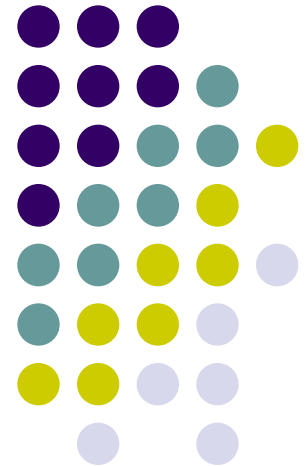


Non-Open Source Licenses

Presentation: Ass.Prof.Dr. Vu Thanh
Nguyen





Content

- Classic Proprietary License
- Sun Community Source License
- The Commercial Use Supplement
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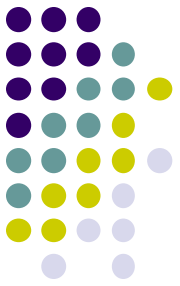
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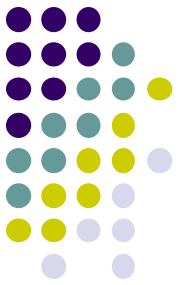
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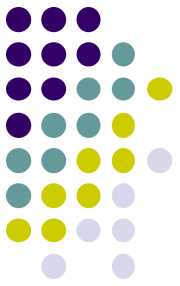
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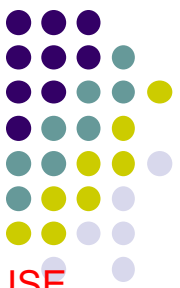


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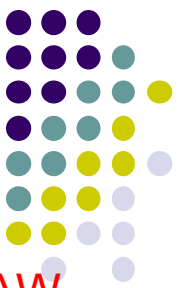


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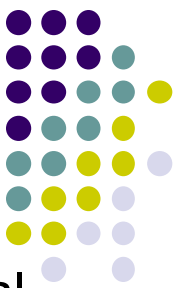
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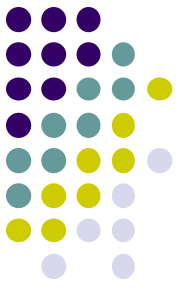
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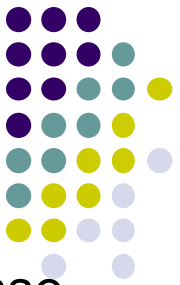
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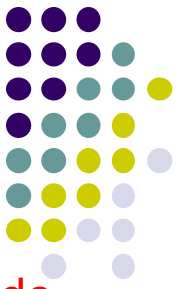
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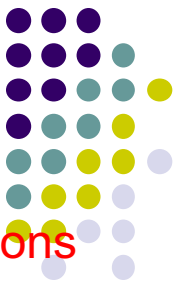
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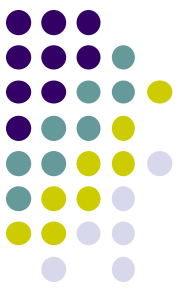
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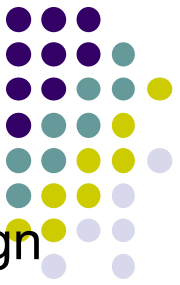
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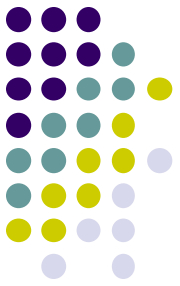
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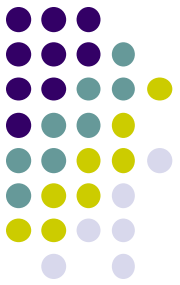
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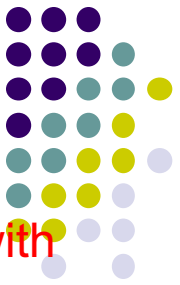
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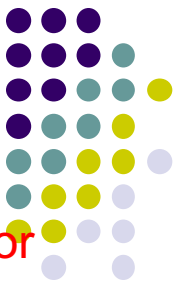
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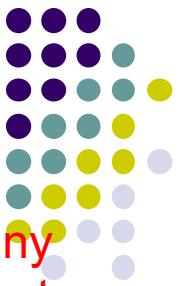
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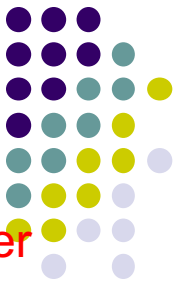
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- ❑ This provision imposes an affirmative obligation on the Community Member not only to provide one category of modifications to the work, Error Corrections (defined above), but to do so “as soon as practicable.”

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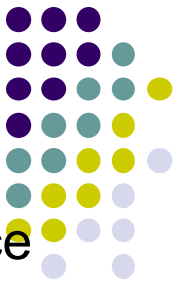
- ❖ You may provide other Contributed Code to Original Contributor at any time, in Your discretion. Original Contributor may, in its discretion, post Your Contributed Code and Contributed Code Specifications on the Technology Site.
- ❖ Additionally, You may post Your Contributed Code and/or Contributed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

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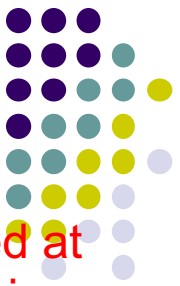
- ❖ B. Notices. You must reproduce without alteration copyright and other proprietary notices in any Covered Code that You distribute. The statement, “Use and Distribution is subject to the Sun Community Source License available at <http://www.sun.com/software/communitysource>” must appear prominently in Your Modifications and, in all cases, in the same file as all Your copyright and other proprietary notices.
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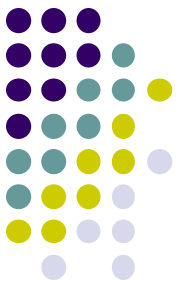
- ❑ As was the case with the MPL and some of the other open source licenses, the licensee has the obligation to provide to other licensees and to the Original Contributor a file identifying those changes that he has made to the Covered Code.
 - ❖ D. Distribution Requirements. You may distribute object 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.
 - ❖ E. Extensions.

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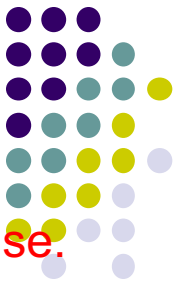
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 - ❖ A. License Versions.

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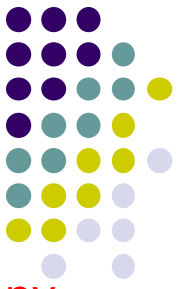
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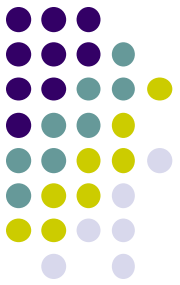
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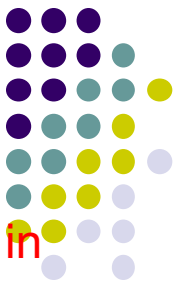
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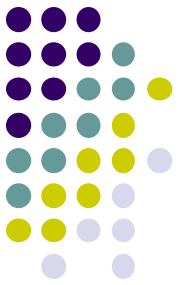
- ❖ Specifications infringe Your patent(s), then Original Contributor may in its sole discretion terminate all rights granted to You under this License (including any supplements/attachments hereto) immediately upon written notice.
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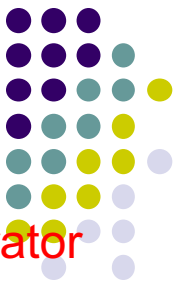
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- ❖ 5. Dispute Resolution.
- ❖ a) Any dispute arising out of or relating to this License shall be finally settled by arbitration as set forth in this Section V.E.5, except that either party may bring an action in a court of competent jurisdiction (which 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.

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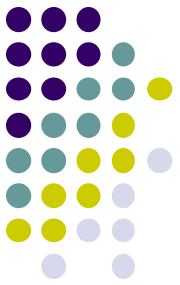
- ❖ b) All proceedings will be in English and conducted by a single arbitrator selected in accordance with the Rules who is fluent in English, familiar with technology matters pertinent in the dispute and is either a retired judge or practicing attorney having at least ten (10) years litigation experience. 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.

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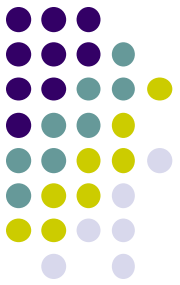
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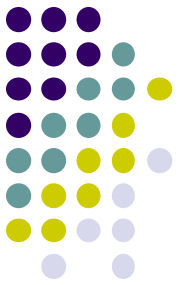
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- ❑ The remaining parts of the license consist of forms indicating acceptance of the license and are included here for purposes of completeness.

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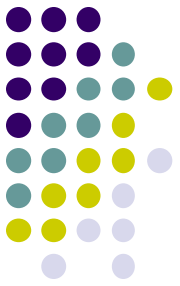
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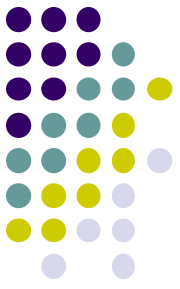
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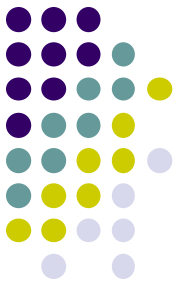
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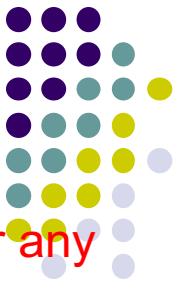
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 - ❖ **COMMERCIAL USE SUPPLEMENT TO SUN COMMUNITY SOURCE LICENSE**
 - ❖ **I. PURPOSE AND EFFECT.**

The Commercial Use Supplement



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

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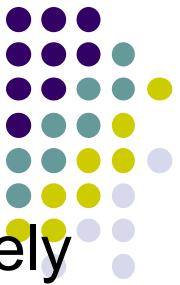
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- ❑ This covers every use not permitted by the research use license.
 - ❖ “Compliant Implementation” means Covered Code that fully implements and conforms to the Technology Specifications and complies with the Compliance Materials, the License, this 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.

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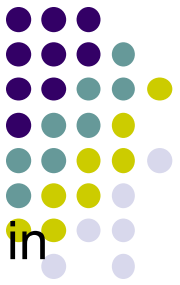
- ❖ “Technology Specific Attachment(s)” means an attachment or attachments to the License and this CUSupp which contains terms and conditions specific to the Technology therein identified as well as the specifics of the Compliance Materials and requirements for such Technology.
- ❑ Variations of the CUSupp unique to different Technologies may have additional terms attached to the supplement. The Sun Jini technology has such additional terms.
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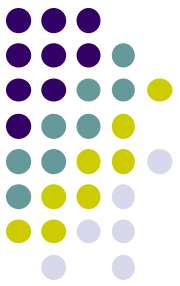
- There are two provisions in this section that immediately stand out. The first is the “royalty-bearing” language: use of the Covered Code for commercial purposes may be subject to payment of a royalty, at a rate to be specified in the Technology Specific Attachment. The second is the “specified Field 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.
 - ❖ 1. use the Compliance Materials to determine whether Covered Code constitutes a Compliant Implementation;
 - ❖ 2. use, reproduce, display, perform and distribute internally source and object code copies of Compliant Implementations for Commercial Use;

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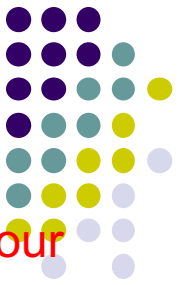
- ❑ This permits distribution of Compliant Implementations internally in the form of both source and object code.
 - ❖ 3. reproduce and distribute to third parties and Community Members through multiple tiers of distribution object code copies of Compliant Implementations for Commercial Use;
- ❑ Only object (or executable) code of the Compliant Implementations may be distributed to third parties, or even to Community Members, for Commercial Use.
 - ❖ 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.

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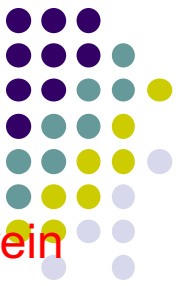
- This provision is self-explanatory.
 - ❖ IV. ADDITIONAL RESTRICTIONS AND COMMUNITY RESPONSIBILITIES.
 - ❖ As a condition to the Commercial Use rights granted above, You must comply with the following restrictions and community responsibilities (in addition to those in the License)
 - ❖ F. Certification. 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.

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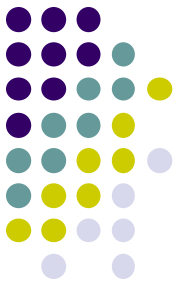
- ❖ G. Compliance Materials. Depending on the Technology licensed, Your access to and use of the Compliance Materials may be subject to additional requirements such as entering into a support agreement and trademark license. Such additional requirements, if any, are as set out in the Technology Specific 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.
 - ❖ I. Commercial Distribution Requirement.

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- ❖ 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.

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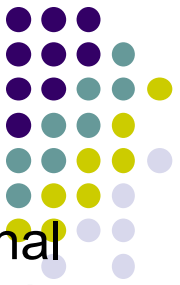
- ❖ 2. You may distribute or display the Technology Specifications only pursuant to the specification license agreement applicable to the Technology Specifications in question in the exact form provided by Original Contributor on the Technology Site, and provided that You require, as a pre-condition 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.
 - ❖ 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.

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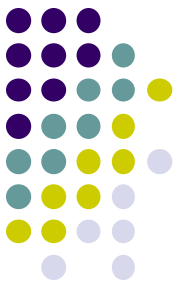
- ❖ 1. Software contains copyrighted information of Sun Microsystems, Inc. and title is retained by Sun.
- ❖ 2. Use, duplication or disclosure by the United States government is subject to the restrictions set forth in the Rights in Technical Data and Computer Software clauses in DFARS 252.227-701(c)(1)(ii)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

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- ❑ 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.
- ❑ 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.

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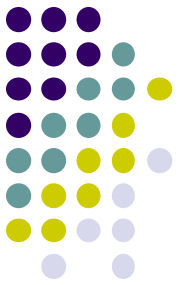
- ❑ The CUSupp applies a mirror provision requiring that licensees undertake a similar duty to defend both the Original Contributor and other Community Members from arising from any code contributed by the licensee;
 - ❖ 2. By You. Notwithstanding Section V.C.1 of the License, You will defend, at Your 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.

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- ❖ 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.
 - ❖ 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.

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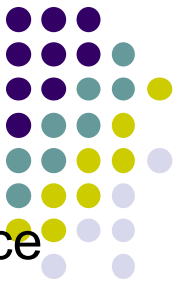
- ❑ This section merely provides that indemnification provisions just described provide the sole remedy and that no other protection is available under the CUSupp.
 - ❖ L. Notice of Breach or Infringement. You agree to notify Original Contributor should You become aware of any potential or actual breach 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.

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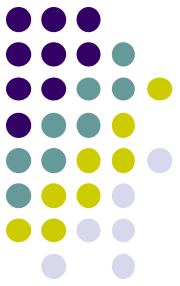
- ❑ This provision is designed to avoid the effect of some state laws that protect agents or franchisees of national or global companies, like McDonald's.
 - ❖ O. Assignment. This CUSupp and Technology Specific Attachment(s) shall not be assigned by You, including by way of merger (regardless of whether You are the surviving entity), acquisition or otherwise, without Original Contributor's prior written consent.
- ❑ 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 Commercial Use Supplement



- ❑ 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.

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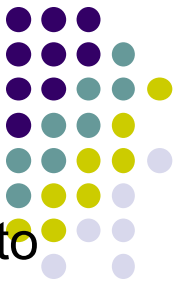
- ❑ Microsoft has historically wrung great profits from proprietary software licensing. Its business model, along with its substantial profit margins, is completely dependent upon licensing access to the software that it controls.
- ❑ In response to the growing market for open source and free software 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.

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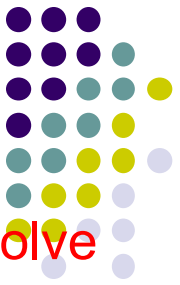
- ❑ New demands are also growing: as a result of open source, the developer community is increasingly used to having liberal access to whatever source code it needs to conduct business; governments and customers now expect to be able to audit the source code that makes up the products that they depend 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.

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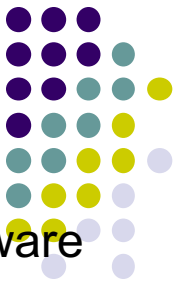
- ❑ Were Microsoft to relicense its code, all participants would have to be contacted and terms renegotiated, or else replacement code would need to be written and tested.
- ❑ As described in Chapter 3, when Netscape open source licensed its proprietary Communicator software under the Mozilla Public 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.
- ❑ 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.

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- ❑ 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

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- ❑ 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.
- ❑ 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.
- ❑ 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.

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- ❑ 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.”