the parties, in which case, this License shall terminate.

4. Governing Law. This License is governed by the laws of the United States and the State of California, as applied to contracts entered into and performed in California between California residents. The choice of law rules of any jurisdiction and the United Nations Convention on Contracts for the International Sale of Goods shall not apply, nor shall any law or regulation which provides that a contract be construed against the drafter.

5. Dispute Resolution.

a) Any dispute arising out of or relating to this License shall be finally settled by arbitration as set forth in this Section V.E.5, except that either party may bring an action in a court of competent jurisdiction (which jurisdiction shall be exclusive), relative to any dispute relating to such party’s intellectual property rights or Your compliance with Original Contributor’s compatibility requirements. Arbitration will be administered (i) by the American Arbitration Association (AAA), (ii) in accordance with the rules of the United Nations Commission on International Trade Law (UNCITRAL) (the “Rules”) in effect at the time of arbitration, modified as set forth herein, and (iii) by an arbitrator described in Section V.E.5.b who shall apply the governing laws required under Section V.E.4 above. Judgment upon the award rendered by the arbitrator may be entered in any court having jurisdiction to enforce such award. The arbitrator must not award damages in excess of or of a different type than those permitted by this License and any such award is void.

b) All proceedings will be in English and conducted by a single arbitrator selected in accordance with the Rules who is fluent in English, familiar with technology matters pertinent in the dispute and is either a retired judge or practicing attorney having at least ten (10) years litigation experience. Venue for arbitration will be in San Francisco, California, unless the parties agree otherwise. Each party will be required to produce documents relied upon in the arbitration and to respond to no more than twenty-five single question interrogatories. All awards are payable in US dollars and may include for the prevailing party (i) pre-judgment interest, (ii) reasonable attorneys’ fees incurred in connection with the arbitration, and (iii) reasonable costs and expenses incurred in enforcing the award.

- c) Nothing herein shall limit either party's right to seek injunctive or other provisional or equitable relief at any time.

These are all provisions standard in commercial contracts. The first preserves the remainder of the agreement in the event that one or more provisions are invalidated. The second provides that California law governs the interpretation of the SCSL. The third provides for arbitration of disputes, meaning that instead of a court, a single arbitrator, familiar with the matters in dispute, would determine the result of any dispute. Arbitration proceedings may be faster and less expensive to the parties than formal court proceedings. However, the relative merits of arbitration, as opposed to ordinary civil litigation, are well beyond the scope of this book.

- 6. U.S. Government. If this Software is being acquired by or on behalf of the U.S. Government or by a U.S. Government prime contractor or subcontractor (at any tier), the Government's rights in this Software and accompanying documentation shall be only as set forth in this license, in accordance with 48 CFR 227.7201 through 227.7202-4 (for Department of Defense acquisitions) and with 48 CFR 2.101 and 12.212 (for non-DoD acquisitions).

This provision provides that U.S. government users have the same rights under the agreements as any other person.

7. International Use.

- a) Covered Code is subject to US export control laws and may be subject to export or import regulations in other countries. Each party shall comply fully with all such laws and regulations and acknowledges its responsibility to obtain such licenses to export, re-export or import as may be required. You must pass through these obligations to all Your licensees.
- b) You must not distribute Reference Code or Technology Specifications into countries other than those listed on the Technology Site by Original Contributor, from time to time.

This provision puts Community Members on notice that U.S. law may limit the rights of foreign users to Covered Code. Users located outside the United States, or who intend to distribute Covered Code to such persons, should consult with an attorney before doing so.

The remaining parts of the license consist of forms indicating acceptance of the license and are included here for purposes of completeness.

READ ALL THE TERMS OF THIS LICENSE CAREFULLY BEFORE ACCEPTING.

BY CLICKING ON THE ACCEPT BUTTON BELOW, YOU ARE ACCEPTING AND AGREEING TO ABIDE BY THE TERMS AND CONDITIONS OF THIS LICENSE.

YOU REPRESENT THAT YOU ARE legally entitled to grant the licenses set forth herein and that you have sufficient copyrights to allow each Community Member and Original Contributor to use and distribute Your Shared Modifications and Error Corrections as herein permitted (including as permitted in any supplements/attachments to this License).

IF YOU ARE AGREEING TO THIS LICENSE IN AN EMPLOYEE OR AGENT CAPACITY, YOU REPRESENT THAT YOU ARE AUTHORIZED TO BIND YOUR EMPLOYER OR PRINCIPAL TO THE LICENSE.

WHETHER YOU ARE ACTING ON YOUR OWN BEHALF OR THAT OF YOUR EMPLOYER OR PRINCIPAL, YOU MUST BE OF MAJORITY AGE AND OTHERWISE COMPETENT TO ENTER INTO CONTRACTS.

IF YOU DO NOT MEET THESE CRITERIA, OR YOU DO NOT AGREE TO ANY OF THE TERMS OF THIS LICENSE, CLICK ON THE REJECT BUTTON AND EXIT NOW.

ACCEPT LICENSE REJECT LICENSE AND EXIT

The following two attachments are certifications of status as a Community Member or as a Student. As previously described, the license requires that Community Members obtain such certifications prior to distributing Covered Code.

ATTACHMENT A-1

COMMUNITY MEMBER CERTIFICATE

“You certify that You are a Licensee in good standing under the Sun Community Source License for the _____ Technology (fill in applicable Technology and Version) (the “License”) and that You agree to use and distribute code, documentation and information You may obtain pursuant to this certification only in accordance with the terms and subject to the conditions of the License.”

Add to the end of the foregoing, as appropriate:

For written documents:

“Signature: _____

Printed Name

and Title: _____

Company _____”

For web downloads add buttons with the following:

“Agreed and AcceptedReject and Exit”

ATTACHMENT A-2

STUDENT ACKNOWLEDGMENT

“You acknowledge that this software and related documentation has been obtained by your educational institution subject to the Sun Community Source License (the “License”). You have been provided with access to the software and documentation for use only in connection with your course work as a matriculated student of your educational institution. Commercial use of the software and documentation is expressly prohibited.

THIS SOFTWARE AND RELATED DOCUMENTATION CONTAINS PROPRIETARY MATERIALS OF SUN MICROSYSTEMS, INC. PROTECTED BY VARIOUS INTELLECTUAL PROPERTY RIGHTS. YOUR USE OF THE SOFTWARE AND DOCUMENTATION IS LIMITED.”

Add to the end of the foregoing, as appropriate:

For written documents:

“Signature: _____

Printed Name : _____”

For web downloads add buttons with the following:

“Agreed and Accepted Reject and Exit”

Those persons who undertake such distributions should be sure to collect and retain such certifications from all persons whose work is governed by the SCSL.

The Commercial Use Supplement

As described, the SCSL does not permit commercial use of the licensed code: the only uses permitted are for “Research Use,” defined as “research, evaluation, development, educational or personal and individual use, excluding use or distribution for direct or indirect commercial (including strategic) gain or advantage.” Not only may the licensee not distribute the licensed code for commercial use, he may not even “use” it to that end, for example, as part of an application for use in a business.

Commercial use is permitted, however, under the SCSL’s Commercial Use Supplement, described below. This supplement, however, is an entirely different license, and it licenses an entirely different category of code. The SCSL research use license permits testing and development of unfinished code; the SCSL Commercial Use Supplement permits use (including commercial use) of code that, having passed through the period of research and development contemplated by the research use license, has been tested and deemed compliant with the standards governing the code.

COMMERCIAL USE SUPPLEMENT TO SUN COMMUNITY SOURCE LICENSE

I. PURPOSE AND EFFECT.

This Commercial Use Supplement General Terms (“CUSupp”) is required for Commercial Use of Covered Code and shall be made effective as to any Technology specified in a Technology Specific Attachment once such Technology Specific Attachment is signed by You and Original Contributor. The rights and responsibilities set forth in this CUSupp are additional to those in Your License. You have agreed to the terms of the License by selecting the “Accept” button at the end of the License or by executing a hardcopy License with Original Contributor. You acknowledge that the License is binding on You.

The Commercial Use Supplement or CUSupp is technology-specific and requires the execution of the research use license applicable to that technology.

II. DEFINITIONS. Capitalized terms used but not defined in this CUSupp shall have the same meaning as the identical capitalized terms in Section I of the License. Additional terms are defined as follows:

The CUSupp incorporates by reference all the definitions previously given in the research use license.

“Commercial Use” means uses and distributions of Covered Code for any direct or indirect commercial or strategic gain or advantage.

This covers every use not permitted by the research use license.

“Compliant Implementation” means Covered Code that fully implements and conforms to the Technology Specifications and complies with the Compliance Materials, the License, this CUSupp and applicable Technology Specific Attachment(s).

This is a critical term of the CUSupp, as it applies only to code that is a “Compliant Implementation.”

“Compliance Materials” means the test programs, guides, documentation and other materials identified in the Technology Specific Attachment(s) for use in establishing that Covered Code is a Compliant Implementation, as may be revised by Original Contributor from time to time.

These materials are the benchmarks for determining compliance and are provided by the Original Contributor. They may be modified from time to time, which could result in an implementation, once determined to be compliant, to fall out of compliance upon the revision of the Compliance Materials.

“Technology Specific Attachment(s)” means an attachment or attachments to the License and this CUSupp which contains terms and conditions specific to the Technology therein identified as well as the specifics of the Compliance Materials and requirements for such Technology.

Variations of the CUSupp unique to different Technologies may have additional terms attached to the supplement. The Sun Jini technology has such additional terms. (They are not described in this book.)

III. COMMERCIAL USE RIGHTS.

A. Commercial Use. Subject to and conditioned upon Your compliance with the terms and conditions of Your Research Use license and the additional terms and conditions set forth in this CUSupp and associated Technology Specific Attachment(s), including the provisions of Section IV, below, Original Contributor hereby adds to those rights enumerated under Section III.A.1 of the Research Use license the non-exclusive, worldwide, royalty-bearing right to, within the specified Field of Use denoted in the Technology Specific Attachment:

There are two provisions in this section that immediately stand out. The first is the “royalty-bearing” language: use of the Covered Code for commercial purposes may be subject to payment of a royalty, at a rate to be specified in the Technology Specific Attachment. The second is the “specified Field of Use”: while the licensee may be permitted to use the Covered Code for commercial purposes, the scope of that right could be very narrowly circumscribed—and, again, the critical language will be contained in the Technology Specific Attachment. Subject to these very important limitations, the licensee has the rights to:

1. use the Compliance Materials to determine whether Covered Code constitutes a Compliant Implementation;

The CUSupp permits, indeed requires, that the licensee test the Covered Code himself to determine if it is a Compliant Implementation.

2. use, reproduce, display, perform and distribute internally source and object code copies of Compliant Implementations for Commercial Use;

This permits distribution of Compliant Implementations internally in the form of both source and object code. Distribution of non-compliant implementations within an organization is allowed under the Research Use permissions granted by the SCSL is allowed, presuming that all distributees have agreed to be bound by the terms of the SCSL.

3. reproduce and distribute to third parties and Community Members through multiple tiers of distribution object code copies of Compliant Implementations for Commercial Use;

Only object (or executable) code of the Compliant Implementations may be distributed to third parties, or even to Community Members, for Commercial Use. However, this provision does not limit the rights granted to distribute code to Community Members for non-Commercial Use or Research Use.

4. reproduce and distribute the source code of Compliant Implementations to Community Members licensed for Commercial Use of the same Technology; and

Community Members who have the same Technology license for Commercial Use can distribute both object and source code among themselves.

5. reproduce and distribute a copy of the Technology Specifications (which may be reformatted, but must remain substantively unchanged) with Compliant Implementations for Commercial Use.

This provision is self-explanatory. The Commercial Use of the code governed by CUSupp is further limited by certain additional restrictions.

IV. ADDITIONAL RESTRICTIONS AND COMMUNITY RESPONSIBILITIES.

As a condition to the Commercial Use rights granted above, You must comply with the following restrictions and community responsibilities (in addition to those in the License)

F. Certification. You may distribute source code of Compliant Implementations for Commercial Use only to Original Contributor or to Community Members from whom You have first obtained a certification of status in the form set forth in Attachment A-1. You must keep a copy of each such certificate and acknowledgment You obtain and provide a copy to Original Contributor, if requested.

As is the case with the SCSL, distributors of code under the CUSupp must take affirmative action to ensure the recipients of code are permitted to receive that code, by requesting and maintaining certifications from the recipients.

G. Compliance Materials. Depending on the Technology licensed, Your access to and use of the Compliance Materials may be subject to additional requirements such as entering into a support agreement and trademark license. Such additional requirements, if any, are as set out in the Technology Specific Attachment. You agree to comply fully with all such applicable requirements.

This notifies potential licensees that the Original Contributor may attach additional conditions and restrictions that would be contained in the Technology Specific Attachment.

H. Compatibility. Only Compliant Implementations may be used and distributed for Commercial Use.

This restates a condition already made clear in the SCSL and the CUSupp.

I. Commercial Distribution Requirement.

1. You may distribute object code copies for Commercial Use as herein contemplated under a license agreement of Your choice which is consistent with Your rights and obligations under the License and this CUSupp. You may provide warranties, indemnities and/or other additional terms and conditions in Your license agreements, provided that it is clear that such additional terms and conditions are offered by You only. You hereby agree to hold Original Contributor and each Community Member harmless and indemnify against any liability arising in connection with such terms and conditions. You will pay all damages, costs and fees awarded by a court or arbitrator having jurisdiction over the matter or any settlement amount negotiated by You and attributable to such claim.

As noted, in connection with the SCSL, the only license guaranteed to comply with the SCSL and the CUSupp is the SCSL/CUSupp itself. The CUSupp, however, like the GPL and some other licenses already described, explicitly permits the licensee to provide warranties, indemnifications, or similar additional terms. Such warranties and guaranties do not bind the Original Contributor or any other Community Member, and the grantor of such warranties or guaranties agrees not only not to bind such persons but to “hold them harmless,” meaning that the grantor agrees to pay any legal judgment against the Original Contributor or other Community Members, as well as any legal fees associated with their defense, that might arise from the issuance of such a warranty or guaranty.

2. You may distribute or display the Technology Specifications only pursuant to the specification license agreement applicable to the Technology Specifications in question in the exact form provided by Original Contributor on the Technology Site, and provided that You require, as a pre-condition of any third party’s access to Technology Specifications distributed or displayed by You, acceptance by such third party of the terms of such specification license.

This is more a form of notice than a specific provision. In addition to the terms of the SCSL and the CUSupp, the licensee may also be bound by the terms of the Technology Specific Attachment and also by the terms of the “specification license agreement applicable to the Technology Specifications.” Depending on the Technology being licensed, the licensee may be bound by (and accordingly should read carefully) not one but four distinct documents: the SCSL, the CUSupp, the Technology Specific Attachments, and the license agreement governing the Technology Specifications; the last two of which are separate from the licenses described here.

J. End User License Terms. You must include the following terms and conditions in end user license agreements accompanying copies of Compliant Implementations distributed for Commercial User hereunder:

If the licensee distributes the code under a license other than the SCSL/CUSupp, such a license must include the following terms.

1. Software contains copyrighted information of Sun Microsystems, Inc. and title is retained by Sun.
2. Use, duplication or disclosure by the United States government is subject to the restrictions set forth in the Rights in Technical Data and Computer Software clauses in DFARS 252.227-701(c)(1)(ii) and FAR 52.227-19(c)(2) as applicable.

The following section, governing the right (or the option) to defend claims, is really more a part of insurance contracts than software licensing.

K. Defense of Claims.

1. By Original Contributor.

- a) Notwithstanding Section V.C.1 of the License, Original Contributor will defend, at its expense, any legal proceeding brought against You to the extent based on a claim that Your authorized Commercial Use of Reference Code is an infringement of a third party trade secret or copyright in a country that is a signatory to the Berne Convention, and will pay all damages, costs and fees awarded by a court of competent jurisdiction, or such settlement amount negotiated by Original Contributor, attributable to such claim. The foregoing shall not apply to any claims of intellectual property infringement based upon the combination of code or documentation supplied by Original Contributor with code, technology, or documentation from other sources.

With regards to the rights granted by the CUSupp only, the Original Contributor (i.e., Sun) will undertake the legal defense of specified claims—including presumably the costs of hiring legal counsel—and will indemnify, paying all legal damages that may result from the specified claims. This defense applies only to a narrow range of claims, including only those claims of copyright or trade secret that arise out of the licensee’s use of the Reference Code distributed by the Original Contributor. This excludes patent claims and any claims arising from code not put forward as being developed by the Original Contributor.

The Original Contributor has the right, but not the obligation, to defend patent claims arising from the Reference Code.

- b) Original Contributor will have the right, but not the obligation, to defend You, at Original Contributor’s expense, in connection with a claim that Your Commercial Use of Reference Code is an infringement of a third party patent, and, if Original Contributor elects in its sole discretion to defend You, will pay all damages, costs and fees awarded by a court or tribunal of competent jurisdiction, or such settlement amount negotiated by Original Contributor and attributable to such claim.

The duty to defend is complex in nature, and again, more the subject of insurance law than software licensing. In essence, the party undertaking the defense (here, the Original Contributor) has the obligation to defend the licensee and to act solely in the interest of the licensee in the course of that defense. However, insofar as the Original Contributor (in legal terms, the indemnitor) is paying for and directing the defense, the tendency for such an indemnitor is to protect its own interests (whether

they are consistent with the interests of the licensee or not) in the course of such a defense. The Original Contributor has an interest in not having a judgment entered against anyone, including its licensees, that could limit its own ability to exercise the rights to the Reference Code. These provisions are the result of that interest, not necessarily any generosity on the part of Sun.

The CUSupp applies a mirror provision requiring that licensees undertake a similar duty to defend both the Original Contributor and other Community Members from arising from any code contributed by the licensee; from any warranty or guarantee granted by the licensee and from any claim arising from any commercial use of the Covered Code, excepting only patent claims that arise from the Reference Code, which fall under the previous section.

2. By You. Notwithstanding Section V.C.1 of the License, You will defend, at Your expense, any legal proceeding brought against any Original Contributor and any Community Member to the extent based on a claim: (a) that the use, reproduction or distribution of any of Your Contributed Code or Contributed Code Specifications is an infringement of a third party trade secret or copyright in a country that is a signatory to the Berne Convention; (b) arising in connection with any representation, warranty, support, indemnity, liability or other license terms that you may offer in connection with any Covered Code; or (c) arising from Your Commercial Use of Covered Code, other than a claim covered by Section IV.K.1 above, and other than a patent claim based solely on Reference Code. You will pay all damages, costs and fees awarded by a court of competent jurisdiction, or such settlement amount negotiated by Original Contributor, attributable to such claim.

This is a significant obligation. It should give pause to any licensee considering offering as Contributed Code any code that could even arguably be considered a violation of applicable copyright or patent law.

3. Prerequisites. Under Sections IV.K.1.a and IV.K.1.b, You must, and under Section IV.K.2, Original Contributor or a Community Member must: (a) provide notice of the claim promptly to the indemnifying party; (b) give the indemnifying party sole control of the defense and settlement of the claim; (c) provide to indemnifying party, at the indemnifying party's expense, all available information, assistance and authority to defend and settle; and (d) have not compromised or settled such claim or proceeding with the indemnifying party's prior written consent.

As a prerequisite to such indemnification, the party seeking indemnification must provide prompt notice, cooperate with the indemnitor, and surrender its own right to defend (including the right to settle) the given claim. As noted above, there may certainly be occasions in which a party is better off defending a claim on its own than in seeking indemnification. The resolution of such issues is, however, beyond the scope of this book.

4. Entire Liability. Section IV.K.1 states Original Contributor's entire liability and Your sole and exclusive remedy with respect to claims of infringement of any intellectual property rights brought by any third party or any Community Member. Section IV.K.2 states Your entire liability and Original Contributor's sole and exclusive remedy with respect to claims of infringement of any intellectual property rights brought by any third party or any Community Member.

This section merely provides that indemnification provisions just described provide the sole remedy and that no other protection is available under the CUSupp.

L. Notice of Breach or Infringement. You agree to notify Original Contributor should You become aware of any potential or actual breach or violation of the License or infringement of the Technology or any of Original Contributor's intellectual property rights in the Technology, Reference Code or Technology Specifications.

This is an interesting provision. Licensees are required to inform the Original Contributor if they become aware of any potential infringement of the Original Contributor's property.

M. Proprietary Rights Notices. You must not remove any copyright notices, trademark notices or other proprietary legends of Original Contributor or its suppliers contained on or in the Covered Code, Technology Specifications and Contributed Code Specifications.

This provision speaks for itself.

N. Relationship. The relationship created is that of licensor and licensee only. You hereby waive the benefit of any law or regulation dealing with the establishment and regulation of franchises or agencies.

This provision is designed to avoid the effect of some state laws that protect agents or franchisees of national or global companies, like McDonald's.

O. Assignment. This CUSupp and Technology Specific Attachment(s) shall not be assigned by You, including by way of merger (regardless of whether You are the surviving entity), acquisition or otherwise, without Original Contributor's prior written consent.

An assignment is a legal contract under which one party is permitted to substitute for another in a pre-existing contractual relationship, such as a lease or similar agreement. This provision, typical in commercial contracts, provides that such assignments are not permitted without the consent of the Original Contributor. This is the last provision in the CUSupp. As already noted, individual Sun licenses will contain additional terms, which govern either the specific Technology being licensed or the terms under which technology specifications can be distributed. Those specific contracts are not described here.

The SCSL and the CUSupp present a combination of open source and proprietary contract ideas and values. The SCSL is very far from an open source contract in its strict limitations on the use of the licensed code; the bar on any form of commercial use eliminates a great deal of the motivation for participation in open source projects. The CUSupp, while permitting such commercial use, imposes two significant limitations. First, the possible requirement of payment of royalties will certainly limit the availability of the code (depending on the price). Second, the need to remain compliant with Sun's specifications, while encouraging uniformity, will discourage innovation, at least innovation outside the lines envisioned by Sun. Nonetheless, the SCSL is a potentially important experiment in integrating some aspects of open source into a commercial model, with an emphasis on maintaining the uniformity of operation that is the touchstone of Sun's work.

Microsoft Shared Source Initiative

Microsoft has historically wrung great profits from proprietary software licensing. Its business model, along with its substantial profit margins, is completely dependent upon licensing access to the software that it controls. In response to the growing market for open source and free software in the last 15 years, Microsoft has made clear that it has no intention of changing its approach. In fact, its public position and actions seem to signify that the company is becoming more aggressive about its licensing programs and about protecting its intellectual property through strategies such as patent procurement and litigation.

Yet, historically, Microsoft has provided at least some business partners and customers access to its source code, as well as obtained access to the source code of others for inclusion in its products, or for ensuring interoperability. New demands are also growing: as a result of open source, the developer community is increasingly used to having liberal access to whatever source code it needs to conduct business; governments and customers now expect to be able to audit the source code that makes up the products that they depend upon daily; and academics and start-ups alike understand that open source is an efficient way to conduct shared research projects. As the open source movement continues to gain steam, Microsoft, like many other software companies, has felt pressure to provide public access to its source code.

Microsoft cannot easily turn to existing open source licenses and communities in order to solve this problem. Large-scale proprietary software products represent a complex web of legal relationships between all of those who own copyrights, trademarks, and patents that apply not only to the code, but also to arcane elements such as the communications protocols and media formats being used. Were Microsoft to relicense its code, all participants would have to be contacted and terms renegotiated, or else replacement code would need to be written and tested. As described in Chapter 3, when Netscape open source licensed its proprietary Communicator software under the Mozilla Public License, it had to negotiate with third-party providers of code that had been part of the Communicator system and had to rewrite substantial sections of code when some of those providers refused to permit their code to be released under the MPL. This is a difficult process, even for the largest companies.

Beyond the legal difficulties involved, Microsoft's software business model could not possibly sustain the blow to its profit margins that would occur should its software become freely available. Companies that generate income through services or hardware businesses can piggyback directly on open source by refocusing on those aspects of their business. But with almost all of its revenues derived from the licensing of proprietary software, Microsoft needs an approach to source code access that permits it to continue to use its current business model.

The Microsoft Shared Source Initiative is Microsoft's attempt to solve this source code access dilemma. The Shared Source Initiative has many facets, and it is difficult

to describe briefly. It can be most simply explained as an umbrella under which Microsoft positions its many different software-licensing practices. On its face, it is a program for facilitating access to Microsoft source code, but, considered more broadly, it is also a lobbying effort aimed at explaining and defending the benefits of strong intellectual property laws to the world at large.

Within this system, Microsoft has defined five key source code licensing attributes:

1. The ability to view and reference source code without changing it
2. The ability to enhance debugging with source code access
3. The ability to modify source code for local use only
4. The ability to distribute products based on modified sources for non-commercial purposes
5. The ability to commercialize products built on modified source code

Using these attributes, Microsoft has carefully tailored a number of software licenses that grant more or less restricted access to the source code for many of its software products, depending upon a number of variables such as what country the licensee resides in; how important the product is to Microsoft's core business; and whether the software is being used for commercial purposes, charitable use, or academic research. For some products, such as Windows, there may be literally dozens of different licensing options.

Because the Microsoft Shared Source Initiative is so complex, and each license is the result of relatively laborious negotiation within Microsoft and between Microsoft and its users and developers—with product and location specificity built into each license—the project has none of the simplicity or transparency of open source and free software licenses. It is, at least at this time, little more than a branded extension of Microsoft's current commercial licensing practices.

Within Microsoft's existing business ecosystem, however, the Shared Source Initiative has already borne copious amounts of fruit. Awareness of the initiative within Microsoft product teams has resulted in standardized and simplified ways for customers, subcontractors, support firms, hardware vendors, academic researchers, and governments to obtain access to code that would have been off-limits or very difficult to access in the past. It has also catalyzed internal analysis and product planning, which has resulted in deeper Microsoft participation in existing open source communities and processes.

Beyond the edges of the ecosystem populated by Microsoft dependents, reaction to the Shared Source Initiative has been much more ambivalent. To many people, the program seems to be little more than a series of carefully scaled permissions governing access to Microsoft's closely guarded source code. Although some of the licenses involved allow for unfettered change and redistribution of underlying code, the code to which these licenses apply is not core application or operating system code. Developers have no real opportunity to make changes to such core assets without first

agreeing to very restrictive terms. As a result, the resulting collaboration between Microsoft and external developers bears little relationship to the open source or open source-like development relationships described in this and previous chapters.

Despite its readily apparent lack of enthusiasm for them, Microsoft has been actively following developments in the open source movement and slowly adapting to them via the Shared Source Initiative. Microsoft has begun to use existing open source licenses for some of its newer projects. Although these projects are minor at this point, the trend is very likely to continue because of the great advantages that open source has to offer, even to Microsoft, at least under certain circumstances. Microsoft is also beginning to understand how open source approaches can be “safely” integrated with its traditional business practices, and as a result of this, Microsoft’s intellectual property agenda is likely to cause profound change within existing open source practices, through litigation, lobbying, lawmaking, and “coopetition.” Although Microsoft’s positioning of shared source as an alternative to open source might seem absurd, it should not be lightly dismissed.



As this book was going to press, Microsoft released its Windows Installer XML (WiX) technology under the Common Public License (CPL), an Open Source Initiative-approved license, at <http://sourceforge.net/projects/wix/>. This marks a first, though how far Microsoft will go with such projects is yet to be seen.

In terms of placing various licensing models on a spectrum, the GPL or the BSD-model license would fall on one end, depending on the nature of the “freedom” being measured; obviously, the classic proprietary license would fall upon the other, in terms of the restrictions imposed on licensees. In the continuum would fall the Perl, the MPL, the SCSL and the other licenses already described. The Microsoft Shared Source Initiative falls quite near the classic proprietary model in its function: not a surprising result, considering that Microsoft is by far history’s largest beneficiary of the proprietary software licensing model. But, nonetheless, it has already, at least with regards to some applications, moved closer to a true open source model, and the Initiative is a project worth watching.

As this book was going to press, Microsoft released its Windows Installer XML (WiX) technology under the Common Public License (CPL), an Open Source Initiative-approved license, at <http://sourceforge.net/projects/wix/>. This marks a first, though how far Microsoft will go with such projects is yet to be seen.