OSET FOUNDATION

PUBLIC LICENSE AGREEMENT

RATIONALE DOCUMENT—VERSION 2.2

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Last Update: September 2015

Overview

The mission of the Open Source Election Technology Foundation (OSET) is research and education in the innovation of elections technology, including designing and developing reference implementations utilizing open source principles and making results available as royalty-free open source for the public benefit. Our long-term goal is a sustainable public benefits organization with an endowment to continue the efforts to accomplish this mission.

The Foundation's flagship effort to accomplish its mission, the TrustTheVote Project, is addressing a serious problem with the vast majority of today's elections and voting systems: the lack of verifiable, accurate, secure, and transparent technology that is demonstrably worthy of the public's trust. Our focus is on creating production-ready reference implementations of elections systems software that are federal- and state-certified and developed via a collaborative, open volunteer community to ensure complete transparency and public review, comment, and participation.

We have created this rationale document to catalyze discussion and explain our reasons in choosing to invest in the development of a new open source license to specifically and particularly meet the procurement requirements of our Stakeholders—elections officials (*sometimes referred to as our "constituency"*) who decide what to implement to carry out their mission of delivering free and fair elections.

In summary, the motivation for a new open source license designed to meet the OSI definition, was to address specific issues raised by procurement agents of prospective state and county government adopters of technology developed by the TrustTheVote Project.

Version 2 of OPL

This is the second version of the OPL we have released. When we drafted the first version, we created a rationale document. This rationale document for the new OPL is an update of the original. While some of our rationales are no different from the first version, we have preserved them, so those reading version 2 of the OPL don't have to study the first version as well.

Weak Copyleft

Our primary goal is broad adoption by U.S. elections jurisdictions of software the TrustTheVote Project makes available, balanced by the objective of avoiding our software being forked wholesale and appropriated into proprietary systems. Accordingly, we started with the assumption that a "weak copyleft" license will best accomplish our goals. A "strong copyleft" license would be more likely to place the goals of free software licensing above our goal of broad adoption. Our constituencies, for the license terms we offer, include both government and quasi-governmental organizations and the private entities to which they contract their election fulfillment responsibilities. Any license we use, therefore, must be acceptable to private actors while maintaining a basic copyleft structure. Our assumptions about what will likely be acceptable to our constituencies is based on significant feedback we have received from our constituencies[1].

License Proliferation and a One-Document Solution

We carefully considered whether existing open source licenses approved by the Open Source Initiative ("OSI") would be effective to promulgate our software; however, the existing licenses lack certain material terms we have detailed below that are necessary to contracting in this context.

> **Please Note**: Our review included the NASA Open Source Agreement, which is, to our knowledge, the only OSI-approved open source license specifically written for government contracting.

Commentators from the open source community have suggested that we supplement an existing copyleft license with these additional material terms; however, we see two obstacles to doing so.

1. First, many OSI—approved copyleft licenses *prohibit* additional restrictions to the terms of the existing copyleft license, or *prohibit* modification of the license.

2. Second, even if the additional terms we require would not be considered additional restrictions or modifications in violation of a license, our Stakeholders have clearly advised us that a single contract vehicle is necessary to achieve our goals.

Accordingly, we have chosen to base our license on the **Mozilla Public License** version 2.0 ("MPL"). The MPL is a weak copyleft license that our constituencies advise us will be acceptable to private actors and has also been modified by others in the past.

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[1] "Constituencies" as the term is used here refers to our Stakeholder Community, a group comprised primarily of elections administrators, directors, and officials from states and counties across the country. This community also includes other elections domain experts from academia, non-profit good government groups (*e.g., Rock The Vote, NAACP, Overseas Vote Foundation, Verified Voting, SAVE, etc*.), and other research experts (*e.g., Caltech/MIT VIP, AEI, Brookings Institute, Brennan Law Center, etc*). As of this writing, the Stakeholder Community (*our "constituencies"*) includes over 200 individuals. Our constituencies advise us on a wide range of matters, primarily regarding requirements and specifications for elections and voting technology, but administrative, procedural, and regulatory issues as well. This includes matters of licensing for adoption and deployment of any publicly owned, open source elections and voting software technology to be implemented on approved commodity hardware or specialized application-specific hardware, and subject to federal and/or state certification requirements for use in binding public elections.

Multi-Licensing

In addition to our license, the software may alternatively be licensed under the GNU General Public License (GPL) version 3.0 or the GNU Lesser General Public License (LGPL) version 3.0. This is consistent with the compatibility clauses of MPL 2.0. However, once a licensee uses the software under either of these alternatives, and contributes changes to the code, these downstream changes cannot be re-introduced into our code base without the permission of the contributor.

Goal-Specific Changes

We have modified the MPL to address six (6) issues that we have been informed affect distributing and deploying our software to government elections agencies and their contractors:

1. **Governing Law**. Most government procurement regulations require the application of local state law or federal law to the material terms and conditions of any contract. Most open source licenses lack law or venue selection provisions. Also, the application of particular law affects the interpretation of a license document as a whole, and therefore, we conclude, is necessarily a modification to all of its terms. Thus, to agree in a separate contract that a particular body of law applies to a license would be an additional restriction on that license.

2. **Venue**. Many state and federal procurement regulations require that disputes be resolved in particular venues. Please see our comments above regarding governing law.

3. **Government Rights**. We want to clarify that the software is defined as "*commercial software*"[2] and not subject to rules of federal procurement that may require an assignment of rights to the software when the government funds development. Such provisions are essential to maintain community control, and they are also part of most commercial software licenses where the licensee is not named.

4. **March-in Rights**. Some of the technology we are developing may rise to the level of patentability, which we intend to pursue with a "public assignment" of resulting patent rights.[3] Since some portion of our R&D work may be subject to funding from federal government grants, we will need to address the issue of "march-in rights" by the federal government.

5. **Sovereign Immunity**. Contracting with states may require a waiver of sovereign immunity to make the license agreements enforceable. It is customary in government contracting to allow a party to seek redress for violation of the agreement by the government.

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[2]   We also want to clarify that as used herein, "commercial software" is a legal term of art and in _no way_ suggests that the OSET Foundation or TrustTheVote Project is or intends to be engaged in any commercial venture, or offer any of its technology or bodies of work for sale. We expressly disavow any intention or conduct. Our California Department of Justice Registry of Charitable Trusts ID is: CT020291.

[3]   The OSET Foundation's organizational structure as a public charity legally _prohibits_ the corporation from transacting any assets created by the organization to any commercial entity for pecuniary gain. All such assets can _only_ be transacted into another non-profit corporation. This is discussed more fully in an archived blog post at the OSET Foundation web site. See: bit.ly/OSETip

6. Deployment. In order to make our elections technology framework deployable for legal use in public elections, we will seek federal and/or state certifications where applicable. In so doing, it may be necessary to incorporate additional terms into licenses for actual deployment of the software, as opposed to licenses for further development.

Harmonization Changes

Our original OPL was based on Mozilla 1.1. Since we originally drafted our license, Mozilla Foundation updated the MPL. With the introduction of OPL 2.0, we have harmonized our license with the updated MPL.

Changes to Meet IRS Requirements

The OSET Foundation (then the "OSDV Foundation") attained its full tax-exempt status under 501(c)(3) of the Internal Revenue Code declaring us a public charity in the 3rd quarter of 2013. In the course of seeking this status, as part of a negotiation[4], we agreed to make certain changes to the license to ensure that our source code is free for everyone to use. Section 5.3 of the 2.0 license now requires that a licensee who does _not_ abide by the terms of the license must make the Covered Software available in Source Code Form on a publicly available computer network for a period of no less than three (3) years.

This goes beyond the source code delivery requirements of standard open source licenses. Section 5.4 reserves the ability of a licensor under our license to seek injunctive relief for violation of the terms of the license. It is not clear at this point whether a court could, under applicable law, order a violator to release source code. But we cannot control the law, only our license. Therefore, if that remedy is available under law, we want to make sure it is available under our license as well.

Specific Changes

Sections that have _not_ changed (*except for numbering*) are _not_ listed below.

- **1.5** Changed the reference to earlier versions of the license to comport with OSET's version numbering.

- **3.1 Notices**. We added language requiring licensees who modify the software and distribute their modified versions to include prominent notices stating that the files have been changed. We borrowed this language from the Apache Software License version 2.0.

- **3.5B Application of Additional Terms**. We allowed additional conditions specifically to address national security or public interest concerns as well as state and federal procurement regulations. This is an important aspect of the unique target audience for this license – federal, state, county, and/or municipal elections administration agencies.

- **4 Inability to Comply Due to Statute or Regulation**. We added national security and necessity of public interest to the list of circumstances due to which the licensee may be unable to comply with the terms of the license.

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4 The entire process endured to achieve our tax-exempt status and the negotiations resulting in, among other things, the tuning of our open source license is well beyond the scope of this paper and deserving of a paper of its own, which we are contemplating as of this writing.

- **5 Termination**. We added new Sections 5.3 and 5.4 to address some of the policy considerations noted above. Section 5.3 requires licensees who do not abide by the terms of the license to make the Covered Software available in Source Code Form on a publicly available computer network for a period of no less than three (3) years. Section 5.4 allows any Contributor to pursue legal remedies against licensees who fail to comply with the license. To accommodate the new Sections and preserve the logical flow of terms within Section 5, we moved old Section 5.3 to new Section 5.5.

- **9 Government Terms**. We created a new Section 9 to include terms specific to government licensees, as discussed above.

- **11.1. New Versions**. We changed the name of the license steward from Mozilla to OSET.

- **Exhibit A**. Changed the name from Mozilla to OSET.

Process Going Forward

The license itself is a separate document available on our Project Wiki as well as on our principal web site OSETFoundation.org. Before reviewing that document together with this document, let us explain our process for review, comment, and future development (*which we hope is not necessary*).

The license, together with this rationale document, was released as a TrustTheVote Project Stakeholder Community RFC ("Request for Comment"). It was made available to the Stakeholders in advance of the general public, and then was subsequently made available to that secondary audience two (2) weeks later. The comment period ran for 30 days.

The comment period closed and the license was settled in the first quarter of 2014. However, The TrustTheVote Project and OSET Foundation Legal Department continue to accept comments from anyone interested in contributing thoughtful remarks, advice, or suggestions about the License by eMail to legal@osetfoundation.org

Our legal team reviews all comments—particularly from our Election Official Stakeholders—for consideration in future revisions. Any decision to incorporate any suggested changes will reside solely with the OSET legal team at their discretion and in their professional judgment. However, it is our sincere desire for public review of and comment on this license agreement. We're particularly interested in the sufficiency of terms and conditions for states, counties, and municipalities as legal entities desiring to license OSET Foundation TrustTheVote Project elections technology framework software.

We look forward to your feedback.

The TrustTheVote Project Core Team & Legal Team