



## READING THE “NEW BSD” LICENSE IN ISOLATION<sup>†</sup>

Brendan Scott\*  
Open Source Law  
www.opensourcelaw.biz  
inquiries@opensourcelaw.biz  
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### ABSTRACT<sup>1</sup>

The Open Source Initiative identifies a particular set of wording as the “New BSD” license.<sup>2</sup> We assert that there exists a view that the words of this license permit the licensing of works licensed under that license (and modifications of such works) under closed source licenses. In this paper we put forward an argument to the effect that the terms of this license taken alone may require works licensed under it, and modifications to such works, to be licensed under the terms of the “New BSD” license. We look at some possible consequences.

**Note/Disclaimer:** This paper is not intended to be a concluded view and it has been helpful to receive criticism on earlier drafts of this paper. It is an exposition of an (untested) argument as to the effect of the “New BSD” license. This discussion is limited to likely effects under Australian law. Some of the arguments made are of a generic nature and might be profitably applied in other common law jurisdictions, such as the UK and the US – but, then again, they might not. Open source licenses have been subject to little judicial scrutiny to date. Nothing in this paper is legal advice or a statement of the law.

### 1. SCOPE, DISCUSSION AND ASSUMPTIONS

- 1.1 We assert without proof that there exist a small number of views (all very similar, but differing on certain aspects) on the practical consequences of licensing of code under the “New BSD” license (NBSDL).<sup>3</sup> Of particular interest is the view that once you acquire a work licensed under the NBSDL (NBSDL Work), you can license it to others under any terms you like, including on the terms of a closed source license or, alternatively, that modifications or a work as modified may be subject to a different license which, in practice, affects the use of that part of the original code which is distributed.
- 1.2 We propose an argument that the words of the license may require the licensing of NBSDL Work and modifications to NBSDL Work under the terms of the NBSDL. In this paper we look at a number of scenarios and analyze some consequences of the application of the NBSDL to software code.
- 1.3 The arguments in this paper apply only to the words of the NBSDL when considered in the abstract. Further, in attempting to discern an “objective” meaning for the words of the NBSDL, this paper relies on implication in a number of places. Where the context of the grant of the license is inconsistent with an implication, that implication – and therefore the argument in this paper – must fail. For this reason the

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<sup>†</sup> This paper revises and updates an earlier paper on the BSD license (“BSD – The Dark Horse of Open Source”) based on feedback on and reactions to that paper. I am grateful for the feedback received on the earlier drafts of this paper. It has raised a number of issues for me, only a few of which are resolved in this draft. Others may need to be the subject of a later paper.

\* Brendan is the principal of Open Source Law, an ICT legal practice with a special focus on open source and customer copyright. Brendan has over 12 years of experience in ICT related legal issues. He is a director and founding member of Open Source Industry Australia Limited and has served on the steering committee of the Australian Service for Knowledge of Open Source Software.

1 Orthography in this paper is US English.

2 <http://www.opensource.org/licenses/>

3 By this, we mean the license available from: <http://www.opensource.org/licenses/bsd-license.php> as at 12 January 2007.



arguments in this paper are unlikely to have any effect in practice on any established NBSDL licensed project.

- 1.4 The paper also confines itself to the text of the license – which refers to “modifications”. The paper expresses no opinion on what “modifications” means, and whether it includes derivative works, compilations and/or linkage or aggregation with other works.
- 1.5 The mechanics of license propagation are not specifically addressed by most open source licenses. An assumption made by this paper is that the original licensor has already granted a license over the software to everyone, and the giver is simply notifying the recipient of the terms of that license. A second method of propagation is that licensees are granted their license by distributors by way of sublicense (and not by the original licensor directly). Where relevant, comments on the effect of this alternative licensing interpretation (ALI) are made in the article. These are marked “ALI”. There is a third method of license propagation by which the original licensor grants a license to the recipient automatically at the time of the recipient's receipt of the code. This paper does not address this third licensing method, but the arguments in it are likely to be similar to those for the default position.

## 2. WHAT ARE THE TERMS OF THE LICENSE?

- 2.1 There are currently two recognized forms of the BSD license – the “original” and the “new” BSD License.<sup>4</sup> The text of the “new” BSD License is as follows (our numbering – it is this numbering which is used when we refer to “clause x” of the NBSDL):<sup>5</sup>

1 *Copyright (c) <YEAR>, <OWNER>*  
*All rights reserved.*

2 *Redistribution<sup>6</sup> and use in source and binary forms, with or without modification, are permitted provided that the following conditions are met:*

- 3 • *Redistributions of source code must retain the above copyright notice, this list of conditions and the following disclaimer.*
- 4 • *Redistributions in binary form must reproduce the above copyright notice, this list of conditions and the following disclaimer in the documentation and/or other materials provided with the distribution.*
- 5 • *Neither the name of the <ORGANIZATION> nor the names of its contributors may be used to endorse or promote products derived from this software without specific prior written permission.*

6 ***THIS SOFTWARE IS PROVIDED BY THE COPYRIGHT HOLDERS AND CONTRIBUTORS "AS IS" AND ANY EXPRESS OR IMPLIED WARRANTIES, INCLUDING, BUT NOT LIMITED TO, THE IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE ARE DISCLAIMED. IN NO EVENT SHALL THE COPYRIGHT OWNER OR CONTRIBUTORS BE LIABLE FOR ANY DIRECT, INDIRECT, INCIDENTAL, SPECIAL, EXEMPLARY, OR CONSEQUENTIAL DAMAGES (INCLUDING, BUT NOT LIMITED TO, PROCUREMENT OF SUBSTITUTE GOODS OR SERVICES; LOSS OF USE, DATA, OR PROFITS; OR BUSINESS INTERRUPTION) HOWEVER CAUSED AND ON ANY THEORY OF LIABILITY, WHETHER IN CONTRACT, STRICT LIABILITY, OR TORT (INCLUDING NEGLIGENCE OR OTHERWISE) ARISING IN ANY WAY OUT OF THE USE OF THIS SOFTWARE, EVEN IF ADVISED OF THE POSSIBILITY OF SUCH DAMAGE.***

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4 Some people refer to these two forms as the “original” and “revised” BSD licenses. The terminology used in this paper (“original” and “new”) has been chosen to be consistent with that used by the Open Source Initiative (see link in note 4), from which the text of the license was acquired. Incidentally, as at the time of writing, Google returns roughly an order of magnitude more results for the search “new BSD” (183,000) than it does for the search “revised BSD” (18,800).

5 Text taken from: <http://www.opensource.org/licenses/bsd-license.php>.

6 Surprisingly, “distribute” seems to have an appropriate meaning in US English, but not in UK English. Compare the meanings given in The American Heritage Dictionary of the English Language: Fourth Edition 2000 and The Fifth Edition of the Shorter Oxford English Dictionary (or the Australian Oxford Dictionary). Presumably “re”distribution is used in the license rather than the more natural “distribution” on the assumption that your acquisition was an initial distribution.



- 2.2 This license is described as being a “license template” from which a license is created by completing details of year owner and organization.<sup>7</sup>
- 2.3 The text of the “original” BSD License is equivalent to the NBSDL with a clause specifying an advertising requirement. This paper does not consider the “original” BSD License.
- 2.4 The logical flow for this analysis is to consider distribution of a NBSDL Work in source and binary form, with and without modification. We consider each of these scenarios separately in the following paragraphs.

### 3. THE BASIC ARGUMENT

- 3.1 The basic argument used by this paper is as follows. Consider a general case where:
  - (a) a person P, is the author and copyright holder of a work W; and
  - (b) P distributes W with a specific arrangement of words A; and
  - (c) a reasonable person would interpret the distribution of W with A:
    - (i) as having the effect of granting a license (determined by A) over W; and
    - (ii) that license grant applies to the whole of W.
- 3.2 Now assume that P<sub>2</sub> has the legal capacity to license another work W<sub>2</sub>, but that P has a right to permit or prohibit the distribution of W<sub>2</sub> (no assumption is made about any relationship between W and W<sub>2</sub>). If P, as a condition of P<sub>2</sub> distributing W<sub>2</sub>, requires P<sub>2</sub> to have the arrangement of words A appear in, or be associated with, W<sub>2</sub>, isn't it reasonable to assume P's intention was for the inclusion of A to have the effect of granting a license (determined by A) and for that license to apply to the whole of the work (in this case W<sub>2</sub>)? On what basis could P<sub>2</sub> argue that the effect of the inclusion of A ought to be restricted to a subset of W<sub>2</sub>? Clearly there will be cases where this argument is precluded by the wording of A. For example, if it is drafted in such a way as to be clearly inapplicable to W<sub>2</sub> or expressly limited in the extent that it covers. We do not believe this is the case with the NBSDL. We would argue that if the words of A are ambiguous or silent, such an effect (ie a limitation in the scope of A) should not be implied.
- 3.3 In other words, when an original licensor takes the action of distributing the NBSDL Work with the text of the NBSDL included it is (uncontroversially) interpreted as having a specific meaning (including that the work is licensed to the recipient under its terms). If that is the objective meaning of taking this action, then (subject to anything expressed to the contrary in the license terms) when that person requires another person to take that action in respect of a work (whether the NBSDL Work or a different one) that requirement ought to be read as an intention to bring about the same result (ie licensing) in respect of the work.

### 4. REDISTRIBUTION IN SOURCE FORM WITHOUT MODIFICATION

- 4.1 The conclusion in the case where the source form is redistributed without modification follows automatically because we have assumed that third parties have already been licensed under the NBSDL and that the inclusion requirement simply puts the recipient on notice of the license terms.

#### ALI (Distributor Sublicensing)

- 4.2 In this scenario we are assuming that the redistributor is sublicensing the NBSDL work when they redistribute it without modifications. The argument that the unmodified work may be licensed under a different license seems difficult to sustain. For example, there is no separate copyright under which a redistributor may invoke copyright rights and the words of the NBSDL do not contain an express permission to license the work under any other terms. Nevertheless it is worthwhile to consider whether the retained/reproduced words determine the sublicense and to what extent the words could be retained/reproduced but “framed” – that is, presented in a manner or context (including by adding limiting words) which affects their meaning.

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<sup>7</sup> “The following is a BSD license template. To generate your own license, change the values of OWNER, ORGANIZATION and YEAR from their original values as given here, and substitute your own.” New BSD license page, op cit note 5.



- 4.3 Normally, the reproduction of the source form of software involved in such a redistribution would be an infringement of copyright. Therefore in order to distribute the code legally, the distribution would need to be permitted by a license. Clause 2 clearly permits a person to redistribute that code providing that they comply with clause 3. Clause 3 requires the retention of “the above copyright notice” and “this list of conditions”.
- 4.4 What is the legal effect of being required to retain “this list of conditions”. Are they just there for show? Do they have some other effect? In determining this, a court will look to the *objective* meaning of the clause and, potentially, the *objective* intention of the original licensor. In this case, the actual subjective intention of the party granting the license (and what they thought the words meant) is irrelevant.<sup>8</sup> What the court is looking to determine is what the reasonable person (ie an idealized and dispassionate citizen who is called on to assess the scope of the license) would make of the words.<sup>9</sup>
- 4.5 Consider first the warranty disclaimer. If there is a requirement to “retain” a copy of the warranty disclaimer in a redistribution, is a court likely to say the warranty disclaimer is intended to be effective or not? For example, could the disclaimer be retained but framed by a redistributor in such a way that the disclaimer had no legal force?<sup>10</sup> It is likely that the reasonable person would read the license and think that the licensor intended that the warranty disclaimer was to be retained without qualification. A similar argument could be made about clause 5 (which prohibits endorsements).
- 4.6 On this analysis, the warranty disclaimer travels with the distribution and the redistributor has no ability to qualify it. The question then becomes what about the other clauses? What about clause 2 which permits “redistribution and use” of the source form? If, in the case of the warranty disclaimer, the objective intention of the requirement to “retain” or “reproduce” the warranty disclaimer is that the warranty disclaimer cannot, by the manner of its retention, be limited in its application or scope. Why should the same reasoning not apply to the terms in the “list of conditions”? Moreover, if the disclaimer and endorsement prohibition *are* operative as conditions, what basis can there be for arguing that the other clauses are not?
- 4.7 If the other license terms are operative, then the combined effect of clauses 2 and 3 is that redistribution of the source form must occur on the terms of the NBSDL. A similar argument leads to the same result in respect of redistribution in object form. There is a certain element of common sense to this conclusion. If the license terms are not operative, any later taker could legally vary the requirement that (eg) the disclaimer be included. Moreover, if anyone could license the work under different terms, then any person redistributing the unmodified form<sup>11</sup> could remove the warranty disclaimer and other terms, removing the protections expressly included by the copyright holder.
- 4.8 It is a corollary of the above that if a copyright holder wants a warranty disclaimer to travel with the code, then they must include a condition to that effect, and that condition must travel with the code to at least the same extent that the disclaimer is intended to.
- 4.9 Some further thoughts:
- (a) it is unlikely that the retention/reproduction requirement would permit violating the integrity of the NBSDL. For example, the disclaimer could presumably not be separated from the balance of the conditions and (eg) retained in another part of the work or “reproduced” separately from them, nor (eg) could additional disclaimer wording be interposed or added;
  - (b) it is arguable, along similar lines as that in respect of the warranty disclaimer, that the “reproduction” requirement in the case of binary form must be in a manner which gives a similar prominence to the words as they appear in the source form of the NBSDL Work (assuming that the source form is the form initially acquired).

8 If they express that subjective intention prior to the granting of the license it will vary the license – in accordance with an objective interpretation of the manner in which they express their subjective intention.

9 It is not clear whether it is the idealized addressee of the license or the dispassionate third party observer whose view is considered.

10 Consider (eg): “*One of the conditions on our redistribution is a requirement to retain the following. However, it is retained only as an example of some fine legal draftsmanship and has no effect on your rights as a recipient of the corresponding code:..*”

11 Note that the discussion in this section is only in respect of the unmodified form.



## 5. REPRODUCTION IN SOURCE FORM WITH MODIFICATION

- 5.1 We now turn our attention to the case where modifications are made to the source form, and redistribution of the source form with those modifications occurs. Above, we concluded that the NBSDL applies to the unmodified source form. Does it also apply to the source form with modifications?
- 5.2 The situation in this case can be argued in a similar manner to the argument above about framing the warranty disclaimer. By assumption, no license is granted by the redistributor over the original code. This raises a question about the difference between the original work and the work as modified. This difference may not be able to be licensed by the original licensor as it may not be theirs to license. However, the original licensor has mandated specific wording to be included which, on its face, applies to the source form “with modifications”. The question would become – is it reasonable to read these words as permitting a similar form of framing by the distributor to that discussed above (in paragraph 4.5/note 10)? For the same reasons as those above, it seems unlikely that the wording would be permitted to be framed so as to be ineffective. Could it be framed to be limited in application? We would argue that the original licensor has an interest in disclaiming the whole of the source form “with modifications”, especially as modifications may cause the code to operate incorrectly. If so, that would support a reading of the license as not permitting the restriction of the disclaimer to a subset of the source. A similar argument might be made in respect of the no endorsement requirement in clause 5 (which refers to “this software”), although this is not so clear.
- 5.3 Two clauses (the warranty disclaimer and the clause 5) imply that the terms of the license are intended to address some of the interests of contributors to the software.<sup>12</sup> The references to “contributors” in clauses 5 and 6 would have no meaning if the license terms only ever applied to the original form as licensed. As these references to contributors appear to be very deliberate, it would be inappropriate to prefer an interpretation in which they have no meaning.
- 5.4 As such, we argue that the license does not permit its own “framing” in the course of distribution and the wording would be read as a license over the work with modifications. There may now be two licenses, one from the original licensor relating to the unmodified work, and one from the contributor relating to the work with modifications.
- 5.5 A counter argument may be that, depending on how the template's details are populated, the copyright statement (clause 1) will be wrong in the case of modifications and the NBSDL does not provide an option for the addition of other copyright notices. This is difficult to reconcile with the interpretation above.<sup>13</sup> However, if not reconciled (perhaps as a drafting error),<sup>14</sup> it is difficult to see how the NBSDL can be interpreted except by reading down the references to contributors in clauses 5 and 6.<sup>15</sup>
- 5.6 The arguments in relation to clauses 5 and 6 may have different weight based on the characteristics of the licensor. For example, a single licensor (with no existing contributors) adopting this language would put the argument at its strongest, while a work licensed by multiple copyright holders (and with many other contributors) applying this language to a work would put it at its weakest.

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12 Clause 5 is ambiguous in that “its contributors” may mean the contributors of “<ORGANIZATION>”. The better reading is probably that it refers to contributors to the software, especially given that clause 6 includes references to contributors and the “copyright holder” (the “obnoxious advertising clause” which was removed from the “original” BSD license refers to “*the University of California, Berkeley, and its contributors*”). However, as the clause refers to use of “this software” it would support an argument that the license does not permit framing since in this context there is a clear intention to refer to the whole of the software (the clause refers to the original work as a subset of “this software”).

13 If clause 1 of the NBSDL is intended to vest copyright in modifications in the original author it will be consistent with the above interpretation. Such an interpretation would face other difficulties. For example, arguably an interpretation transferring property, ought not be inferred without a clear intention. Further, such a license may be ineffective for failure to comply with formality requirements for such a transfer. In this context clause 6 exquisitely draws both the distinction between the “copyright holders” (plural) and contributors and between the “copyright owner” (singular) and contributors.

14 The “contributors” references can also be argued to be errors, but with less force given the manner in which they have been included.

15 Or that contributors means contributors of “<ORGANIZATION>” – which, while unnatural, is plausible for clause 5, but less so for clause 6. Query though whether it is meaningful, especially in the general case (eg licensor is an individual).



## ALI (Distributor Sublicensing)

5.7 Clause 3 simply talks about “*Redistributions of source code*”. A distribution of modified source is a distribution of source form, so clause 3 applies – a copy of these terms must be included with the modified source form. The wording does not support identification of a specific subset of the source code (ie the portion which is unmodified) for the license to apply to. Assuming the analysis in relation to the unmodified form above applies, then by including the license terms with the modified source form will make those terms (in particular, the rights to distribute and use in clause 2) apply to the whole of the modified source form as redistributed.

## 6. BINARY FORM OF MODIFICATIONS

6.1 A similar argument to that for source form applies in relation to modified binaries. Arguably therefore, if you have modified the binary form of a NBSDL Work then when you distribute it your modifications must also be licensed under the terms of the NBSDL.

6.2 One might argue that, in the case of binaries, most people don't actually modify the binary form of some software. Rather they modify the source form, and compile a new binary form from that modified source. That is, the binary form is not the original binary “with modifications” but both of them are derived from a common source.

6.3 In Australia the compilation of source code into object code is itself a reproduction of the source code.<sup>16</sup> In fact, any derivation of object code from source is such a reproduction. As such, if you modify the source code, you need the original copyright holder's permission to compile it and to subsequently distribute it. Where is that permission to be found in the NBSDL? If the new object code is not the “source or binary [form], with or without modification” then there is no right to distribute that new object code. Either the compilation of the modified source is a binary form which is subject to the NBSDL, or it will be an infringement to distribute it at all (in the absence of an additional license).

## 7. CAN A NBSDL WORK BE LICENSED UNDER A DIFFERENT LICENSE/CLOSED SOURCE LICENSE?

7.1 We asserted above the view that NBSDL Works may be able to be licensed under other licenses. We argue this view is not supported by the words of the license. This is not to say that the NBSDL terms expressly forbid them. Rather, if the terms of the NBSDL cannot be framed or restricted to specific parts of a modified work then the NBSDL's usage and distribution rights are so broad that additional (parallel) restrictions would appear to be ineffective.<sup>17</sup> There is not even any basis on which modifications to a NBSDL Work can be used to leverage a different license – because, if the argument above is correct those parts which are the original “with or without modification” are licensed under the NBSDL (as mentioned above, exactly what constitutes a “modification” is left open).

7.2 Can the actions of a community of people utilizing a NBSDL Work be taken into account when determining the scope of the license? Ordinarily, the answer to this would need to be no. For example, widespread reproduction of a program in breach of a license would not cause a change in the license terms of the program to permit that activity. Whether it is appropriate to adopt this position in the context of an open source project is not so clear cut. In an open source project people are not only taking code from a project, but also contributing their own works to a project as licensors. That is, “ordinarily” the analysis of licensing assumes a unidirectional license flow, from a licensor to a licensee. The flow of licensing rights in the open source case will typically be bidirectional. It may well be appropriate to take such a culture into account in interpreting the license in some circumstances. This paper is concerned with the effects of the words considered in isolation – for example, where a person gives a CD with the NBSDL and a NBSDL Work to a stranger in the street with no other communication between them. The circumstances in which it may be permissible to take such a culture into account and the effects and consequences of such an approach are beyond the scope of this paper.

<sup>16</sup> Section 21(5) of the *Copyright Act 1968* (Cth).

<sup>17</sup> For example, additional terms “In order to use this you must first whistle dixie.” are unlikely to be effective, because if the software is licensed under the NBSDL then the recipient has a license to use the software without such whistling.





## 8. DOES THE NBSDL REQUIRE AVAILABILITY OF SOURCE CODE?

- 8.1 The NBSDL does not have any express provision requiring that source code be distributed along with a binary. One might argue that by distributing a binary version of the software a license is also granted over the corresponding source form (even if the source form or modified source form is not distributed) since clause 2 of the NBSDL permits “use and redistribution” of the program in source form. However, if this argument is correct, it would still not lead to the provision of access to the source code.
- 8.2 So, even if:
- (a) modified source code is required, in the event of redistribution, to be licensed under the terms of the NBSDL; and
  - (b) the binary form of the modified source must, if redistributed, be licensed under the NBSDL;
- neither of these by itself, nor both taken together, ensure that anyone will be entitled to access to the source code for that binary.
- 8.3 While a license of a binary form under the NBSDL would presumably require that the source form for that binary also be licensed under the NBSDL it does not require that access to that source code be provided.
- 8.4 As a side issue, how does the NBSDL meet the requirements of clause 2 of the Open Source Definition<sup>18</sup> (OSD) in the absence of a requirement to distribute source code? There has been inconclusive discussion in relation to this on the OSI's license-discuss mailing list in 2002,<sup>19</sup> the upshot of which was that OSD #2 apparently does not impose a requirement on the terms of *the license* and is, rather, a pragmatic requirement relating to the *software* itself and the circumstances under which it is distributed in practice.<sup>20</sup> This leads to the conclusion that it is possible for software to cease being open source software (ie if its source code ceases to be available) even if its license terms remain the same.

## 9. KEEPING THE SOURCE

- 9.1 When a company incorporates a NBSDL Work into some software (relying only on the words of the NBSDL to determine their license) then, only to the extent the binaries are modifications of that NBSDL Work, the company is, by assumption, required to license that NBSDL Work (including their own modifications and the source form for their modifications) under the terms of the NBSDL when redistributing. We saw above that this does not mean that the source code must be released at all. However, what of the situation where the source code subsequently becomes available? If that was the case, would there be no copyright infringement for copying and distributing that source code?
- 9.2 In this case we have assumed that the terms of the NBSDL give a recipient a right to copy the source code for that software even if they only receive the binary. While it will be of great comfort to know that the NBSDL does not require the production of the source code, the NBSDL (by assumption) permits anyone who already has (a licensed binary and) access to the source form to distribute that source form. Under the Australian law of confidential information in order for the disclosure of information to be actionable the information must be of a confidential character and the disclosure in question must be unauthorised (among other requirements).<sup>21</sup> Of itself, the granting of a license to redistribute a work would appear to substantially reduce the confidential character of the source code or, alternatively, undermine the argument that a disclosure was not authorised. While a person may have held that source code previously under an obligation to maintain it confidential, is it not possible that the granting of a NBSDL over the corresponding binary form to that person will remove the requirement to keep the source form

18 Relevant text from item 2 reads: “*The program must include source code,...Where some form of a product is not distributed with source code, there must be a well-publicized means of obtaining the source code for no more than a reasonable reproduction cost...*” <http://www.opensource.org/docs/definition.php>

19 See, for example (from 2002): <http://thread.gmane.org/gmane.comp.licenses.open-source.general/397> and <http://thread.gmane.org/gmane.comp.licenses.open-source.general/372>

20 The term “license” does not appear in OSD #2. This interpretation is subject to its own problems – how, for example, can a *program* “allow access” to the source code? Either this is a requirement that the program itself actually displays its own source code, or the reference to “program” should really be a reference to the license. This clause of the OSD is problematic.

21 *Coco v A N Clark (Engineers) Ltd* [1969] RPC 41 at 47 is frequently cited on this point.



confidential? Such a scenario may pose an interesting issue for the interplay between (eg) an equitable or contractual duty to maintain something as confidential and a general permission to disclose the information. The outcome in such a case is likely to be strongly influenced by the particular equities of the case.

- 9.3 For this risk to occur requires the confluence of a number of different factors and should not be viewed as an automatic consequence of the adoption of a NBSDL Work. Nevertheless, the risk of the NBSDL is that an organization may make an investment in modifications to a NBSDL Work on the assumption that the modifications will remain protected by non disclosure only to find that they cannot prevent a person having the source form with modification from redistributing it.

## 10. OPEN ISSUES

- 10.1 This analysis raises a number of issues, which are beyond the scope of this paper, but may warrant further analysis. Two issues of particular interest are:
- (a) what is the scope of “modification”? and
  - (b) what is the status of “compatibility” between the NBSDL and other licenses? In particular, to what extent can a NBSDL Work be combined (to the extent the combination is a “modification”) with code licensed under a different license – and will the use of different values for populating the license template give rise to such a “different license”?

## 11. CONCLUSION

- 11.1 If the arguments in this paper are correct then we can draw a number of conclusions:
- (a) arguably, the words of the NBSDL considered in isolation require that modifications be distributed under the terms of the NBSDL, and that this requirement therefore cascades down to subsequent generations of code;
  - (b) the license does not appear to leave room for the relicensing of a NBSDL Work under the terms of any other license, at least in so far as any restrictions in other licenses would seem to be able to be avoided;
  - (c) the NBSDL does not have a requirement for the distribution of source code.
- 11.2 Use of the NBSDL is not without consequences. While unlikely, the worst case scenario could be the inability to prevent the disclosure of modifications made to the NBSDL Work. Use of the NBSDL requires the same careful consideration as the use of any other open source license.